AMERICAN ECONOMIC LIBERTIES PROJECT

The Case Against Live Nation-Ticketmaster

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The Live Nation-Ticketmaster merger, approved by the Antitrust Division of the Department of Justice ("Justice Department") through a consent degree in 2010, has been a disaster for the live event industry. It has given Live Nation unprecedented control over artists, venues, and consumers. Live Nation has used this position to block rivals in the primary and secondary ticketing markets, funnel ticketing contracts with its own venues and the tours it promotes to Ticketmaster, extract supra-competitive rents from venues and artists, boycott venues that reject its terms, and price gouge consumers. The consent decree that allowed this merger to go forward in the first instance has clearly failed, and it is time for the Justice Department to take renewed action, either through additional amendments to the consent decree or a new Sherman Act case, to break up the live event giant, bar Live Nation from participating in the primary and secondary ticketing markets in the future, and enjoin the use of exclusivity contracts by Ticketmaster.

A BRIEF HISTORY OF THE LIVE NATION-TICKETMASTER MERGER

A. HOW LIVE NATION IS STRUCTURED

Live Nation describes itself as "the largest live entertainment company in the world, connecting over 670 million fans across all of our concerts and ticketing platforms in 48

countries."[1] It is divided into five segments: "live music events [Concert Promotion], music venue operations [Venues], the provision of management and other services to artists and athletes [Artist Management], ticketing services [Ticketmaster], and sponsorship and advertising sales."[2] The first four generate revenue as follows:

- Concert Promotion — the sale of tickets, "impacted by the number of events, volume of ticket sales, and ticket prices," totaled $13.5 billion in 2022;[3]
- Venue Operation — "the sale of concessions, parking, premium seating, rental income, and ticket rebates or service charges earned on tickets sold through our internal ticketing operations or by third parties under ticketing agreements";[4]
- Artist Management — "commissions on the earnings of the artists and other clients we represent, primarily derived from clients' earnings for concert tours";[5]
- Ticketing (Ticketmaster) — "convenience and order processing fees, or service charges, charged at the time a ticket for an event is sold in either the primary or secondary markets," totaling $2.2 billion in 2022.[6]

Live Nation also offers sponsorship and advertising products, and separately reports that revenue. In 2022, Live Nation's sponsorship and advertising revenue totaled $968 million.[7] Because that revenue is derivative of Live Nation's dominance in its core business segments, we do not list it as a separate segment for purposes of this structural analysis. For their part, artists—the talent behind all of these revenue streams—are paid a fixed guarantee and/or a percentage of ticket sales and event profits. They are sometimes reimbursed for costs of production like sound and lights.[8]

1 Live Nation Entertainment, 2022 Annual Report, at 2.
2 *Id.* at 4.
3 *Id.* at 5, 30, 87. The $13.5 billion figure includes revenue from Concert Promotion, Venue Operations, and Artist Management. *Id.* at 89. Figures for each of these three segments are not reported separately.
4 *Id.* at 5.
5 *Id.* at 87.
6 *Id.* at 5, 31, 87, 89.
7 *Id.* at 31, 88, 89.
8 *Id.* at 4.

FIGURE 1.

One can easily see where conflicts of interest arise: In any given transaction, Live Nation may have competing financial incentives to increase artists' earnings, decrease venues' and promoters' costs, and maximize its take of ticket sales at the Artist Management, Concert Promotion, Venue Operation, and Ticketing levels of its live event business. In only one of these segments, Artist Management, is it incentivized to maximize artists' earnings, and even then, Live Nation is more likely to manage artists whose fanbases can fill its own major concert venues and generate revenue for its other business segments. Furthermore, the incentive to generate greater revenue for artists competes internally with the incentive for Live Nation to keep a higher percentage of ticket sales. Live Nation is financially incentivized to schedule events at one of the 172 venues it owns, leases, or operates (including festival sites) or at one of the 61 other venues for which it has exclusive booking rights;[9] and to use Ticketmaster as the ticketing agent for every event it promotes (over 43,000 events in 2022).[10] Ticketmaster's ticket-selling dominance, meanwhile, gives Live Nation access to immense scale and the consumer data that comes with it, which in turn attracts advertising revenue that it can use to subsidize supra-competitive guarantees that attract high-profile artists to its Artist Management business.

Finally, Live Nation's Concert Promotion and Artist Management businesses are notorious for retaliating against third-party venues that refuse to use Ticketmaster, despite the consent decrees that it has been bound by since 2010. Independently owned and operated venues know that, if they do not use Ticketmaster, they are unlikely to be offered the

9 *Id.* at 7.
10 *Id.* at 5, 7, 28.

chance to host lucrative Live Nation tours and events. Instead, those desirable events will go to competitor venues that use Ticketmaster, or to Live Nation's own venues. On the other hand, if independent venues choose to contract with Ticketmaster, they are effectively subsidizing the ability of Live Nation's Venue Operator business to outbid them for desirable non-Live Nation tours, via ticket fees that Ticketmaster, and by extension Live Nation, collects on every ticket. These conflicts allow Live Nation to pick winners and losers, box out rivals, and refuse to innovate along metrics that benefit fans.

All of this has broken the live event industry. We outline below the terms of the consent decree that led to this state of affairs, how it failed, what remedies are required, and how the Justice Department can pursue them under our antitrust laws. The short answer is that Live Nation's four main segments—Concert Promotion, Venue Operations, Artist Management, and Ticketing—must be separate and independent entities.[11] Healthy competition in the live event industry cannot be restored as long as they operate under a single corporate umbrella. These divestments, and the behavioral remedies we also propose, are exactly what the Sherman Act and Clayton Act were designed for, and the Justice Department's authority to enforce those laws should be used to those ends here.

B. THE 2009 MERGER AND THE GOVERNMENT'S RESPONSE

In 2008, Ticketmaster was the dominant primary ticketing service in the country, with a market share exceeding 80% among major concert venues.[12] Ticketmaster dominated primary ticketing for over two decades and maintained its market share through the use of long-term exclusivity agreements, which created significant barriers to entry in the primary ticketing market.[13] Even as Ticketmaster's distribution costs began to decrease with the advent of online purchasing, Ticketmaster's fees remained the same.[14]

For its part, Live Nation was (and still is) the country's largest concert promoter. The 172 venues that Live Nation owns outright include 64% of the nation's top-grossing amphitheaters.[15] Live Nation was Ticketmaster's largest primary ticketing client for several years, until Live Nation decided to enter the ticketing business itself in late 2007.[16] Seemingly overnight, Live Nation became the second largest primary ticketing service in

11 The Sponsorship and Advertising segment's revenue is not explicitly linked to ticket sales and is not a concern of this paper. In any event, the new entities created by the proposed breakup can presumably handle advertising sales on their own.
12 *United States v. Ticketmaster Entertainment Inc.*, No. 1:10-cv-00139-RMC, Complaint (Dkt. 1), ¶21 (D.D.C. Jan. 25, 2010).
13 *Id.* ¶¶5, 21.
14 *Id.* ¶23.
15 Krista Brown, *The Depth of Live Nation's Dominance: A Data Analysis of the Corporate Capture Behind Top Concert Venues Worldwide*, American Economic Liberties Project, at 3 (July 2023).
16 *Ticketmaster*, Complaint, ¶25.

the country and was, given its control of venues and artists, an immediate and existential threat to Ticketmaster. As Live Nation began poaching contracts with third-party venues and with the largest venue operator in the United States (and Ticketmaster's third-largest customer), SMG,[17] Ticketmaster's share of the primary ticketing market dropped from 82.9% to 66.4%.[18]

The threat Live Nation posed was so great that, in February 2009, Live Nation and Ticketmaster announced their intent to merge. One year later, the Justice Department, along with 17 state attorneys general, filed a lawsuit alleging that the proposed merger would substantially lessen competition in primary ticketing in the United States and violated Section 7 of the Clayton Act, 15 U.S.C. § 18.[19] The parties ultimately reached a settlement allowing the merger to proceed, contingent on the merged firm (1) licensing a copy of Ticketmaster's host platform software to Anschutz Entertainment Group, Inc. (AEG), and (2) divesting Ticketmaster subsidiary Paciolan, Inc. to Comcast-Spectacor.[20] The consent decree also included behavioral restrictions, like prohibitions on retaliating against concert venues for using an alternative ticketing service, threatening concert venues, or undertaking other specified actions against concert venues for a period of 10 years.[21]

C. THE 2019 ENFORCEMENT ACTION

Fast forward nine years, and the consent decree was failing. Paciolan's success as a Ticketing service was limited to the market for college athletics ticketing; the ticketing marketplace remained highly concentrated, with Live Nation controlling 60% and AEG 30%, respectively, of the primary ticketing services market; and Live Nation was systematically retaliating against venues that chose to do business with its Ticketing competitors. For instance, in 2018, multiple venues managed by AEG in cities across the country were threatened that they would lose concerts if they did not use Ticketmaster.[22] Live Nation was so powerful that the 2019 court filings outlining its abuses—blatant violations of the 2010 judgment—anonymized its victims to prevent further retaliation.[23]

17 Live Nation, *Live Nation and SMG Announce Multi-Year Strategic Alliance Bringing 25 Million Tickets to Live Nation Ticketing* (Sept. 11, 2008). Formerly known as Spectacor Management Group, SMG was, at the time, one of the largest property management companies in the world, and a merger with Live Nation was discussed around 2017. Don Muret, *Live Nation Entertainment Bidding to Acquire Facility Manager SMG*, Sports Business Journal (Nov. 28, 2017). SMG ultimately merged with AEG Facilities in 2019, and the merged firm is now known as ASM Global. Press Release, *AEG Facilities and SMG Complete Transaction to Create ASM Global*, Business Wire (Oct. 1, 2019).
18 *Ticketmaster*, Complaint, ¶¶21, 24.
19 *Id.* ¶46.
20 *Ticketmaster*, Final J'ment (Dkt. 15) (D.D.C. July 30, 2010).
21 *Id.*
22 Ben Sisario and Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, N.Y. Times (Apr. 1, 2018).
23 *Ticketmaster*, Mtn. to Modify Final J'ment and Enter Am. Final J'ment (Dkt. 22), at 7–10 (D.D.C. Jan. 8, 2020).

The Justice Department's response, led at the time by Assistant Attorney General Makan Delrahim, to Live Nation's repeated violations of the consent decree was tepid. Live Nation was assessed a paltry $3 million fine.[24] And despite the failure of the original consent decree, they agreed to a revised consent decree that did not strengthen or otherwise expand any of the behavioral remedies. It merely extended the existing remedies by five and a half years. DOJ failed to pursue any further structural remedies, and it created opaque monitoring and compliance programs that do little to protect venues, artists, and fans. The monitoring programs included appointing an Independent Monitoring Trustee, requiring Live Nation to hire an Antitrust Compliance Officer, and establishing various reporting and certification requirements. Finally, the revised consent decree conferred jurisdiction upon "Interested Plaintiff States" to pursue their own remedies for any violations of the agreement.

1. THE INDEPENDENT MONITOR

Mark Filip of Kirkland & Ellis was appointed as the Independent Monitoring Trustee by the district court shortly after entry of the revised consent decree.[25] Mr. Filip is charged with "monitor[ing] Defendants' compliance with the terms of the Amended Final Judgment."[26] His primary duties include:

- Providing "periodic reports" to the United States and the various states that were parties to the initial merger challenge (the "Plaintiff States");[27] and
- Promptly reporting any violations, including written findings and recommendations for appropriate remedies, to the United States.[28]

Live Nation is responsible for paying the fees and expenses incurred by Mr. Filip in his independent monitoring capacity.

The revised consent decree also requires Live Nation to appoint an internal employee as an antitrust compliance officer. While the identity of the compliance officer must be provided to DOJ and the Plaintiff States, that information is not published on the court docket or subject to the supervising court's scrutiny. The compliance officer is tasked with:

24 *Ticketmaster*, Am. Final J'ment (Dkt. 29), at 40 (D.D.C. Jan. 28, 2020).
25 Mr. Filip previously served as deputy attorney general at DOJ and as a federal district court judge in the Northern District of Illinois. Kirkland & Ellis, *Profile of Mark Filip, P.C.*
26 *Ticketmaster*, Am. Final J'ment at 30.
27 Plaintiff States include the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania.
28 *Id.* at 30–31, 33.

- Reporting violations of the revised consent decree to the independent monitor and DOJ and the Plaintiff States;
- Establishing whistleblower policies and protections;
- Providing annual certifications, by the Live Nation CEO, of compliance with the revised consent decree to DOJ and the Plaintiff States; and
- Certifying that relevant employees have been appropriately briefed and trained on the terms of the revised consent decree.[29]

Live Nation is also required to provide a copy of the revised consent decree to all venues to whom Ticketmaster provides services and to all others with whom Ticketmaster negotiates.[30]

2. THE STATES' ENFORCEMENT POWERS

The Plaintiff States were given nominal additional authority under the revised consent decree. They can inspect and copy Live Nation's records; interview its employees, officers, and agents; and demand written reports related to the revised consent decree to determine whether it was violated or requires modification.[31] But the results of those investigations are confidential.[32]

3. FUTURE ENFORCEMENT PROCEEDINGS

The revised consent decree also added a section providing clarity as to future enforcement proceedings. The first two paragraphs simply commemorate what is already true: a violation of the judgment (a court order) amounts to civil contempt, and Plaintiffs need only prove violations by a preponderance of the evidence. There is an arbitration clause, but it is not mandatory. And Live Nation agreed to a penalty of $1 million per violation of the anti-retaliation provisions.

D. ENFORCEMENT FAILURES AND RENEWED SCRUTINY

Live Nation's consolidated revenue in 2022 totaled $16.7 billion,[33] and it recently reported that its revenue is up 27% as of its 2023 Q2 earnings report,[34] so it is not surprising that a single monitor operating with little oversight or transparency—with the threat of fines disproportionally small compared to Live Nation's profits—has done little to deter Live

29 *Id.* at 33–37.
30 *Id.* at 35–36.
31 *Id.* at 22–23.
32 *Id.* at 23–24.
33 Live Nation Entertainment, *2022 Annual Report*, at 30.
34 Live Nation, *Live Nation Entertainment Reports Second Quarter 2023 Results* (July 2023).

Nation's anti-competitive and illegal behavior. The consent decree, and the original complaint filed by the Justice Department, makes no attempt to address the myriad ways Live Nation's monopoly position and vertical integration harm artists and venues.

Recall that Live Nation has the largest Concert Promotion, Artist Management, and Ticketing businesses in the live entertainment industry. It also owns and operates a significant share of venues (including festival grounds) in the United States.[35] This creates significant conflicts of interests, discussed more fully in Section I above. In the fall of 2022, the hazards of Live Nation's uncontested power took center stage when ticket sales for Taylor Swift's Eras tour led to systemwide failures at Ticketmaster and eye-popping pricing for her fans. The floodgates of public outrage opened, and the public saw Live Nation's monopoly laid bare.[36] A public letter-writing campaign directed at the Department of Justice facilitated over 50,000 letters urging the federal government to reopen its investigation of Live Nation-Ticketmaster.[37] Congressional hearings shed light on the impossible circumstances artists and venues face under its yoke, and executives offered little in the way of explanation to the United States Senate. But the question remained: *What can be done?*

In November 2022, reports emerged that the Justice Department is in fact investigating whether Live Nation's conduct violated the consent decree, accompanied by speculation that the Justice Department might be gearing up to file an antitrust lawsuit against Live Nation. According to a Politico report, the Justice Department's probe is focused on whether and how Live Nation uses its heft to muscle out competing ticketing services, concert promoters, and other segments of the multi-billion-dollar live event industry.[38] Meanwhile, attorneys general in both North Carolina and Tennessee announced their own investigations of Live Nation's potentially violative business practices.

Anticipating the results of these investigations and other potential enforcement actions against Live Nation and its subsidiary Ticketmaster, the next section describes what it would look like to break them up.

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35 When Live Nation entered the ticketing market independently in 2007, its ability to choose the ticketing agent for over 75 venues in the U.S. was a significant factor in its ability to challenge Ticketmaster's monopoly position. *Ticketmaster*, Complaint, ¶27.
36 Rachel Treisman, *The Senate's Ticketmaster hearing featured plenty of Taylor Swift puns and protesters*, NPR Morning Edition (Jan. 24, 2023).
37 Press Release, *New Campaign Launches to Break Up Ticketmaster*, American Economic Liberties Project (Oct. 19, 2022).
38 Josh Sisco, *DOJ probing Live Nation and Ticketmaster for antitrust violations*, Politico (Nov. 18, 2022).

RESTORING COMPETITION FOR LIVE EVENTS AND TICKETING

Our antitrust laws give the courts power "to prevent and restrain" antitrust violations.[39] These remedies take two basic forms: one addresses the structure of the market and the merged firm, and the other the behavior of the merged firm. Structural remedies generally will involve the sale of businesses or assets by the offending firm. Behavioral remedies usually entail injunctive provisions that regulate the firm's business conduct or pricing authority. When devising either type of antitrust remedy, restoring competition is the "key to the whole question," and courts are "required" to "decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."[40] Preserving competition "requires replacing the competitive intensity" that would be "lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels."[41] And as we have seen in the case of Live Nation, behavioral remedies alone often fail to achieve this metric because of the difficulties that come with monitoring compliance and pursuing penalties for violations.

As explained above, Live Nation operates several different lines of business: Concert Promotions, Venues, Artist Management, Ticketing, and Sponsorship and Advertising. Each service—or relevant market—is functionally distinct but vertically integrated under Live Nation's corporate umbrella. Live Nation's Artist Management and Concert Promotion segments plan concert tours that rely on Live Nation's Venue Operations, and those tours are almost always ticketed through Live Nation's own Ticketing service (under the Ticketmaster brand). This allows Live Nation to self-preference its own venues and exclude independent venues from hosting shows, through control of Artist Management, Concert Promotions, and Venue Operations; blacklist venues that do not use Ticketmaster, through control of Concert Promotions and Venue Operations; and rob artists of important revenue streams, through its control of Concert Promotion, Venue Operations, and Ticketing.

Antitrust remedies may include both structural and behavioral components, and behavioral relief can be useful to facilitate effective structural relief. In the case of Live Nation, where behavioral remedies have proven insufficient, a combination of both structural and behavioral remedies would best serve the purpose of restoring competition to the market

39 15 U.S.C. § 25.
40 *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).
41 *See Fed. Trade Comm'n v. Sysco Corp.*, 113 F. 3d 1, 72 (D.D.C. 2015) ("Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.").

for primary ticketing services to major event venues. Thus, the remedies described are best understood as complementary to each other, and not necessarily effective otherwise.

A. BREAKUP OF LIVE NATION'S CORE BUSINESSES

In government actions, "divestiture is the preferred remedy for an illegal merger or acquisition."[42] It is an equitable remedy that serves several functions:

> (1) It puts an end to the combination or conspiracy when that is itself the violation.
> (2) It deprives the antitrust defendants of the benefits of their conspiracy.
> (3) It is designed to break up or render impotent the monopoly power which violates the Act.[43]

To restore pre-merger competition in the primary ticketing market, the obvious approach is also the correct approach: full divestiture of Ticketmaster's ticket-selling business from Live Nation's venue and concert promotion business. In other words, the Department of Justice should seek complete unwinding of the merger. But while this is necessary, it is not sufficient. To restore competition in the live event industry more broadly, Live Nation's three other core businesses—Venue Operations, Concert Promotions, and Artist Management—must also be spun off into three separate and independent businesses.

By combining Live Nation's dominance over Concert Promotions and Venue Operations with Ticketmaster's dominant Ticketing service, the merger has allowed Live Nation to maintain and expand its market power across the entire supply chain for live events. As a vertical merger, it has foreclosed rival ticket-selling services from accessing critical scale benefits, including individual concertgoer data that Ticketmaster leverages to secure third-party venue contracts. As a horizontal merger, it eliminated direct competition between Ticketmaster and Live Nation's own emerging ticket-selling service.

In terms of firm organization, unwinding the merger may also be relatively straightforward. According to the revised consent decree, Live Nation and Ticketmaster remain separately incorporated entities. Furthermore, both subdivisions of the merged firm have maintained separate brands. Whereas the intermingling of staff, corporate

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42 ***Cal. v. Am. Stores Co.,*** **495 U.S. 271, 281 (1990).** ***See also du Pont,*** **366 U.S. at 329–30 ("Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when s 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved.").**

43 ***Schine Chain Theatres v. United States,*** **334 U.S. 110, 128–29 (1948),** ***overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.,*** **467 U.S. 752 (1984);** ***see also United States v. Microsoft Corp.***, **253 F.3d 34, 103 (D.C. Cir. 2001) (remedies decrees must "[1] 'unfetter a market from anticompetitive conduct,' [2] 'terminate the illegal monopoly, [3] deny to the defendant the fruits of its statutory violation, and [4] ensure that there remain no practices likely to result in monopolization in the future'") (cleaned up) (citations omitted).**

assets, branding, and intellectual property ownership can present significant hurdles to a successful divestiture, here the complexities are likely confined to the licensing of intellectual property and other service contracts.

And yet, because of Live Nation's dominance over both Concert Promotions, Venue Operations, and Artist Management, solving for the primary ticketing market alone will not fully restore competition for artists, fans, competing ticketing service, and independent venues and promoters. In theory, concert promoters and artists should have the same core incentive: making the most money from a show by bringing in fans and keeping venue costs low. But when the Concert Promoter and the Venue Operator are the same entity, as is the case with Live Nation, the Concert Promoter is able to charge supra-competitive prices to the artist. For their part, the artist has no other option because the Concert Promoter requires them to perform at Live Nation's venues. Meanwhile, Live Nation has foreclosed access to markets for more competitive promoters, and independent venues are unable to compete without use of Live Nation's immense Concert Promotion service. To re-establish a fair playing field, and restore the downstream benefits of competitive bidding, an appropriate remedy requires separation of Live Nation's Venue Operations, Concert Promotion, and Artist Management segments.

B. DIVESTITURE OF TICKETMASTER'S HOST PLATFORM

Separating Live Nation into four separate firms will not on its own restore competition, if the separated entities are able to sustain barriers to entry that have impeded fair competition and prevented new market entry. To achieve those goals, relief must also include divestiture of critical *intangible* assets, to allow rival ticket sellers to effectively compete in the market. Such was the remedy in *United States v. National Lead Co.*, a case involving patentees who had entered into a combination in restraint of trade in titanium pigments and compounds.[44] In that case, the court determined that the granting of compulsory nonexclusive licenses at a uniform reasonable rate was an appropriate remedy for restoring competition in the wake of defendants' anti-competitive restraint.[45]

Ticketmaster's Host Platform, defined in both the original and the revised consent decrees as the software used by Ticketmaster to sell primary tickets in the United States, is one such intangible asset.[46] The revised consent decree goes to significant lengths to require full and effective divestiture of Ticketmaster's software via a perpetual, paid-in-full license to AEG, including ongoing training and support to enable AEG to operate the software

44 332 U.S. 319 (1947).
45 *Id.* at 338.
46 *Ticketmaster*, Am. Final J'ment, at 3.

and to understand the source code so that it may make independent changes to the code.[47] In other words, the divestiture of critical intangible assets was structured to ensure that competitors had a fair chance at actually competing with Ticketmaster, in the wake of a decade-plus of anti-competitive foreclosure.

As part of an effective remedy, and in addition to the other specific relief described in this section, relief should also require the ability for any potential competitor to obtain a non-exclusive, perpetual license to critical ticketing software. Any such license must include the ability for the licensee to make independent changes to the code, including to enhance data security and prevent brokers and resellers from unlawfully accessing inventory. The license need not be royalty free, and courts have long held that parties should be compensated for the use or sale of their property, intangible as well as tangible.[48] Nevertheless, to the extent that Ticketmaster's core software was developed as a result of its anti-competitive conduct over at least the past decade, making it available to all potential rivals who had been foreclosed from entering the market is critical for the restoration of competition.

C. ENDING TICKETMASTER'S VENUE EXCLUSIVITY AGREEMENTS

Beyond these two forms of divestiture—of the corporate form and of Ticketmaster's critical intangible assets—enforcement should also seek to impose behavioral remedies that render structural relief more effective. Among these tools is putting an end to Ticketmaster's anti-competitive exclusivity agreements with live event venues. Disallowing Ticketmaster's exclusive dealing agreements does not necessitate an industry-wide prohibition on exclusivity, but exclusive dealing agreements "are of special concern when imposed by a monopolist."[49] The primary concern is that the monopolist will use such agreements "to strengthen its position, which may ultimately harm competition."[50] Even prior to its merger with Live Nation, Ticketmaster had long-term exclusivity agreements that foreclosed rivals' ability to compete and achieve scale.[51] This included a long-term exclusivity deal between Ticketmaster and Live Nation.[52] While Ticketmaster's unparalleled access to concertgoer data has made it a more attractive option for venues and promoters seeking its advertising services, it has also abused its monopoly position to extract higher fees from independent venues and concertgoers alike.

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47 *Id.* at 4.
48 *E.g. Nat'l Lead Co.*, 332 U.S. at 349; *Mass. v. Microsoft Corp.*, 373 F.3d 1199, 1231 (D.C. Cir. 2004).
49 *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012).
50 *Id.* at 270.
51 *Ticketmaster*, Competitive Impact Statement (Dkt. 2), at 9 (D.D.C. Jan. 25, 2010).
52 Maureen Tkacik and Krista Brown, *Ticketmaster's Dark History*, The American Prospect (Dec. 21, 2022).

Breaking up Live Nation and Ticketmaster will be futile if Ticketmaster is able to replicate one of the merger's core functions by maintaining exclusive ticket-selling agreements with Live Nation. But even for venues not owned or managed by Live Nation, the best way to restore competition and innovation among ticket sellers is to preclude Ticketmaster from leveraging its scale to obtain exclusive dealing agreements post-breakup, with the effect of denying market entry to potential rivals. An injunction barring Ticketmaster from entering into exclusivity agreements for the ticketing of live events is therefore critical to the successful restoration of competition.[53]

D. RESTRICTING LIVE NATION'S RE-ENTRY INTO TICKETING

Courts may also restrict firms from engaging in certain lines of business if doing so would impair competition in a relevant market. Such was the case, for instance, with the original consent decree entered into by AT&T and Western Electric in 1956, which precluded AT&T from engaging in any business other than the provision of common carrier communications services and Western Electric from manufacturing equipment other than that used by Bell Electric.[54] The vertical dis-integration of telephone manufacturing from the provision of telephone service was one piece of the relief sought by the government in its original case against the defendants, in addition to divestiture by AT&T of its ownership interest in Western Electric and the termination of exclusive relationships between AT&T and Western Electric.[55]

In the year prior to its merger, Live Nation had begun to emerge as a credible competitor to Ticketmaster in the primary ticket-seller market, possessing the significant advantage of being able to access scale on the level of Ticketmaster simply by ticketing its own venues.[56] Recognizing Live Nation's ability to disrupt its dominant position in the market for primary ticketing services, Ticketmaster sought to renew its contract with Live Nation before its expiration at the end of 2008, but Live Nation instead chose to license technology that would enable it to sell tickets on its own.[57] Not coincidentally, Live Nation and Ticketmaster merged a few months later.

As we have seen, the concerns about Live Nation's ability to leverage its dominance in Venue Operation, Concert Promotion, and Artist Management into dominance in Ticketing

53 This would not be an industry-wide ban on exclusive ticketing contracts, a remedy that is likely beyond the power of a court hearing claims brought against a single entity. Instead, such a ban would need to be pursued through legislation. In any event, allowing smaller rivals in the Ticketing industry to pursue exclusivity deals while Ticketmaster is under an injunction would give them a more realistic chance of challenging Ticketmaster's monopoly position.

54 *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 138 (D.D.C. 1982).

55 *Id.* at 136.

56 *Ticketmaster*, Competitive Impact Statement (Dkt. 2), at 10 (D.D.C. Jan. 25, 2010).

57 *Id.*

proved to be well founded. As a result, any effective remedy aimed at restoring competition in the primary ticket-selling market must restrain the newly divested Concert Promotion, Venue Operation, Artist Management, and Ticketing entities from re-entering the other live event segments anew.[58] To permit otherwise would allow those entities, each of which will remain dominant in their respective markets given their size, to once again foreclose access to a substantial share of those markets by controlling the sale of tickets and access to live events.[59]

THE LEGAL OPTIONS FOR INSTITUTING BETTER REMEDIES

A number of options are available to the Justice Department to pursue these remedies. However, mere enforcement of the existing consent decree is not one. A civil contempt proceeding, which is coercive and primarily intended to enforce the existing terms,[60] would be grossly insufficient, given that the revised consent decree only provides for a $1 million fine per violation. Criminal contempt, which is limited to a $1,000 fine and imprisonment up to six months,[61] is likewise insufficient. Neither would result in any sort of divestment or additional behavioral remedies. Moreover, as we have already seen, the fines are too small to have any deterrent effect when compared to the enormous rents Live Nation has extracted from consumers, artists, live event venues, and concert promoters in the last 13 years.

Fortunately, the Justice Department is not without other recourse. To truly restore competition in the live event industry, the Justice Department can, as outlined below, ask the district court that entered the revised consent decree to modify it. Or it can file a new lawsuit alleging violations of the Sherman Act.

58 For example, the newly independent Ticketing entity cannot independently enter the Concert Promotion, Venue Operations, or Artist Management business, and the newly independent Venue Operations entity cannot enter the Ticketing, Concert Promotion, or Artist Management business.
59 *See generally* Brown, *supra* note 15.
60 *Int'l Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 827 (1994).
61 18 U.S.C. § 402.

A. MODIFICATION OF THE EXISTING CONSENT DECREE

1. THE CONSENT DECREE HAS FAILED ITS ESSENTIAL PURPOSE

Federal courts are implicitly empowered to modify consent decrees when they fail to achieve their stated purpose.[62] This is true "whether the decree has been entered after litigation or by consent."[63] A "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."[64] Here, the consent decree's stated purpose is "the imposition of certain conduct restrictions on defendants, *to assure that competition is not substantially lessened*."[65] It permits the parties to seek modifications, and it imposes no limitations as to either the nature of the modification sought or the circumstances under which modification may be sought.[66] Nor does it require a finding that Live Nation has violated the consent decree as a precondition to seeking such modification.

The Justice Department must only show that (1) the agreed upon remedies are not achieving their stated goal of preserving competition and (2) additional remedies up to and including divestment are required. As the Supreme Court stated 55 years ago in *United Shoe*,

> If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market"—the time has come to prescribe other, and if necessary more definitive, means to achieve the result.[67]

Separating Live Nation into four distinct entities—Ticketing, Concert Promotion, Venue Operations, and Artist Management—will promote substantial competition in the relevant market originally identified by the Justice Department ("[t]he provision of primary ticketing services to major concert venues")[68] by precluding Live Nation from leveraging its control of artists, venues, and events to squeeze out independent venues and rival ticketing agents.

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62 *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251 (1968); see also *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions.").
63 *Swift*, 286 U.S. at 114.
64 *Id.*
65 *Ticketmaster*, Am. Final J'ment at 2 (emphasis added); see also id. at 38 (declaring that the consent decree is meant "to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition Plaintiffs alleged was harmed by the challenged conduct in this Amended Complaint [the Live Nation-Ticketmaster merger]").
66 *See id.* at 22 (permitting Justice Department access to company for purposes of "determining whether the Amended Final Judgment should be modified or vacated"); *id.* at 29–30 (Court retaining jurisdiction "to enable any party to this Amended Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate … to modify any of its provisions").
67 *United Shoe*, 39 U.S. at 251–52.
68 *Ticketmaster*, Complaint, ¶35.

2. DIVESTMENT AND INJUNCTIVE RELIEF ARE PERMISSIBLE REMEDIES UNDER SECTION 7

Divestiture is the preferred remedy under the Clayton Act: “The very words of § 7 suggest that an undoing of the acquisition is a natural remedy … [and] should always be in the forefront of a court’s mind when a violation of § 7 has been found.”[69] There are a number of examples of mergers that have been unwound after consummation, or other curative divestitures ordered, due to findings or allegations of violation of Section 7, in some cases after an initial decision by a federal enforcement agency not to challenge the merger.

In *United States v. Ford Motor Co.*, the district court ordered Ford to divest itself of a spark plug factory, a battery factory, and a trade name nine years after the merger was consummated, citing “the purpose of the antitrust laws and the duty” of the district court to “free” the “rising wind of new forces in the spark plug market which may profoundly change it” from “the unlawful restraint imposed upon them so that they may run their natural course.”[70] In the more recently decided *Chicago Bridge & Iron Company v. Federal Trade Commission*, the Fifth Circuit upheld a large administrative divestment order by the Commission, stating:

> Total divestiture is not necessarily inappropriate even though the antitrust violation found relates to but one aspect of the company thus acquired, especially where, as here, total divestiture is deemed necessary to restore effective competition.[71]

Here, Live Nation was afforded 10 years to comply with the consent decree it signed and demonstrate a commitment to pro-competitive behavior. It failed that test, and the consent decree has proven to be entirely ineffective. That the merger has been consummated is irrelevant. The Hart-Scott-Rodino Act specifically provides:

> Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.[72]

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69 *du Pont*, 366 U.S. at 329–31; *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 792 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. Fed. Trade Comm’n*, 749 F.3d 559, 573 (6th Cir. 2014).

70 315 F. Supp. 372, 377 (E.D. Mich. 1970), *aff’d Ford Motor Co.*, 405 U.S. at 575.

71 534 F.3d 410, 441 (5th Cir. 2008).

72 15 U.S.C. § 18a(i)(1). *See Fed. Trade Comm’n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 57 (D.D.C. 2022) (affirming that the HSR Act allows for post-consummation merger challenges).

> And in the case of Live Nation, the real-world experiment facilitated by the existing consent decree proves that divestiture is the only remedy that will restore competition in the Concert Promotion, Venue Operation, Artist Management, and Ticketing segments of the live event industry.

B. NEW SUIT ALLEGING SHERMAN ACT VIOLATIONS

The last option we propose is the initiation of a new lawsuit against Live Nation under Sections 1 and 2 of the Sherman Act.[73] Section 1 claims require proof "(1) that [d]efendants entered into a contract, combination, or conspiracy; (2) that this agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."[74] Unlawful monopoly maintenance under Section 2 is "the possession of monopoly power" and "the willful … maintenance of that power" through "exclusionary conduct as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[75] Because Live Nation's conduct involves agreements with third parties and independent anti-competitive agreement, both prongs of the Sherman Act are implicated.

A tying agreement like the one Live Nation frequently forces on its partners is illegal where:

> (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.[76]

The contracts Live Nation imposes on its partners—conditioning the hosting of live events on the use of Ticketmaster as the sole primary Ticketing agent—undoubtedly meet these criteria.

"'An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time.'"[77] Courts do not treat exclusivity agreements as per se violations of the Sherman Act. Instead, their legality "'… depends on whether the agreement foreclosed a substantial share

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73 15 U.S.C. §§ 1, 2. This could be pursued as a civil action or as a criminal one through a grand jury indictment or a criminal complaint.
74 *Reyn's Pasta Bella, LLC v. Visa U.S.A.*, 259 F. Supp. 2d 992, 997–98 (N.D. Cal. 2003), *aff'd sub nom.* 442 F.3d 741 (9th Cir. 2006).
75 *Microsoft*, 253 F.3d at 50 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).
76 *Id.* at 85.
77 *United States v. Google LLC*, No. 20-cv-3010, 2023 WL 4999901, at *14 (D.D.C. Aug. 4, 2023) (citation omitted).

of the relevant market such that competition was harmed.'"[78] The primary question is whether "'the opportunities for other traders to enter into or remain in that market [were] significantly limited.'"[79] Here, Live Nation appears to have used exclusive agreements with venues to foreclose up to 80% of the primary ticketing market from competition. This market share is a strong indication of illegality.

The question then becomes what remedies are available. Where an acquisition provided "the fruits of monopolistic practices or restraints of trade" or "even if lawfully acquired … may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy," divestment remains an appropriate, and probably necessary, remedy.[80]

> To require divestiture … is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.[81]

Indeed, this was the very remedy approved by the Supreme Court in its seminal 1911 decision ordering that the Standard Oil Trust be dissolved and split into 34 separate companies.[82] As shown above, that remedy is wholly appropriate in this case as well, and the complementary behavioral remedies proposed above are ordinary parts of antitrust litigation.

CONCLUSION

The consent decree that Live Nation and the Justice Department crafted was, for all intents and purposes, a 13-year real world experiment in the effectiveness of behavioral remedies and independent monitors. It proved that this lighter approach to merger enforcement is ineffective when one entity has monopoly power over an entire industry. In the face of

78 *Id.* (citation omitted).
79 *Id.* (quoting *Microsoft*, 253 F.3d at 69).
80 *United States v. Paramount Pictures*, 334 U.S. 131, 152.
81 *Schine Chain Theatres v. United States,* 334 U.S. 110, 128 (1948), overruled on other grounds by *Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752 (1984).
82 *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 81–82 (1911).

skyrocketing prices for consumers, depletion of artist earnings, and erosion of independent and locally owned venues, it is time for Live Nation to be broken up, so competition in the live event industry can thrive, artists can earn a living wage, and consumers looking for joyous moments in a post-COVID world can see their favorite artists without paying ransom prices.

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