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Increasing Competition in Live Music: The Case for Better Enforcement of the Live Nation Entertainment Consent Decree

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INCREASING COMPETITION IN LIVE MUSIC: THE CASE FOR BETTER ENFORCEMENT OF THE LIVE NATION ENTERTAINMENT CONSENT DECREE

TJ HUNT*

ABSTRACT

In 2009, Live Nation and Ticketmaster Entertainment expressed their intent to merge to become Live Nation Entertainment. Before the merger, Ticketmaster Entertainment was the leading live music ticketing and marketing company. Live Nation was the leading producer of live music events. Live Nation also entered the primary ticket sales market and led merchandising at its entertainment venues. Antitrust concerns arose that this newly formed entity would be a near-monopoly in live music. Despite general antitrust concerns and lawsuits from consumers, smaller promoters, seventeen state attorneys general, and the Department of Justice (“DOJ”), Live Nation Entertainment agreed to a consent decree in 2010 with the DOJ to become the largest live music conglomerate in the world. Since the merger, competition at virtually all levels of the live music industry has diminished. This has hurt consumers, artists, and venues the most.

Live Nation Entertainment has violated the 2010 consent decree and the consequences of their violations have amounted to a “slap on the wrist” thus far. This Note will argue the best way to increase competition at all levels of the live music industry is increased enforcement of a 2019 extension of the 2010 consent decree by the DOJ. The updated consent decree is more precise and gives the DOJ more power to enforce it. A breakup of Live Nation Entertainment has the potential to destroy live music, but true enforcement by the DOJ will help consumers, smaller artists, venues, and promoters. Congress can also consider passing legislation to target the live music industry and this Note will layout the factors Congress must consider. Ultimately, the DOJ must fully enforce the enhanced consent decree. In doing so, live music can avoid the potential negative consequences of a breakup or targeted legislation while reaping

* J.D. expected May 2023, Cleveland State University College of Law. I extend my appreciation to Dr. Angelin Chang for her willingness to take the time to share her passion and knowledge in music. I also would like to thank Professor Chris Sagers for helping me understand the complexities of antitrust law, and to the entire *Cleveland State Law Review* team for making this Note possible. Last, but certainly not least, I extend my great appreciation to my family and friends for their unwavering support throughout this process, especially Tom, Tammy, Pam, Abby, and Alex.

the rewards of lower ticket prices, more competition for talent, and greater freedom for artists and venues.

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I. INTRODUCTION

The sound of music, the sight of bright lights, and the feeling of camaraderie from other music enthusiasts when an artist begins to perform are just a few reasons consumers purchase tickets to live music events. The last thing that the consumer wants to think about is whether they are being taken advantage of by a ticketing company using exorbitant fees due to a lack of competition. However, that is a reality

in the live music industry, especially for large music events put on by Live Nation Entertainment.¹

The COVID-19 pandemic certainly had a crushing impact on the live music industry, but many of these problems have impacted the industry for years.² The pandemic has aggravated these problems and brought them to light.³ Many issues that hurt promoters, artists, festivals, and consumers are due to the tight grip that large music corporations have on the live music industry.⁴ This is especially evident in the artist management market, primary ticket market, and secondary ticket market.⁵ The live music industry is mainly run by a few big companies, such as Live Nation Entertainment.⁶ The live music conglomerate Live Nation merged with Ticketmaster Entertainment in 2010 to create today's Live Nation Entertainment.⁷

For more than ten years, the Department of Justice ("DOJ") worked to crack down on the anticompetitive measures of the 2010 merger between Live Nation and Ticketmaster Entertainment.⁸ However, the DOJ's actions mostly failed, creating a virtual monopoly for ticket sales and artist management.⁹ Smaller promoters have attempted to sue more prominent promoters, such as Live Nation Entertainment and Anschutz Entertainment Group ("AEG"), for violating antitrust law by forcing artists to sign unreasonable noncompete agreements or radius clauses to perform at a venue.¹⁰

¹ Kaitlyn Tiffany, *How Ticket Fees Got So Bad, and Why They Won't Get Better*, VOX (June 12, 2019, 1:30 PM), <https://www.vox.com/the-goods/2019/6/12/18662992/ticket-fees-ticketmaster-stubhub-ftc-regulation>.

² Marisa Henderson & Amy Shelver, *How COVID-19 Exposed Music Industry Fault Lines and What Can Be Done*, U.N. CONF. ON TRADE AND DEV. (Sept. 28, 2021), <https://unctad.org/news/how-covid-19-exposed-music-industry-fault-lines-and-what-can-be-done>.

³ *Id.*

⁴ Brooke Adams, *Festival Turf Wars*, MUSIC BUS. J., <http://www.thembj.org/2016/01/festival-turf-wars/> (last visited Feb. 17, 2022); Hilary Lewis, *Small Concert Promoters Come Out Swinging At Live Nation Hearing*, BUS. INSIDER (Feb. 24, 2009, 5:30 PM), <https://www.businessinsider.com/small-concert-promoters-come-out-swinging-at-live-nation-hearing-2009-2>.

⁵ Ron Knox, *Big Music Needs to Be Broken Up to Save the Industry*, WIRED (Mar. 16, 2021, 9:00 AM), <https://www.wired.com/story/opinion-big-music-needs-to-be-broken-up-to-save-the-industry/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; Decades of bad policy, an indifferent DOJ, and a poorly written consent decree led to this problem. See *United States v. Ticketmaster Ent., Inc.*, No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 (D.D.C. July 30, 2010) (the original consent decree).

¹⁰ See Jennifer M. Oliver, *DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar*, NAT'L L. REV., (Mar. 19, 2020), <https://www.natlawreview.com/article/doj-event-powerhouse-live-nation-punished-concert->

Live Nation Entertainment has also been a consistent target for antitrust lawsuits since its 2010 merger, despite the company agreeing to a consent decree with the DOJ in 2010.¹¹ Ultimately, the 2010 consent decree did not work for any of the parties involved so it is crucial to lay out the events that led to this and examine potential solutions.

The DOJ has failed to prosecute Live Nation Entertainment effectively since the parties agreed to terms in 2010.¹² There is evidence that Live Nation Entertainment has not acted in good faith since the merger, but ultimately, the DOJ should not have agreed to a consent decree they could hardly enforce.¹³ For over twelve years, independent promoters, artists, festivals, and consumers have been hurt by this merger.¹⁴ Part II of this Note gives important background about the Live Nation Entertainment merger, the live music industry, and how Live Nation Entertainment has emerged at all levels of the industry. Part III looks at how the DOJ handled the Live Nation Entertainment merger, and how the two sides and other third parties have responded. Part IV poses potential solutions and ultimately concludes that with stronger enforcement from the DOJ, the newly agreed upon consent decree extension should help increase competition within the live music industry.

II. AN UNDERSTANDING OF THE LIVE MUSIC INDUSTRY

A. A 30,000-Foot View of Live Music

The live music industry took a huge hit during the COVID-19 pandemic as it forced artists to stop performing in person, shut down venues, and canceled festivals.¹⁵ There was a rise in streaming and virtual performances that helped some artists generate revenue, but overall, ticket sales and sponsorships fell sixty-four percent in 2020.¹⁶ However, the live music industry is not disappearing due to the pandemic.¹⁷ It

venues-using-competing-ticketers (providing examples of lawsuits against large promoters, including Live Nation Entertainment).

¹¹ See, e.g., *Batson v. Live Nation Ent., Inc.*, 746 F.3d 827 (7th Cir. 2013).

¹² “Live Nation” refers to the large entertainment company prior to merging with “Ticketmaster Entertainment” in 2010. “Live Nation Entertainment” refers to the large entertainment company after the merger of “Live Nation” and “Ticketmaster Entertainment” in 2010. Hereinafter, “Ticketmaster” refers to primary ticketing subsidiary of Live Nation Entertainment.

¹³ Motion to Modify Final Judgment & Enter Amended Final Judgment, *United States v. Ticketmaster Ent., Inc.*, No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 (D.C. Cir. Jan. 8, 2020) [hereinafter Motion to Modify].

¹⁴ *Id.* at 9.

¹⁵ *Live Music Down 64% This Year – But Will Rebound In 2021*, IQ (Sept. 10, 2020), <https://www.iq-mag.net/2020/09/live-music-down-64-this-year-but-rebound-2021-pwc/>.

¹⁶ *Id.*

¹⁷ *Id.*

is increasing to revenue numbers comparable to before the pandemic began.¹⁸ The industry's revenue is projected to be \$29.3 billion in 2022, a \$300 million increase from 2019.¹⁹ Today, with the backing of Live Nation Entertainment and other Wall Street giants, there is more money involved in the live music industry than ever before, and with more money involved, more issues have ensued.²⁰

In 2010, Live Nation and Ticketmaster Entertainment completed a massive merger to become Live Nation Entertainment.²¹ The merger was challenged by seventeen state attorneys general and the DOJ due to antitrust concerns that the merger caused.²² Despite the challenge, Live Nation Entertainment became a reality after the merged company agreed to a consent decree with the DOJ.²³ Today, Live Nation Entertainment enjoys a near monopoly in the live music and artist management markets.²⁴ Live Nation Entertainment holds a seventy percent market share on ticket concert sales and heads ticket sales for eighty percent of stadiums and arenas in the United States.²⁵ Live Nation Entertainment also holds exclusive rights to over forty percent of top-tier talent.²⁶ The tight grip that Live Nation Entertainment has on these markets, such as the use of restrictive radius clauses and anticompetitive forcing, has hurt artists, promoters, and smaller venues.²⁷ Live Nation Entertainment is able to sign artists to extremely restrictive contracts, outbid smaller promoters, and force venues into using Ticketmaster for primary ticketing.²⁸ Consumers are then forced to pay

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Oliver, *supra* note 10.

²¹ Jeremy Pelofsky & Yinka Adegoke, *Live Nation, Ticketmaster Merge; Agree to U.S. Terms*, REUTERS (Jan. 25, 2010, 7:52 PM), <https://www.reuters.com/article/us-ticketmaster-livenation/live-nation-ticketmaster-merge-agree-to-u-s-terms-idUSTRE6004E520100126>.

²² Press Release, U.S. Dept. of Just., Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc. (Jan. 25, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-ticketmaster-entertainment-inc-make-significant-changes-its> [hereinafter DOJ 2010 PR].

²³ Press Release, U.S. Dept. of Just., Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019), <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live> [hereinafter DOJ 2019 PR].

²⁴ Christine Jurzenski, *Live Nation Stock Can More Than Double in 3 Years, Analyst Says*, REUTERS (Apr. 8, 2020, 5:58 PM), <https://www.barrons.com/articles/live-nation-stock-can-more-than-double-in-three-years-analyst-51586380765>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Oliver, *supra* note 10.

²⁸ Jurzenski, *supra* note 24.

more to see their favorite artists.²⁹ Live Nation Entertainment does not have an incentive to stop these actions if the consent decree is not enforced.³⁰

Two acts of Congress that are important to the Live Nation Entertainment merger in this Note are the Sherman Antitrust Act and the Clayton Antitrust Act.³¹ First, Congress enacted the Sherman Antitrust Act in 1890 and declared that "every contract, combination, or conspiracy in restraint of trade" is illegal.³² This broad prohibition has been interpreted by courts as only those contracts or combinations that "unreasonably" restrain competition.³³ Second, Congress enacted the Clayton Antitrust Act of 1914, which specifies some of the individual practices that the Sherman Antitrust Act does not mention.³⁴ In particular, the Clayton Antitrust Act specifies that, "mergers and acquisitions are illegal if, in fact, the effect of it substantially lessens competition or tends to create a monopoly."³⁵

B. *The Concert*

The modern concert is unlike anything musicians a hundred years ago would have imagined, a time when music performers played in small jazz halls.³⁶ The entire concert experience has changed since the early 1900s, but that time period helped pave the way for the concerts that fans enjoy today.³⁷ In the 1960s, the modern concert format emerged when Bill Graham, a revolutionary promoter, introduced advanced ticketing, security measures, and hygiene standards for pop music concerts.³⁸ The 1990s saw immense technological advances in the concert experience, such as better lighting, new screens, projectors, and smaller sized equipment.³⁹ The 1990s brought an explosion of different popular music genres, including hip-hop, rap, metal, and punk.⁴⁰ Today, with the help of technology, particularly the Internet, popular artists

²⁹ *Id.*

³⁰ DOJ 2019 PR, *supra* note 23; Jurzenski, *supra* note 24.

³¹ 15 U.S.C. § 12; Sherman Act, § 1 (1890) (current version 15 U.S.C. § 1).

³² 15 U.S.C. § 1 (2001).

³³ Standard Oil Co. v. United States, 221 U.S. 1, 69 (1911).

³⁴ *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Sept. 12, 2022, 8:07 PM).

³⁵ *Id.*

³⁶ Max Jones, *Evolution of the Concert*, BEAT, <https://vocal.media/beat/evolution-of-the-concert> (last visited Dec. 2, 2021).

³⁷ Vas Panagiotopoulos, *The History and Future of Live Music*, EMPIRICS ASIA (Apr. 16, 2019), <https://empirics.asia/the-history-and-future-of-live-music/>.

³⁸ *Id.*

³⁹ Jones, *supra* note 36.

⁴⁰ *Id.*

are able to generate revenue by filling stadiums and arenas with thousands of fans.⁴¹ The modern concert has combined the many advances made throughout the 1900s to create today's massive live music industry.

C. *The Music Festival*

Another important development is the increase in music festivals. In August of 1969, Woodstock essentially invented the modern music festival.⁴² Throughout the late 1900s, no one could match the lasting impact that Woodstock had on the modern music festival.⁴³ The modern music festival is usually a multi-day event in which many artists from one or more genres perform daily.⁴⁴ In contrast, a concert usually has one or more artists of the same genre before a "headliner" performs, for a shorter period of time and during one day.⁴⁵ Music festivals are an extension of the modern concert.⁴⁶ Daft Punk revolutionized music festivals, especially the electronic dance music (EDM) genre, after turning a stage at Coachella with 40,000 concertgoers into a complete sensory experience in 2006.⁴⁷ In 2022, upwards of 400,000 concertgoers attended Electric Daisy Carnival (EDC) in Las Vegas for a three-day EDM music festival.⁴⁸

The business side of larger music festivals was streamlined with the advent of big music promoters, such as Live Nation Entertainment.⁴⁹ Live Nation Entertainment acquired hefty controlling stakes in several music festivals, effectively increasing the organizational capacity to manage ticketing and the other crucial factors of putting on a music festival.⁵⁰ The ability to bring this many fans to see a number of different artists is likely one of the positive effects of big music promoters, such as Live Nation Entertainment.

⁴¹ *Concert*, ENCYC. BRITANNICA, <https://www.britannica.com/art/concert>.

⁴² Jones, *supra* note 36.

⁴³ *Id.*

⁴⁴ *What's the Difference Between a Festival and a Concert?*, THE FESTIVAL CLOTHING CO. (Feb. 27, 2020), <https://www.festivalclothinguk.co.uk/whats-the-difference-between-a-festival-and-a-concert/>.

⁴⁵ *Id.*

⁴⁶ Jones, *supra* note 36.

⁴⁷ *Id.*

⁴⁸ Graham Berry, *Snoop Dogg, Grimes, NFTs & Drone Shows: The 8 Best Moments Of EDC Las Vegas 2022*, BILLBOARD (May 25, 2022), <https://www.billboard.com/music/music-news/edc-las-vegas-2022-best-moments-1235077390/>. This is one example of the massive growth that music festivals have seen, particularly in the EDM scene, along with the return of festivals after COVID-19 shutdowns. *Id.*

⁴⁹ Mahita Gajanan, *How Music Festivals Became a Massive Business in the 50 Years Since Woodstock*, TIME (Aug. 14, 2019), <https://time.com/5651255/business-of-music-festivals/>.

⁵⁰ *Id.*

D. The Major Players

Putting on a successful live music event takes the time, money, and labor of several individuals and stakeholders within live music.⁵¹ The key figures for a live music event are the artist, talent manager, booking agent, promoter, venue, venue service providers (including the ticket distributor), secondary ticket market, and consumer.⁵² First, the talent manager is in charge of managing the day-to-day operations of the artist that performs at a live music event.⁵³ The day-to-day tasks of a talent manager include advising, scheduling, and managing public relations of the particular artist they represent.⁵⁴ The talent manager usually works with the artist and a booking agent to put together the artist's touring schedule.⁵⁵ The booking agent can then negotiate a contract with a promoter to produce a show or multi-performance event.⁵⁶ Once the booking agent contracts with a promoter, the promoter is in charge of finding a venue or putting together a venue, and then marketing the event.⁵⁷ The venue rents out the space to the promoter for the artist to perform.⁵⁸

The ticketing process for live music events is more complex than consumers may realize, likely due to the process of scalping tickets.⁵⁹ The venue either uses its ticketing process or contracts with a primary ticket distributing company that delivers tickets directly to consumers.⁶⁰ The consumer pays the face value of the ticket, determined by the artist and promoter, as well as service fees that the primary ticket company decides.⁶¹ If consumers (or scalpers) want to sell their tickets, they can do so

⁵¹ Helen Alexander, *How to Organise a Music Concert and Please Fans Everywhere*, EVENTBRITE (Feb. 25, 2021), <https://www.eventbrite.co.uk/blog/organise-music-concert-ds00/>.

⁵² Josh Baker, *The Merger and Damage Done: How The DOJ Enabled an Empire in the Live Music Industry*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 76, 79 (2013).

⁵³ See *What Is an Artist Manager? Understanding What a Musician Manager Does and How to Get One for Your Band*, MASTERCLASS (Aug. 9, 2021), <https://www.masterclass.com/articles/what-is-an-artist-manager-understanding-what-a-musician-manager-does-and-how-to-get-one-for-your-band#what-are-the-duties-of-an-artist-manager>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Jeremy Young, *The 5 People You Need to Know When Booking Shows*, SOUNDFLY (May 18, 2015), <https://flypaper.soundfly.com/tips/the-5-people-you-need-to-know-when-booking-shows/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 30A C.J.S. *Entertainment and Amusement* § 155 (2007), Note 1. (“‘Ticket scalping’ is . . . the practice of selling tickets to popular entertainment events at prices which greatly exceed the established price for those tickets”).

⁶⁰ Baker, *supra* note 52, at 79.

⁶¹ *Id.*

through a secondary ticket service that charges an additional fee to the next consumer.⁶²

The artist and promoter receive a guaranteed payout or a percentage of revenues, with the manager and agent then receiving a percentage of the artist's payout.⁶³ The venue receives a percentage of concessions, merchandise, and ticket distributor's fees.⁶⁴ Understanding these relationships is crucial to analyzing the Live Nation and Ticketmaster Entertainment merger because it gives background on how this merger could cause (and has caused) anticompetitive problems.⁶⁵

III. THE DOJ AND LIVE NATION ENTERTAINMENT

A. *Live Nation and Ticketmaster Entertainment Proposed Merger Immediately Scrutinized*

On February 10, 2009, Live Nation, Inc. and Ticketmaster Entertainment announced their intention to merge to become Live Nation Entertainment.⁶⁶ Before the merger, Ticketmaster Entertainment was the leading live music ticketing and marketing company.⁶⁷ Live Nation was the leading producer of live music events.⁶⁸ Live Nation also entered the primary ticket sales market and led merchandising at its entertainment venues.⁶⁹ The proposed merger was immediately scrutinized as a "near-monopoly" by the popular rock artist Bruce Springsteen.⁷⁰

Mr. Springsteen, an outspoken advocate for lower ticket prices,⁷¹ was particularly frustrated with an incident that occurred weeks before the merger was proposed in

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See generally id.*

⁶⁶ Alan J. Meese & Barak D. Richman, *A Careful Examination of the Proposed Live Nation-Ticketmaster Merger*, ii (2009) (William & Mary Law School Research Paper No. 09-41) (on file with the Duke Law Scholarship Repository).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at ii–iii.

⁷⁰ Chris Tryhorn, *Live Nation and Ticketmaster to Merge*, THE GUARDIAN (Feb. 10, 2009), <https://www.theguardian.com/business/2009/feb/11/live-nation-ticketmaster-merger>.

⁷¹ *See infra* Part IV, Section B for a discussion on a piece of legislation named after Bruce Springsteen, called the "BOSS Act." Springsteen played a crucial part in calling to attention anti-competitive problems presented in the primary and secondary ticket markets by Ticketmaster Entertainment merging with Live Nation. Unfortunately, since the drafting of this note, Springsteen has chosen to use "dynamic pricing" on Ticketmaster for his upcoming tour. This controversial decision has left his fans with the option to purchase tickets to his shows for over \$5,000. Rafi Mohammed, *7 Lessons on Dynamic Pricing (Courtesy of Bruce Springsteen)*, HARV. BUS. REV. (Sep. 30, 2022), <https://hbr.org/2022/09/7-lessons-on-dynamic-pricing-courtesy-of-bruce-springsteen>.

which Ticketmaster was selling \$54 face-value tickets for between \$200 and \$5,000.⁷² Ticketmaster directed consumers to a “secondary site” that charged fans at these incredibly high prices.⁷³ Mr. Springsteen compared this practice to ticket scalping.⁷⁴ The consumer would have been protected by having all tickets freely available for sale to the general public either at face value directly from the event sponsor or at a somewhat higher than face value from Ticketmaster.⁷⁵ Instead, many fans of Bruce Springsteen were forced to pay more than triple face value.⁷⁶ Mr. Springsteen’s call to action led a charge by members of Congress to scrutinize the merger.⁷⁷

A few weeks after the intended merger was announced, U.S. senators convened in a hearing at the Senate Judiciary Committee’s Subcommittee on Antitrust Competition Policy and Consumer Rights.⁷⁸ The CEO of Live Nation, Michael Rapino, stated in a Senate Judiciary Committee’s Subcommittee on Antitrust Competition Policy and Consumer Rights that the competition that existed at the time would continue to thrive undiminished after the merger.⁷⁹ Furthermore, Rapino and Ticketmaster’s CEO Irving Azoff expressed their belief that the merger would help revive the live music industry.⁸⁰ Azoff also felt that the merger was necessary to address inefficiencies in the supply chain and support artists.⁸¹

This came with scrutiny from smaller promoters that were concerned about the two companies working exclusively together.⁸² Seth Hurwitz and Jerry Mickelson, leaders from competitors of Live Nation, were concerned about the vertical integration aspect of the merger.⁸³ Mr. Hurwitz said in the meeting that, “[the Live Nation

⁷² Alan Duke, *Ticketmaster-Live Nation Talks Raise Concerns*, CNN (Feb. 5, 2009, 3:23 PM), <http://www.cnn.com/2009/SHOWBIZ/Music/02/05/ticketmaster.livenation/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Duke, *supra* note 72.

⁷⁷ *Id.* It is important to note that Congress did not have the authority to block the merger but could make a recommendation to the DOJ. Alfred Branch, Jr., *Ticketmaster/Live Nation Merger: Companies Grilled by Skeptical Senators*, TICKETNEWS (Feb. 25, 2009), <https://www.ticketnews.com/2009/02/ticketmasterlive-nation-merger-companies-grilled-by-skeptical-senators/>.

⁷⁸ *Live Nation and Ticketmaster CEOs Outline Benefits of Merger*, LIVE NATION ENT. (Feb. 24, 2009), <https://www.livenationentertainment.com/2009/02/live-nation-and-ticketmaster-ceos-outline-benefits-of-merger/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Branch, *supra* note 77.

⁸³ *See id.*

Entertainment merger] will put all independent promoters at an irreparable competitive disadvantage. [The merger] would be like Pepsi forcing Coke to use its services as its distributor, and pretend that the intelligence Pepsi gathers won't harm Coke. It just can't happen and maintain a fair and level playing field."⁸⁴ Senators in the meeting were also concerned by the vertical integration, and the "unwillingness" to mention that this merger was not about consumers or artists but the profitability of the proposed firm.⁸⁵ Senator Herb Kohl of Wisconsin expressed concerns of the subcommittee in a letter to the DOJ.⁸⁶ Senator Kohl said that the DOJ should only approve of the merger "if it finds that it likely will not substantially reduce competition in the concert ticketing and promotion markets."⁸⁷

B. Problems with the Potential Live Nation Entertainment Merger

There was significant evidence that the merger would substantially reduce competition in the concert ticketing and promotion markets.⁸⁸ The Live Nation Entertainment merger had the potential to crush the local promoters, venues, artists, and consumers that it supposedly set out to protect.⁸⁹ The "solutions" that Live Nation and Ticketmaster proposed immediately drew concern that local promoters and venues would be forced out of business, consumers would pay more, and artists would be handcuffed to massive companies.⁹⁰

1. Forcing Out the Middle Class

The Live Nation Entertainment merger especially concerned the middle class of artists, promoters, and ticketing companies.⁹¹ Jerry Mickelson, the Chairman and VP of a competitor promoting company, said in 2009:

[If the Live Nation and Ticketmaster Entertainment] merger is allowed to proceed the combined entity will have the ability to suppress or eliminate competition in many segments of the music industry including rival concert promoters; primary and secondary ticketing companies; artist management firms; talent agencies who route performers' tours; venue management

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Daniel Kreps, *Politicians Demand Scrutiny of Live Nation-Ticketmaster Merger*, ROLLING STONE (July 28, 2009, 2:43 PM), <https://www.rollingstone.com/music/music-news/politicians-demand-scrutiny-of-live-nation-ticketmaster-merger-237072/>.

⁸⁷ *Id.*

⁸⁸ Branch, *supra* note 77.

⁸⁹ *Live Nation and Ticketmaster CEOs Outline Benefits of Merger*, *supra* note 78. Mr. Rapino of Live Nation said, "[t]ogether with artists, local promoters and venues, and my new partner Irving, we want to offer some solutions." *Id.*

⁹⁰ Branch, *supra* note 77.

⁹¹ *Id.*

companies; record companies; artist merchandise, music apparel and licensing companies; and sponsorship companies.⁹²

Ticketmaster Entertainment was the leading live music ticketing and marketing company.⁹³ Live Nation had recently entered the ticketing market, produced live music, led the promotion of live music events, and operated live entertainment venues.⁹⁴ A Live Nation and Ticketmaster Entertainment merger had the potential to disrupt all levels of the live music market.⁹⁵

Smaller promoters' concerns were based on Live Nation Entertainment's potential to eliminate competition by holding exclusive rights to most artists, venues, and ticketing.⁹⁶ Smaller promoters, who were unable to provide this range of services, would effectively be eliminated from competing with Live Nation Entertainment.⁹⁷ Generally, smaller promoters are innovative in sponsoring a number of different live events, offer greater selection to consumers, and enable artistic creativity.⁹⁸ A lack of competition from smaller promoters would diminish innovation and reduce consumer selection.⁹⁹ Antitrust laws are meant to protect consumers from unbridled power that leads to these higher prices, less selection, and reduced competition.¹⁰⁰ Therefore, the DOJ needed to enforce America's antitrust law to the fullest extent to protect these smaller interests in music.

2. A Horizontal Overview of the Proposed Merger

The next market that could have issues with the Live Nation and Ticketmaster Entertainment merger would be ticketing.¹⁰¹ A horizontal integration is an acquisition of a related business.¹⁰² Ticketmaster was the leader in ticket sales for live music and

⁹² *Id.*

⁹³ Meese & Richman, *supra* note 66, at ii.

⁹⁴ *Id.*

⁹⁵ *See infra* Part III, Section B.3.

⁹⁶ *See* David Balto, *Monopoly Building - Why the Justice Department Must Block the Ticketmaster/LiveNation Deal*, AM. PROGRESS (Apr. 20, 2009), <https://www.americanprogress.org/article/monopoly-building>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *See* Branch, *supra* note 77.

¹⁰² Evan Tarver, *Horizontal vs. Vertical Integration: What's the Difference?*, INVESTOPEDIA (June 13, 2022), <https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp>.

had recently entered the secondary ticket market by acquiring TicketsNow.¹⁰³ Live Nation had also recently entered the primary ticket market in anticipation of the end of a contract for primary ticketing with Ticketmaster in 2008.¹⁰⁴ For the first time in over a decade, Ticketmaster faced the threat of real competition in Live Nation.¹⁰⁵ Likely due to the threat of competition, Ticketmaster decided that merging Live Nation would be more effective than lowering ticket prices for consumers.¹⁰⁶ The horizontal integration between the two companies raised concerns that there would be a lack of competition and Ticketmaster could increase prices with no threat of competition from Live Nation.¹⁰⁷

3. A Vertical Overview of the Proposed Merger

A vertical integration deals with acquiring business operations within the same production by taking control of one or more stages of creating a product.¹⁰⁸ The proposed merger involved vertical integration because it would combine a ticket monopolist in Ticketmaster Entertainment with a firm that promotes marquee concerts in Live Nation.¹⁰⁹ This combination of services was concerning because the Ticketmaster subsidiary of Live Nation Entertainment would have the upper hand in negotiating with venues when vying for marquee concerts.¹¹⁰ Suppose a venue declines to use Ticketmaster as its primary ticket distributor. In that case, Live Nation Entertainment could retaliate by moving the event to a venue that will use Ticketmaster for primary ticketing.¹¹¹ Live Nation Entertainment could also install its own hardware at the venue and use its own proprietary software to handle ticketing.¹¹² Effectively, Live Nation Entertainment would be able to control all levels of a live music event.

In 2009, Irving Azoff, the CEO of Ticketmaster Entertainment said that the merger, “is designed to address the obvious inefficiencies in the entertainment supply chain.”¹¹³ Certainly, a company with a stake in every aspect of live music would

¹⁰³ Branch, *supra* note 77; *Live Nation and Ticketmaster CEOs Outline Benefits of Merger*, *supra* note 78.

¹⁰⁴ Baker, *supra* note 52, at 82.

¹⁰⁵ Balto, *supra* note 96.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ Tarver, *supra* note 102.

¹⁰⁹ Balto, *supra* note 96.

¹¹⁰ Jurzenski, *supra* note 24.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Branch, *supra* note 77.

address inefficiencies in the supply chain.¹¹⁴ For example, an artist in an exclusive contract with Live Nation could perform at a venue in an exclusive contract with Live Nation.¹¹⁵ That venue would then have Ticketmaster for primary ticketing.¹¹⁶ The inefficiencies that this scheme would eliminate also had the potential to eliminate competition, force artists into long-term exclusive contracts, and raise ticket prices for consumers to see their favorite artists.¹¹⁷

C. Consent Decree Terms

There was wide belief that the Obama Administration's DOJ would be tough on an anticompetitive merger, such as the one between Live Nation and Ticketmaster Entertainment.¹¹⁸ In 2009, U.S. Assistant Attorney General for Antitrust, Christine Varney stated, "the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."¹¹⁹ Despite the threat of aggressive enforcement, the merger of Live Nation and Ticketmaster Entertainment was approved on January 25, 2010, almost a year after the original announcement.¹²⁰ That same day, seventeen states and the DOJ's Antitrust Division filed a civil antitrust complaint after a year of concern about how the merger would reduce competition in the live music industry.¹²¹ The proposed final judgment sought two important goals: to establish two new ticketing entities to compete against Live Nation Entertainment and to disallow Live Nation Entertainment from retaliating against venues that do not use Ticketmaster for primary ticketing.¹²²

To establish two new ticketing entities to compete against Live Nation Entertainment, Live Nation Entertainment agreed to share its primary ticketing

¹¹⁴ See Balto, *supra* note 96.

¹¹⁵ See generally *id.*

¹¹⁶ See generally *id.*

¹¹⁷ See Balto, *supra* note 96 for a note on how this merger had the potential to eliminate competition.

¹¹⁸ Hilary Lewis, *DOJ's Antitrust Crackdown Could Scuttle Live Nation-Ticketmaster Merger*, BUS. INSIDER (May 11, 2009, 7:13 PM), <https://www.businessinsider.com/dojs-antitrust-crackdown-could-scuttle-live-nation-ticketmaster-merger-2009-5>; see also Sandford M. Litvack, Eric J. Stock & Jason J. Porta, *Antitrust Enforcement Under the Obama Administration: Change? Really?*, 12 SEDONA CONF. J. 227 (2011).

¹¹⁹ Lewis, *supra* note 118.

¹²⁰ DOJ 2010 PR, *supra* note 22.

¹²¹ See *United States v. Ticketmaster Ent., Inc.*, No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626, 1 (D.D.C. 2010) (naming the plaintiff states).

¹²² Deborah Garza & Elizabeth Arens, *The Ticketmaster/Live Nation Consent Decree*, LAW360 (Mar. 9, 2010), <https://www.cov.com/-/media/files/corporate/publications/2010/03/the-ticketmaster-live-nation-consent-decree.pdf>.

software with AEG and Ticketmaster divested from Paciolan, Inc.¹²³ AEG was the second-largest concert promoter in the United States after Live Nation at the time of the merger and Paciolan was a platform that venues and primary ticket companies could sell tickets through.¹²⁴ For up to five years, AEG was given the right to use the platform to sell tickets at its venues and third-party venues in competition with Live Nation Entertainment.¹²⁵ The final judgment also gave AEG the option to acquire Live Nation Entertainment's platform and source code.¹²⁶

The anti-retaliation clause in the agreement stated that Live Nation Entertainment shall not, "retaliate against a Venue Owner because it is known to Defendants that the Venue Owner is or is contemplating contracting with a company other than Defendants for Primary Ticketing Services."¹²⁷ This prohibited Live Nation Entertainment from tying concerts or artists promoted by the company to the ticketing services that it provided.¹²⁸ The purpose was to preserve competition from other primary ticketing companies, promoters, and artist managers that did not perform any of the other services that Live Nation Entertainment did.¹²⁹ Furthermore, Live Nation Entertainment was prohibited from disclosing client ticketing data to other aspects of the business.¹³⁰ Finally, any venue owner that wanted to switch to a competing ticketing company was required to receive a user-friendly copy of all ticketing data for the venue.¹³¹ Other measures included firewalls, which prevented the merging companies from taking or sharing sensitive information from former Ticketmaster clients.¹³²

D. The Consent Decree that Wasn't: A Bad Agreement, Lack of Enforcement, or Both?

The DOJ likely thought that the merger would cause adverse anticompetitive effects when they forced Live Nation Entertainment to share data relating to the primary ticket market and prevented any retaliation.¹³³ Live Nation agreed to share its

¹²³ *Ticketmaster Ent., Inc.*, 2010 U.S. Dist. LEXIS 88626, at *1, *11, *14.

¹²⁴ Garza & Arens, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Ticketmaster Ent., Inc.*, 2010 U.S. Dist. LEXIS 88626, at *25.

¹²⁸ Garza & Arens, *supra* note 122.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² DOJ 2010 PR, *supra* note 22.

¹³³ *Id.*

primary ticketing software with AEG and Ticketmaster divested from Paciolan, Inc.¹³⁴ There was concern in 2010 that Live Nation Entertainment had higher fixed costs, software that was too technologically advanced, and access to more data than any other primary ticket company that could compete in the large venue market.¹³⁵ Live Nation Entertainment was also large enough to hold expensive, long-term contracts with venues.¹³⁶ Effectively, these factors reduced the chances that the market could see an increase in competition.¹³⁷ Since the merger, many of the anticompetitive concerns have become a reality.¹³⁸ About a dozen competitors have emerged in the primary ticket market but no competitor is able to compete with the eighty percent market share that Ticketmaster has on ticket concert sales.¹³⁹ Live Nation Entertainment also has exclusive rights to eighty percent of stadiums and to over forty percent of top-tier talent.¹⁴⁰ An analysis of how the DOJ has handled the Live Nation Entertainment merger since the 2010 final judgment is important to finding a solution.

1. Department of Justice's Antitrust Authority

The DOJ is led by the U.S. Attorney General and is the agency responsible for enforcing federal law.¹⁴¹ The U.S. Attorneys are the main litigators for the Attorney General and are statutorily responsible for the prosecution and defense of civil cases when the United States is a party.¹⁴² The DOJ's Antitrust Division has the mission of promoting economic competition through enforcing and providing guidance on antitrust laws and principles.¹⁴³ The DOJ's Antitrust Division reviews certain mergers and acquisitions, and uses its current guidelines to determine whether a suit may be

¹³⁴ *Id.* Paciolan was a company that Ticketmaster, Inc. owned before the merger. "Paciolan [was] used by hundreds of venues to sell tickets including major concert venues around the country." *Id.*

¹³⁵ Baker, *supra* note 52, at 88–89.

¹³⁶ *Id.*

¹³⁷ *See id.* at 89.

¹³⁸ Olivia Perreault, *Antitrust Institute Slams DOJ Missed Opportunity in Live Nation Settlement*, TICKETNEWS (Feb. 6, 2020), <https://www.ticketnews.com/2020/02/antitrust-institute-doj-live-nation-settlement/>.

¹³⁹ Anthony Dreyer et al., *FTC Invites Comment on Online Ticket Sales, Examines GAO Report*, JDSUPRA (Nov. 26, 2018), <https://www.jdsupra.com/legalnews/ftc-invites-comment-on-online-ticket-90864/>.

¹⁴⁰ Jurzenski, *supra* note 24.

¹⁴¹ *How Big Is the Department of Justice and What's Its Authority?*, MOLOLAMKEN LLP, <https://www.mololamken.com/knowledge-How-Big-Is-the-Department-of-Justice-and-Whats-Its-Authority> (last visited Feb. 18, 2022).

¹⁴² *Id.*

¹⁴³ U.S. DEP'T OF JUST., ANTITRUST DIVISION, MISSION (July 20, 2015), <https://www.justice.gov/atr/mission>.

filed against a particular company.¹⁴⁴ There are separate DOJ guidelines that are in place for horizontal and non-horizontal mergers that determine how they will enforce antitrust law.¹⁴⁵ These guidelines are in place for transparency reasons for companies that are debating a potential acquisition before potential litigation ensues.¹⁴⁶ The Antitrust Division can file a civil action for a court order forbidding violations of the law and require steps to remedy the anticompetitive effects of past violations.¹⁴⁷

2. Consent Decree Enforcement

Before critiquing the DOJ's enforcement in this case, a look at how consent decrees are typically enforced is warranted. Courts have the inherent power to enforce settlements in cases pending before them.¹⁴⁸ When litigation began in *United States v. Ticketmaster Entm't, Inc.*, the court had the inherent power to enforce the settlement between the DOJ and the newly formed firm, Live Nation Entertainment.¹⁴⁹ The standard of approval for a consent decree is whether it is "fair, adequate, and reasonable, as well as consistent with the public interest."¹⁵⁰ Once the court finds that this standard is met, it may approve the consent decree and lose the ability to modify it.¹⁵¹ The court does not have the inherent power to enforce the settlement agreement once the case is closed.¹⁵² The two parties that agree to a consent decree have standing to seek enforcement of the judgment in court.¹⁵³ In this case, the DOJ has standing and must enforce the consent decree against Live Nation Entertainment, so long as enforcing it would serve a federal interest.¹⁵⁴

¹⁴⁴ U.S. DEP'T OF JUST., ANTITRUST DIV., HORIZONTAL MERGER GUIDELINES (August 19, 2010), www.justice.gov/atr/horizontal-merger-guidelines-08192010.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ U.S. DEP'T OF JUST., *supra* note 143.

¹⁴⁸ Jim Wagstaffe, *Enforcing Settlements and Consent Decrees*, PRAC. GUIDANCE J. (Sept. 12, 2018), <https://www.lexisnexis.com/authorcenter/the-journal/b/pa/posts/enforcing-settlements-and-consent-decrees>.

¹⁴⁹ *United States v. Ticketmaster Ent., Inc.*, No. 1:10-CV-00139, 2010 U.S. Dist. LEXIS 88626, at *36 (D. D.C. July 30, 2010).

¹⁵⁰ *United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489 (6th Cir. 2010).

¹⁵¹ Wagstaffe, *supra* note 148.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*

A consent decree is a settlement that contains an injunction.¹⁵⁵ A party seeking to prove a violation of the injunction must do so with clear and convincing evidence.¹⁵⁶ Each party is bound to the terms of the consent decree and proof of violation may result in whatever remedies are outlined in the original consent decree.¹⁵⁷ A party may also move to modify a consent decree by proving that significant changes in circumstances warrants revision.¹⁵⁸ The party seeking modification may do so “by showing a significant change either in factual conditions or in law.”¹⁵⁹ The process of enforcing and modifying consent decrees is important to the DOJ, especially the ten-year agreement that the United States and Live Nation Entertainment originally agreed upon.¹⁶⁰

3. DOJ’s Enforcement of the Consent Decree

To enforce the DOJ’s consent decree in the case of Live Nation Entertainment, the Antitrust Division established an infrastructure via a new Compliance Committee to monitor potential violations of the consent decree.¹⁶¹ The DOJ also enacted rules to interview or depose Live Nation Entertainment employees, demand corporate documents, and provide written reports.¹⁶² However, it was noted by Aaron Silvenis¹⁶³ that “[i]f the remedy is to operate successfully in practice, rigorous monitoring and enforcement of the conduct provisions will be critical.”¹⁶⁴ The DOJ had a challenging task by allowing the merger to go forward in the first place, but especially with a vague consent decree.¹⁶⁵

The final judgment agreed upon by the DOJ and Live Nation Entertainment brings into question whether the DOJ’s enforcement was too relaxed or the 2010 consent decree was toothless to begin with. Through different tactics, the consent decree sought to establish two new ticketing entities to compete against Live Nation

¹⁵⁵ *Id.*

¹⁵⁶ Jonathon M. Jacobson, *Presented to the Department of Justice, Issues in Antitrust Consent Decree*, (Apr. 26, 2018), <https://www.justice.gov/atr/page/file/1057131/download>.

¹⁵⁷ Wagstaffe, *supra* note 148.

¹⁵⁸ *Id.*

¹⁵⁹ *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

¹⁶⁰ *United States v. Ticketmaster Ent., Inc.*, No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626, 36 (D. D.C. July 30, 2010).

¹⁶¹ Telephone Interview with Robert Kramer, Chair of the Compliance Committee, U.S. Department of Justice – Antitrust Division (Feb. 9, 2011).

¹⁶² Aaron Silvenis, *Live Aid? Assessing The Ability of The Ticketmaster-Live Nation Consent Decree to Restore Competition Levels in The Primary Ticket Market*, 18 (Am. Antitrust Institute Working Paper No. 11-02, 2011).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Entertainment and to disallow Live Nation Entertainment from retaliating against venues that do not use Ticketmaster for primary ticketing.¹⁶⁶ However, the two new ticketing companies did not come to fruition because AEG, a competitor to Live Nation Entertainment, never exercised its option because the technology was “not innovative enough.”¹⁶⁷ Effectively, a measure that was put in place to keep competition in the ticket market was eliminated almost immediately.¹⁶⁸

The anti-retaliation clause in the consent decree also failed. The consent decree was not detailed enough in outlining exactly what would constitute “retaliation.”¹⁶⁹ Off the record, DOJ officials in favor of the consent decree argued the vagueness of the consent decree created leveraging power, while critics of the consent decree worried that retaliatory conduct would be difficult to discover.¹⁷⁰ Live Nation Entertainment also could choose who it contracted with and the bundling of its services was not prohibited in the consent decree.¹⁷¹ A vague consent decree made it very difficult for the DOJ to meet the clear and convincing standard required to prove a violation of the anti-discriminatory clause of the consent decree.¹⁷² Whether the DOJ actively attempted to enforce this provision of the consent decree throughout the 10-year period is difficult to determine, but the 2020 Motion to Modify Final Judgment appears to show that the DOJ would like to enforce the consent decree now.¹⁷³

The DOJ investigated Live Nation Entertainment for pressuring venues to use Ticketmaster for primary ticketing and found six violations between 2012 and 2019.¹⁷⁴ Among the alleged violations, the DOJ claimed that Ticketmaster’s President told an unnamed venue that it would never do a Live Nation Entertainment show again if the

¹⁶⁶ Garza & Arens, *supra* note 122.

¹⁶⁷ Michael Ewald, ‘Don’t You Let that Deal Go Down’: Reexamining the 2010 Ticketmaster-Live Nation Merger and Department of Justice Consent Decree Ten Years Later, *CONCURRENCES* 2 (Apr. 26, 2018), https://awards.concurrences.com/IMG/pdf/41_don_t_you_let_that_deal_go_down_-_reexamining_the_2010_ticketmaster_live_nation_merger_and_justice_department_consent_decree_ten_years_later.pdf.

¹⁶⁸ *Id.*

¹⁶⁹ Wagstaffe, *supra* note 148, at 9.

¹⁷⁰ Silvenis, *supra* note 162. The bundling of services refers to companies packaging several of their products or services together as a single combined unit, often for a lower price than they would charge customers to buy each item separately. *Id. See, e.g.,* Daniel Liberto, *Bundling*, *INVESTOPEDIA* (Mar. 30, 2021), <https://www.investopedia.com/terms/b/bundling.asp>.

¹⁷¹ Ewald, *supra* note 167, at 12 n. 67.

¹⁷² *See* Jacobson, *supra* note 156.

¹⁷³ Motion to Modify, *supra* note 13, at 3. (“The proposed modifications serve the purpose of the original Final Judgment by clarifying its terms and enhancing the United States’ ability to monitor and enforce compliance; they do not alter the essence of the remedy.”).

¹⁷⁴ Ethan Millman, *Justice Department Details Alleged Live Nation Wrongdoing in New Filing*, *ROLLING STONE* (Jan. 9, 2020), <https://www.rollingstone.com/pro/news/live-nation-doj-complaint-935699/>.

venue did not choose Ticketmaster for primary ticketing.¹⁷⁵ Live Nation Entertainment shows at the venue fell almost fifty percent between 2011 and 2015, but Live Nation Entertainment denied that these threats were made.¹⁷⁶ The 2010 consent decree may have been toothless to begin with, due to a lack of clarity.¹⁷⁷ Because of this, Live Nation Entertainment went without consequences until a 2019 extension, resulting in a “slap on the wrist.”¹⁷⁸

4. The Consent Decree Extension

In 2019, the DOJ and Live Nation Entertainment agreed to extend the consent decree by five-and-a-half years through 2025.¹⁷⁹ The DOJ noted in its Motion to Modify Final Judgment that the “well-earned reputation for threatening behavior and retaliation in violation of the [consent decree] has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts, hindering effective competition for primary ticketing services.”¹⁸⁰ Despite the continued denial from Live Nation Entertainment, the DOJ found that it was necessary to amend the consent decree to protect venues and consumers.¹⁸¹

The DOJ intended to clarify the 2010 consent decree by reinforcing rules against retaliation by the company for withholding events at venues that choose a different primary ticket company.¹⁸² The clarifications prevented Live Nation Entertainment from withholding concerts from a venue if that venue chose to use a primary ticket company other than Ticketmaster.¹⁸³ Furthermore, the 2019 final judgment sought to appoint an independent monitor of Live Nation Entertainment and an internal compliance officer.¹⁸⁴ Live Nation Entertainment is subject to a \$1,000,000 penalty for violation of the final judgment.¹⁸⁵

¹⁷⁵ Motion to Modify, *supra* note 13, at 7.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ See Dave Clark, *Despite Multiple Consent Decree Violations, Live Nation Gets Slap on Wrist from DOJ*, TICKETNEWS (Jan. 14, 2020), <https://www.ticketnews.com/2020/01/live-nation-consent-decree-doj-slap-on-wrist/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Motion to Modify, *supra* note 13, at 1–2.

¹⁸¹ *Id.* at 2.

¹⁸² DOJ 2019 PR, *supra* note 23.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

E. The Consequences of the Live Nation Entertainment Merger

The anti-competitive results of Live Nation Entertainment's merger adversely impacted consumers, especially in the primary ticket market.¹⁸⁶ First, the primary ticket market has not seen the competition that the DOJ originally predicted.¹⁸⁷ Live Nation Entertainment holds a market share of over seventy percent for major concert venues.¹⁸⁸ The anti-competitive barriers that Live Nation Entertainment erected after the merger have kept potential competitors from having a chance to offer prices that are reasonable to consumers.¹⁸⁹

The DOJ heard complaints before the merger that Ticketmaster's prices for tickets were, "unfair, too high, inescapable, and confusing."¹⁹⁰ However, the DOJ claimed that these problems were not antitrust concerns and that the concerns would likely be addressed by the consent decree.¹⁹¹ The market for primary tickets in 2010 had to be defined to determine the potential concentration in the market and whether this concentration would have anticompetitive effects.¹⁹² At the time, the market for these services was defined as "major concert venues within the United States."¹⁹³ The reason that only major concert venues were included was that Live Nation and Ticketmaster Entertainment were able to supply complex resources that small to mid-size venues likely could not afford.¹⁹⁴

The market concentration was analyzed by the DOJ using the Herfindahl-Hirschman Index ("HHI"), a tool used to measure market concentration.¹⁹⁵ An HHI above 1,800 is considered highly concentrated and a merger is presumed to be "likely to create or enhance market power" if that number increases more than 100.¹⁹⁶ The HHI was 4,000 in 2010, and then increased by almost 2,000 after the merger.¹⁹⁷ The

¹⁸⁶ Baker, *supra* note 52, at 104.

¹⁸⁷ *Id.*

¹⁸⁸ Corrado Rizzi, Live Nation, *Ticketmaster Hit with Antitrust Class Action Over Alleged Market 'Stranglehold'*, CLASSACTION (Jan. 7, 2022), <https://www.classaction.org/news/live-nation-ticketmaster-hit-with-antitrust-class-action-over-alleged-market-stranglehold>.

¹⁸⁹ *Id.*

¹⁹⁰ Christine A. Varney, Assistant Attorney General, Antitrust Department, Dep't. of Just., Remarks as Prepared for the South by Southwest (Mar. 18, 2010).

¹⁹¹ *Id.*

¹⁹² Meese & Richman, *supra* note 66, at 17.

¹⁹³ Baker, *supra* note 52, at 87.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 88.

¹⁹⁷ *Id.*

DOJ failed to adequately address the market concentration before agreeing to the consent decree and this was proven after the merger in 2010.

Whether this highly concentrated market would cause adverse anticompetitive effects was a separate question.¹⁹⁸ There was concern at the time of the merger that Live Nation Entertainment had higher fixed costs, software that was too technologically advanced, and access to more data than any other primary ticket company that could compete in the large venue market.¹⁹⁹ These factors, along with Live Nation Entertainment's ability to hold large, long-term contracts with venues, reduced the chances that the market could see an increase in competition.²⁰⁰ Since the merger, there have been about a dozen competitors that have emerged in the primary ticket market but no competitor can keep up with the market share of over eighty percent that Ticketmaster enjoys.²⁰¹

The answer to whether concentration in the market would have anti-competitive effects should have been assessed along with the vertical transaction issues that this merger posed. Instead, they were analyzed separately from each other.²⁰² The threat that a vertical merger posed to live music was clear: Live Nation Entertainment could keep big tours away from venues that do not work with Ticketmaster for ticketing services.²⁰³ This threat went unchecked as ticket prices have increased while Ticketmaster makes up almost fifty percent of Live Nation Entertainment's revenue.²⁰⁴ As recently as January of 2022, Live Nation Entertainment was a named defendant in a lawsuit claiming that the company has shown "predatory and exclusionary conduct."²⁰⁵ The lawsuit contends that Live Nation Entertainment has violated antitrust law and has "shamelessly violated its terms for years."²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 88–89.

²⁰⁰ *Id.* at 88.

²⁰¹ Anthony Dreyer et al., *FTC Invites Comment on Online Ticket Sales, Examines GAO Report*, JDSUPRA (Nov. 26, 2018), <https://www.jdsupra.com/legalnews/ftc-invites-comment-on-online-ticket-90864/>.

²⁰² Varney, *supra* note 190.

²⁰³ Rizzi, *supra* note 188.

²⁰⁴ Tiffany, *supra* note 1. *See also* Compl., Heckman et al. v. Live Nation Entertainment, Inc. et al. (2022).

²⁰⁵ Ellie Robinson, *Live Nation and Ticketmaster Facing Lawsuit Over Alleged "Predatory and Exclusionary Conduct"*, NME (Jan. 6, 2022), <https://www.nme.com/news/music/live-nation-and-ticketmaster-facing-lawsuit-over-alleged-predatory-and-exclusionary-conduct-313116>.

²⁰⁶ Michael Broerman, *New Lawsuit Accuses Live Nation of Withholding Artists, Controlling Secondary Market*, LIVE FOR LIVE MUSIC (Jan. 6, 2022), <https://liveforlivemusic.com/news/new-live-nation-suit-withholding-artists-secondary-market/>.

Live Nation Entertainment has also been able to lock venues and artists into contracts that restrain competition.²⁰⁷ Competitors of Live Nation Entertainment have claimed that the firm can tie its services together to assure that each level of the live music chain is run exclusively by Live Nation Entertainment.²⁰⁸ The bundle that Live Nation Entertainment offers includes the primary ticket service, promotional services, venues, and artist management.²⁰⁹ This should have raised more concern from the DOJ, but there was an economic belief that Live Nation Entertainment would dilute the profitability of the ticket monopoly that Ticketmaster had.²¹⁰ The belief was that Live Nation Entertainment would actually alienate potential venues if it required venues to deal with the unwanted promoter services of Live Nation Entertainment.²¹¹ However, the market power that Live Nation Entertainment enjoyed at all levels of the live music market after the merger proved that it was economically beneficial for Live Nation Entertainment to take advantage of its ability to force (or – to give Live Nation Entertainment the benefit of the doubt – *manipulate*) venues into using all of its services.²¹²

Live Nation Entertainment holds exclusive rights to over forty percent of top tier talent and has a portfolio of more than ninety festivals.²¹³ In the live music industry, a radius clause is a common term agreed to by artists who perform at many concerts and major music festivals.²¹⁴ Music promoters use radius clauses to prohibit an artist from performing again within a certain distance and time.²¹⁵ This is often to the detriment of artists that are willing to perform and consumers that are willing to pay to see artists perform.²¹⁶

²⁰⁷ *Id.*

²⁰⁸ Lucas Shaw, *Concerts Are More Expensive Than Ever, and Fans Keep Paying Up*, BLOOMBERG (Sept. 10, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-09-10/concerts-are-more-expensive-than-ever-and-fans-keep-paying-up>.

²⁰⁹ Competitive Impact Statement at 3, *United States v. Ticketmaster Ent., Inc., et al.*, No. 1:10-cv-00139, 11-12 (D. D.C. Jan. 25, 2010).

²¹⁰ Meese & Richman, *supra* note 66, at 109.

²¹¹ *Id.* at 110.

²¹² Motion to Modify, *supra* note 13, at 18.

²¹³ Jurzenski, *supra* note 24.

²¹⁴ Karen Gwee, *Music Festivals and the Pursuit of Exclusivity*, CONSEQUENCE (Sept. 16, 2016), <https://consequence.net/2016/09/music-festivals-and-the-pursuit-of-exclusivity/>.

²¹⁵ *Id.*

²¹⁶ See Trevor Lane, *Defining Unreasonable Radius Clauses for American Music Festivals*, 42 SEATTLE L. REV. 1247 (2019). See, e.g., John Summit (@johnsummit), TWITTER (July 20, 2021, 12:40 PM), <https://twitter.com/johnsummit/status/1417524770145513472> (“had to drop a festival due to the insane radius clause cuz one fest ain’t worth not playing in half the country”).

Similar to non-compete clauses in employment contracts, radius clauses are ancillary restraints that promoters may rely on to protect their investments.²¹⁷ Radius clauses are useful for promoters and venues that want to attract talent and protect these investments.²¹⁸ Live Nation Entertainment is able to use these radius clauses to restrict artists' ability to perform only in areas that Live Nation Entertainment has market power over.²¹⁹ In *It's My Party, Inc. v. Live Nation, Inc.*, plaintiffs argued that "[Live Nation Entertainment] obtains overly broad exclusivity clauses from artists' to further their monopoly scheme."²²⁰ Live Nation Entertainment was accused of doing this because it "prohibit[ed] artists from performing anywhere in the United States or North America, not just within the area of performance, for an extended period of any tour performance."²²¹ The Court held that plaintiffs did not reach the "substantially foreclosed commerce" standard laid out by the Supreme Court in *Tampa Elec. Co. v. Nashville Coal Co.*²²² This is one example of Live Nation Entertainment using the market power that they have to restrict artists to venues that Live Nation Entertainment runs. This merger is also hurting artists because other third-party ticket services might take a smaller cut of sales.²²³ Moreover, blacklisted venues might offer better terms than those ticket services and venues that contract strictly with Live Nation Entertainment.²²⁴ If an artist is in an exclusive partnership with Live Nation Entertainment, then that artist may be restricted to those venues exclusively run by Live Nation Entertainment.²²⁵

This anti-competitive scheme also hurts the venue itself because it may be forced to use Ticketmaster in exchange for access to artists in exclusive deals with Live Nation Entertainment.²²⁶ While bundling is not a specific violation of antitrust law, anticompetitive forcing is, and there is considerable evidence that Live Nation Entertainment repeatedly violated the consent decree by forcing venues to use its ticketing services in exchange for access to artists.²²⁷ Tying occurs when a supplier makes the sale of a good or service conditional upon the sale of another good or

²¹⁷ Lane, *supra* note 216, at 1248–49.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *It's My Party, Inc. v. Live Nation, Inc.*, 88 F. Supp. 3d 475, 501 (2015).

²²¹ *Id.* at 502.

²²² *Id.* (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 356 U.S. 320, 327 (1961)) This scheme did not "foreclose competition in a substantial share of the line of commerce affected." *Id.*

²²³ John Bergmayer, *More Needs to Be Done to Reign in the Ticketmaster Monopoly*, PUB. KNOWLEDGE (Jan. 29, 2020), <https://publicknowledge.org/more-needs-to-be-done-to-reign-in-the-ticketmaster-monopoly/>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See* Motion to Modify, *supra* note 13, at 1.

service.²²⁸ *It's My Party* lays out two ways that tying suppresses competition: (1) “the buyer is prevented from seeking alternative sources of supply for the tied product;” and (2) “competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement.”²²⁹ Here, independent venues are prevented from alternative sources of supply if they choose not to use Ticketmaster and other promoters are foreclosed access to artists.²³⁰ This hurts all parties involved, especially independent promoters, venues, artists, and consumers, but it lines the pockets of Live Nation Entertainment.²³¹

Ultimately, Live Nation Entertainment’s power over live music locks artists into unreasonable contracts; reduces competition from other promoters, venues, and ticket companies; and makes it harder for consumers to pay reasonable prices to see their favorite artists.²³² Therefore, the DOJ and Congress must weigh solutions to protect these parties.

IV. WEIGHING POTENTIAL SOLUTIONS

Throughout the COVID-19 pandemic, live venues were shut down, jobs were lost, and artists were forced to innovate to generate revenue.²³³ The DOJ failed to adequately protect smaller interests through antitrust enforcement for years before the pandemic, which created a massive industry with little competition.²³⁴ Since the 2010 consent decree, Live Nation Entertainment is alleged to have repeatedly violated the consent decree.²³⁵ The allegations include “threats, conditions, and retaliation designed to force venue operators into contracting with Ticketmaster as their primary ticketing service.”²³⁶

Critics of proposed changes to the live music industry may point to the increase in live music revenue worldwide since the merger as a net positive,²³⁷ and thus, *any*

²²⁸ Baker, *supra* note 52, at 93.

²²⁹ *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 684 (2015).

²³⁰ Letter from Diana L. Moss, Am. Antitrust Inst. President, to Makan Delrahim, Assistant Att’y Gen. for U.S. Dep’t of Just. Antitrust Div. (Feb. 4, 2020) (on file with American Antitrust Institute).

²³¹ Tiffany, *supra* note 1.

²³² Lucas Shaw, *Concerts Are More Expensive Than Ever, and Fans Keep Paying Up*, BLOOMBERG (Sept. 10, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-09-10/concerts-are-more-expensive-than-ever-and-fans-keep-paying-up>.

²³³ See Alex Taylor, *How Covid is ‘Creating a New Genre’ for Live Music*, BBC (Feb. 8, 2021), <https://www.bbc.com/news/entertainment-arts-55947209>.

²³⁴ See Letter from Diana L. Moss to Makan Delrahim, *supra* note 230.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Live Music Industry Revenue Worldwide from 2014 to 2025*, STATISTA (Nov. 9, 2021), <https://www.statista.com/statistics/1096424/live-music-industry-revenue-worldwide/>.

change to the live music industry has the potential to crush the industry.²³⁸ This argument has merit but also ignores the fact that the live music industry's growth can be attributed to more access for consumers to their favorite artists through music streaming and social media.²³⁹ Live performances account for most of artists' incomes.²⁴⁰ Success in the live music industry is linked to consumer access to artists' live performances, so there must be room for growth in live music.²⁴¹ While some drastic actions do have the potential to crush live music, the room for growth must not be ignored.

Live Nation Entertainment has been able to corner the live music market through exclusive contracts with artists, forcing venues into bundling to attract talented artists, and attaching radius clauses to these contracts with artists that reduce competition and strangle the market.²⁴² Furthermore, the DOJ's attempt to save competition in the primary ticket market by forcing Live Nation Entertainment to share its software with AEG was an attempt to provide competition for Live Nation Entertainment.²⁴³ However, that never came into fruition and Live Nation Entertainment has fended off any potential competitors.²⁴⁴ In reality, Live Nation Entertainment "nullified the remedy for 9 years, and the event was then subject to no penalty for its strategic interpretation of the clause."²⁴⁵ The DOJ has failed to adequately save competition at all levels of live music and its most recent update to the merger must be enforced to have any positive impact on competition.²⁴⁶ Thus, it is important to weigh stronger enforcement of the consent decree by the DOJ with other potential solutions such as breakup and targeted legislation.

²³⁸ Tony M. Fountain, *The Evolution of The Music Industry — And What It Means for Marketing Yourself as A Musician*, FORBES (Sept. 13, 2021, 10:00 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/13/the-evolution-of-the-music-industry---and-what-it-means-for-marketing-yourself-as-a-musician/?sh=8c8e6f8297a7>.

²³⁹ *See id.*

²⁴⁰ David Andrew Wiebe, *How Do Musicians Make Money? We Breakdown their Income Streams So You Know How to Earn Too*, MUSIC INDUS. HOW TO (Dec. 29, 2020), <https://www.musicindustryhowto.com/music-artists-income-breakdown-how-do-musicians-really-make-their-money/>.

²⁴¹ *Id.*

²⁴² Oliver, *supra* note 10.

²⁴³ Baker, *supra* note 52, at 98.

²⁴⁴ *Id.* at 99.

²⁴⁵ Tommaso Valletti, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, ANTI TRUST & COMEPTITION (Jun. 28, 2021), <https://www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators/>.

²⁴⁶ DOJ 2019 PR, *supra* note 23.

A. *Breaking Up Live Nation Entertainment*

The first potential remedy is under Section 2 of the Sherman Act and it is a break-up.²⁴⁷ Break-up is the most extreme remedy in a monopolization case and is very rarely imposed.²⁴⁸ Section 2 makes it illegal to acquire or maintain monopoly power through improper means.²⁴⁹ To determine if a firm is a monopoly, that firm must have (1) monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.²⁵⁰ For the first prong, the DOJ could likely argue that Live Nation Entertainment has monopoly power in the primary ticket market because it “holds more than 80 percent of the venue ticket sales market.”²⁵¹ For the second prong, the DOJ would have to bring in a couple of arguments that (1) discuss the vertical integration that Live Nation Entertainment holds, and (2) show the merger was not simply due to a better product.²⁵² Before the merger, Live Nation had recently entered the primary ticket market as a competitor to Ticketmaster and the two firms found it better to merge, rather than compete.²⁵³ The DOJ was unable to find any monopoly power before the merger was allowed, despite the potential vertical issues that the merger raised.²⁵⁴ The DOJ should examine its original consent decree and re-think extension remedies in the future.

Since Microsoft in 2001, there has not been a successful monopoly prosecution in the United States, making it extremely unlikely that Live Nation Entertainment would be the first target for break-up in the United States.²⁵⁵ The DOJ acknowledged that under Section 2 of the Sherman Act, the DOJ may “attack any behavior that constitutes

²⁴⁷ James T. Halverson & Brian J. Telpner, *Making Sense of Sherman Act Section 2 in the High-tech Economy*, STEPTO & JOHNSON LLP, <https://www.stepto.com/images/content/1/9/v1/194/25.pdf> (last visited Feb. 18, 2022).

²⁴⁸ *Id.*

²⁴⁹ *Single-firm Conduct and Section 2 of the Sherman Act: An Overview*, DEP’T. OF JUST., https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_4_ (last visited Feb. 18, 2022).

²⁵⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

²⁵¹ See *House Reps Ask Biden Administration to Look into Live Nation/Ticketmaster ‘Monopoly’*, INSIDE RADIO (Apr. 20, 2021), http://www.insideradio.com/free/house-reps-ask-biden-administration-to-look-into-live-nation-ticketmaster-monopoly/article_9a5085ac-a21c-11eb-a2e9-6faa8f01b3e5.html.

²⁵² See generally *Grinnell Corp.*, 384 U.S. at 570–71.

²⁵³ Knox, *supra* note 5.

²⁵⁴ Varney, *supra* note 190.

²⁵⁵ See Frederick Reese, *15 Companies the U.S. Government Tried to Break Up as Monopolies*, STACKER (Oct. 22, 2019), <https://stacker.com/stories/3604/15-companies-us-government-tried-break-monopolies>. See also *United States v. Microsoft Corp.*, 253 F.3d 34, 44 (D.C. Cir. 2001).

an illegal monopolization of a segment of the live music industry.”²⁵⁶ However, a break-up is so rare that there are only a few cases a judge has found this to be a necessary remedy.²⁵⁷ Many legal scholars refer to breaking up a merged company as “unscrambling the eggs.”²⁵⁸ Another analogy, which some believe to be a better comparison, is controlled burns in the case of forest fires because “[they] help reinvigorate forests, allowing ecosystems to regenerate and emerge more resilient than before.”²⁵⁹ Before ignoring break-up as a remedy, it is important to note that a break-up is still a possible option today because of growing scrutiny of big corporations, particularly related to big technology companies.²⁶⁰

However, despite emerging scholarship that proposes break-ups be employed more often,²⁶¹ a forced break-up of Live Nation Entertainment would likely have more negative impacts on live music than positive.

Standard Oil and AT&T are examples of the United States using the break-up as a remedy to a monopoly.²⁶² The Standard Oil breakup had little effect on consumer prices, but the AT&T break-up saw a price decrease for long-distance phone calls.²⁶³ The Standard Oil Company was broken up into thirty-three companies while AT&T was divided into seven “regional holding companies.”²⁶⁴ Both examples involve the

²⁵⁶ Varney, *supra* note 190.

²⁵⁷ See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. AT&T* 552, F. Supp. 131 (D. D.C. 1982).

²⁵⁸ See John Kwoka & Tommaso Valletti, *Unscrambling the Eggs: Breaking up Consummated Mergers and Dominant Firms*, 30 CORP. CHANGE, 1286, 1286 (2021) (defining unscrambling the eggs in the context of antitrust law).

²⁵⁹ Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 2004 (2020) (comparing antitrust law enforcement to a controlled burn as opposed to unscrambling eggs).

²⁶⁰ See, e.g., Motion to Modify, *supra* note 13. See also Alexandra Ocasio-Cortez (@AOC), TWITTER (Nov. 15, 2022, 1:35 PM), <https://twitter.com/AOC/status/1592587226801934336> (“Daily reminder that Ticketmaster is a monopoly, it’s merger with LiveNation should never have been approved, and they need to be reigned in. Break them up.”).

²⁶¹ See Van Loo, *supra* note 259, at 2004.

²⁶² Reese, *supra* note 255.

²⁶³ Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Sept. 11, 2022), <https://www.investopedia.com/insights/history-of-us-monopolies/>. See Andrew Beattie, *AT&T’s Successful Spinoffs*, INVESTOPEDIA (May 7, 2021), <https://www.investopedia.com/ask/answers/09/att-breakup-spinoff.asp>.

²⁶⁴ *Standard Oil Company and Trust*, BRITANNICA (Mar. 24, 2020), <https://www.britannica.com/topic/Standard-Oil>; Ben M. Enis & E. Thomas Sullivan, *The AT&T Settlement: Legal Summary, Economic Analysis, and Marketing Implications*, 49 J. MKTG. 127, 131 (1985).

United States forcing monopolies into multiple smaller firms based on geographical relations that compete against each other.²⁶⁵

The AT&T break-up involved a consent decree that was agreed upon after some slight modifications by a judge, AT&T, and the DOJ.²⁶⁶ For decades, AT&T did not allow consumers to connect phones manufactured by other firms to their network.²⁶⁷ After the break-up, “the Baby Bells” controlled the direct connections and the restrictions on the network were dropped.²⁶⁸ This led to better prices and quality for consumers.²⁶⁹ Furthermore, AT&T’s long-distance phone service monopoly was forced to compete with MCI and Sprint.²⁷⁰

A break-up of the largest live music event provider in the United States has the potential to cause massive problems for artists and consumers. The first problem that a break-up would have, in comparison to the Standard Oil and AT&T break-ups, is that a geographical break-up would simply be ineffective.²⁷¹ Individual companies would have less power based simply on their location.²⁷² For example, Las Vegas and Nashville are the two biggest concert markets in the United States per capita.²⁷³ If an artist wants to play in Las Vegas, but is locked into the Northeast region, that artist would be negatively impacted by a company that only is seated in the Northeast.²⁷⁴ The only option is individual contracts that would take away the efficiency aspect of Live Nation Entertainment.²⁷⁵ Effective artist management would be an almost impossible task in a geographical break-up.²⁷⁶ Therefore, a break-up into multiple local companies would likely hurt artists the most.

²⁶⁵ Enis & Sullivan, *supra* note 264, at 131.

²⁶⁶ *Id.* at 127.

²⁶⁷ Beattie, *supra* note 263.

²⁶⁸ *Id.* (explaining that “Baby Bell” refers to the individual regional service providers that were created after the AT&T break-up).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Ernesto Falcon, *What the AT&T Breakup Teaches Us About a Big Tech Breakup*, ELECTRONIC FRONTIER FOUNDATION (Mar. 1, 2021), <https://www.eff.org/deeplinks/2021/02/what-att-breakup-teaches-us-about-big-tech-breakup>.

²⁷² See *Which U.S. Cities Get the Most Concerts?*, SEATGEEK (Mar. 6, 2018), <https://seatgeek.com/tba/music/which-u-s-cities-get-the-most-concerts/>.

²⁷³ *Id.*

²⁷⁴ See generally *id.*

²⁷⁵ *The Ticket Master/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business? Before the Subcomm. on Antitrust, Competition Pol’y and Consumer Rts. of the Comm. on the Judiciary*, 111th Cong. 10 (2009) (statement of Irving Avoff, CEO, Ticketmaster Entertainment Inc.). See Baker, *supra* note 52, at 79.

²⁷⁶ See generally Baker *supra* note 52, at 79.

Another technique that could be used to break-up Live Nation Entertainment is by separating product and service. This means that Ticketmaster would break off into ticketing, Live Nation would break off into promoting, and other services that Live Nation Entertainment provides would be broken off individually.²⁷⁷ Likely, this would only cause confusion and, again, would take away any of the efficiency perks of streamlining live music events that Live Nation Entertainment brings.²⁷⁸ Conversely, it could lead to the individual product and service companies working in accordance, which would completely eliminate the effect of the break-up.²⁷⁹ The DOJ could block future contracts between the companies for a certain period of time, but again, this would hurt the quality of events because of the high quality of services Live Nation Entertainment provides.²⁸⁰ The effects of a break-up by product and service would hurt consumers and artists the most.

B. Targeted Legislation

Targeted legislation of the live music industry is also a potential solution that could help consumers have easier access to their favorite artists while taking pressure off the DOJ. An example of legislation targeted at large corporations is The Public Utility Holding Company Act of 1935 (“PUHCA”).²⁸¹ This section will briefly discuss this legislation, discuss the goals of targeted legislation at Live Nation Entertainment, and determine whether these goals can effectively be met.

PUHCA was a targeted piece of legislation that was highly effective to break up utility pyramids of the 1920s.²⁸² PUHCA empowered the Securities and Exchange Commission (“SEC”) to dismantle the corporate structures of the utilities without destroying them completely.²⁸³ PUHCA is largely viewed as successful, but it was industry-specific and it was limited in time.²⁸⁴ Today, banking regulations have not been successful, with notable failure from the SEC.²⁸⁵ One proposal for more transparency is a more focused consumer protection agency that is not housed within

²⁷⁷ See generally Paul LaMonica, *Why Giant Companies are Suddenly Splitting into Pieces*, CNN (Nov. 12, 2021), <https://www.cnn.com/2021/11/12/investing/johnson-johnson-ge-toshiba-splits/index.html>.

²⁷⁸ See generally S. Hearing 111–201, *supra* note 275.

²⁷⁹ See generally *id.*

²⁸⁰ *Id.*

²⁸¹ See Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq. (1935) (repealed 2005).

²⁸² Roberta Karmel, *Article: Is the Public Utility Holding Company Act a Model for Breaking Up the Banks That Are Too-Big-to-Fail*, 62 HASTINGS L. J. 821, 827 (2011).

²⁸³ *Id.* at 856.

²⁸⁴ *Id.*

²⁸⁵ Glenn Hubbard, *Financial Regulation: It’s Not About More*, HARV. BUS. REV. (Jun. 21, 2010), <https://hbr.org/2010/06/financial-regulation-its-not-a>.

the federal government.²⁸⁶ The goals laid out below take into account PUHCA and lay out how legislation targeting the live music industry could work.

The first goal of potential legislation must be to protect consumers from making unreasonable decisions based on inaccurate information used in the ticket market. Live Nation Entertainment has marketed lower prices than what the consumer will ultimately pay, has placed timers on purchasing tickets, and has displayed an inaccurate number of tickets to deceive consumers into buying tickets on their websites.²⁸⁷ Ultimately, courts have consistently upheld these practices as lawful,²⁸⁸ and thus, new legislation could specifically target these practices.²⁸⁹ The first step towards real competition in targeted legislation is requiring companies to provide accurate information and transparency.²⁹⁰ By requiring accurate information, primary ticket companies would be barred from marketing inaccurate prices and the consumer would become more informed.

A piece of legislation that was originally introduced to Congress in 2009 with a similar goal of providing transparency is The BOSS Act.²⁹¹ In summary:

[t]he BOSS Act would prohibit tickets reserved for venues, artists or promoters from being re-sold at a higher price, require primary ticket sellers to disclose in advance the total number of tickets available to the general public, and prohibit primary sellers from setting minimum prices at which tickets can be resold.²⁹²

It also would require both the primary and secondary ticket markets to disclose fees and prohibit price changes during the ticket-buying process.²⁹³ The goal behind this legislation is positive, but this could also create incentives for scalpers to buy

²⁸⁶ *Id.*

²⁸⁷ Zachary H. Klein, *Who's the Boss? The Need for Regulation in the Ticketing Industry*, 1 BROOKLYN J. CORP., FIN. COM. L. 185, 204–14 (2010) (detailing the deceptive ticket sale practices employed by LNE).

²⁸⁸ Live Nation Entertainment, *Court Grants Summary Judgement for Live Nation Entertainment in Antitrust Litigation*, CISION PR NEWSWIRE (Feb. 20, 2015, 2:10 PM), <https://www.prnewswire.com/news-releases/court-grants-summary-judgment-for-live-nation-entertainment-in-antitrust-litigation-300039147.html>.

²⁸⁹ Klein, *supra* note 287, at 214.

²⁹⁰ *Id.* at 204.

²⁹¹ See The BOSS Act, H.R. 5245, 114th Cong. (2016).

²⁹² Matt Vittone, *Remember Live Events? FTC Issues Perspective on Events Ticketing Workshop; Updates on the BOSS Act*, LEXOLOGY (May 13, 2020), <https://www.lexology.com/library/detail.aspx?g=625b970a-32b4-4eb8-b3ac-1230518486d9>.

²⁹³ *Id.* The BOSS Act, named after Bruce Springsteen would likely prohibit the “dynamic pricing” that Springsteen himself has used through Ticketmaster for his 2023 U.S. concert tour. The ticket prices fluctuate based on demand, similar to airline tickets and hotels. Mohammed, *supra* note 71.

tickets on the primary ticket market at a lower price and resell them at a higher price.²⁹⁴ While complete transparency is a good idea in theory, it can lead to an easy way for scalpers to increase prices on the secondary ticket market.

Another goal would be to protect independent promoters, smaller artists, and venues from anticompetitive measures by enacting bright-line rules for contracting with promoters.²⁹⁵ This section would be time-limited, similar to PUHCA.²⁹⁶ Legislation that would reduce exclusive rights contracts for live performances with artists to one year would allow new competitors into live music at all levels, thereby reducing some of the vertical constraints on competition that the Live Nation Entertainment merger has created.²⁹⁷ Live Nation Entertainment has been able to use exclusive contracts with venues, averaging six years.²⁹⁸ If this number was reduced today, primary ticket competitors would have a better chance to gain access to larger venues and festivals, so long as their technology has reached or surpassed that of Live Nation Entertainment's technology.²⁹⁹ This would allow more competition at all levels of live music.³⁰⁰ Smaller or newer artists, venues, and promoters would have the opportunity to compete for these exclusive rights contracts that would be from year to year to better adapt to the ever-changing market.

A third goal is to increase competition in the festival space. The duopoly that Live Nation Entertainment and AEG hold in the festival space reduces the number of total festivals because they control when and how artists perform.³⁰¹ The current duopoly may also restrict some cities or states from hosting large music festivals entirely if they are within the boundaries that promoters require.³⁰² New legislation could target these practices by forcing large promoters to seek other potential opportunities from year-to-year.

Finally, the purpose of such specific legislation is to reduce the need for the DOJ to enforce antitrust measures against a company that has repeatedly ignored its

²⁹⁴ *Id.*

²⁹⁵ Jack Goodall, *Live Nation Entertainment: Savior of the Music Industry?*, MUSIC BUS. J., BERKLEE COLL. MUSIC, <https://www.thembj.org/2009/05/live-nation-entertainment-savior-of-the-music-industry/> (last visited Aug. 24, 2022).

²⁹⁶ 15 U.S.C. § 79.

²⁹⁷ Baker, *supra* note 52, at 94.

²⁹⁸ Baker, *supra* note 52, at 89.

²⁹⁹ Complaint at 45, *Oberstein v. Live Nation Entm't.*, CV 20-3888-GW-GJS (C.D. Cal. 2021) (“[Live Nation Entertainment and Ticketmaster’s] scheme relies on utilizing their dominance over primary ticketing services, their control over most major concert tours in the U.S., and their ability to employ technological trickery for anticompetitive purposes.”).

³⁰⁰ *See* Baker, *supra* note 52.

³⁰¹ Broerman, *supra* note 206.

³⁰² Jennifer M. Oliver, *DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar*, NAT’L L. REV. (Aug. 5, 2020), <https://www.natlawreview.com/article/doj-event-powerhouse-live-nation-punished-concert-venues-using-competing-ticketers>.

agreement.³⁰³ Allowing a direct cause of action by a consumer, artist, promoter, or venue in state court, rather than the filing of a federal antitrust lawsuit could be an effective strategy.³⁰⁴ This would allow smaller interests that are injured by the anticompetitive actions of Live Nation Entertainment to file lawsuits and recover damages with fewer resources.³⁰⁵

Any legislation targeting Live Nation Entertainment should not have the effect of a break-up. A break-up has the potential to hurt artists and consumers by dividing music by region or reducing any streamlining done by the Live Nation Entertainment merger.³⁰⁶ The best option for targeted legislation is to take into account the four goals above and make it time limited. However, the targeted legislation option has potentially harmful impacts as it would lead to enforcement issues, especially with federal legislation. The DOJ would likely be relieved and private parties would have to sue. Private parties already have a cause of action for the violations of antitrust law and the DOJ has more resources than some of the smaller interests that have been mentioned.³⁰⁷ Thus, while targeted legislation could increase competition and protect consumers, the issue of enforcement arises.

C. *Much Stronger Enforcement of the Consent Decree is the Best Solution*

Right now, the best option for consumers, artists, and the live music industry is to keep Live Nation Entertainment together, with the DOJ strictly enforcing the consent decree. A drastic action by Congress or the DOJ to force Live Nation to break-up may increase competition but leave the music industry years behind.³⁰⁸ Live Nation Entertainment should be under more scrutiny than the Obama and Trump Justice Departments placed on the firm throughout the twelve years they were in charge.³⁰⁹ The DOJ needs to continue to prevent Live Nation Entertainment from using monopolistic tactics.³¹⁰ The original consent decree was not effective, but the updated

³⁰³ Baker, *supra* note 52, at 102.

³⁰⁴ American Antitrust Institute, *The Vital Role of Private Antitrust Enforcement in the U.S.*, AM. ANTITRUST INST. (Sep. 21, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI_USF-Commentary_2018-Antitrust-Class-Action-Report_Final_5.14.19.pdf.

³⁰⁵ *Id.*

³⁰⁶ Matthew Lane, *The Great Antitrust Breakup: Often Threatened, Rarely Executed*, DISRUPTIVE COMPETITION PROJECT (Mar. 13, 2018), <https://www.projectdisco.org/competition/031318-the-great-antitrust-breakup-often-threatened-rarely-executed/>.

³⁰⁷ See Broerman, *supra* note 206 (highlighting the newest lawsuit against Live Nation Entertainment).

³⁰⁸ Lane, *supra* note 306.

³⁰⁹ American Antitrust Institute, *The State of Antitrust Enforcement and Competition Policy in the U.S.*, AM. ANTITRUST INST. (Apr. 14, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf.

³¹⁰ See Broerman, *supra* note 206 (describing the most recent allegations of monopolistic tactics leveled against Live Nation Entertainment).

consent decree has more teeth to it that will allow the DOJ to enforce it.³¹¹ It is important now that the DOJ goes forward with true enforcement to prevent Live Nation Entertainment from using its vertical power to take advantage of artists and consumers.³¹² If the DOJ is unable to enforce the consent decree, Congress must pass legislation that would reduce ticket prices and lead to new oversight that places enforcement in better hands.

V. CONCLUSION

The live music industry is continuously growing. It is important that there are protections in place to keep the industry competitive. The DOJ had an opportunity to keep the live music industry competitive for years but instead, they let the Live Nation Entertainment merger occur. Live Nation Entertainment continues to take advantage of the weak 2010 consent decree with the DOJ that allowed the company to become a near-monopoly for tickets and artist management. Live Nation Entertainment certainly has displayed the efficiencies of a vertically integrated corporation in live music while crushing smaller promoters, venues, and ticket companies. The DOJ has not adequately enforced antitrust law to this point but can enforce the newly updated consent decree going forward in order to ensure competition and creativity. Breaking up Live Nation Entertainment through legislation or an updated consent decree, geographically or by service, would harm consumers and artists. Congress could pass legislation, but it should adhere to the four goals laid out in this Note and be time limited. The main issue with legislation deals with enforcement because some of the smaller interests lack the resources that the DOJ currently has to enforce the consent decree. The best option for the live music industry and consumers is increased enforcement of the consent decree extension by the DOJ because the consent decree is much clearer, the DOJ has the resources to enforce it, and the other two options come with greater drawbacks than the current state of live music.

³¹¹ Motion to Modify, *supra* note 13.

³¹² See Baker, *supra* note 52, at 104.