

## **A Merger Remedy With Concertgoers in Mind: *United States v. Ticketmaster Entertainment, Inc. and Live Nation, Inc.***

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On January 25, 2010, the Antitrust Division filed with the U.S. District Court for the District of Columbia a Complaint and Final Judgment to settle the Ticketmaster-Line Nation merger.<sup>1</sup> The Antitrust Division alleged that the merger violated Section 7 of the Clayton Act because it would significantly lessen competition in the market of primary ticketing services being provided to major concert venues. Primary ticketing services are “services – such as websites, call centers, and retail networks from which tickets may be purchased – that facilitate the initial sale of tickets to concertgoers.”<sup>2</sup> But the Antitrust Division’s Proposed Final Judgment stated that these competitive concerns could be adequately offset by a divestiture package. The defendants agreed to divest certain assets in order to facilitate the entry of two new primary ticketing players into the market and abide by anti-retaliation provisions in dealing with venue owners.

### **The Relevant Market**

#### *Background of the Industry*

Many moving pieces must come together to create a live music concert.<sup>3</sup> First, the manager/agent books concerts with promoters, such as Live Nation. These promoters contract with the venue, coordinate production services with local companies, and advertise for the event. Of course, in addition to providing the venue itself, venue operators also coordinate concessions and security. The primary ticketing agent, such as Ticketmaster, works with the venue to provide the support and infrastructure to sell the concert tickets. Although this is the general structure of the market, some venues provide their own primary ticketing services.

#### *The Merged Firms*

Ticketmaster is the leading provider of *primary ticketing services*. Ticketmaster provides two primary ticketing products to venues: (1) Host, a platform that Ticketmaster

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<sup>1</sup> The Antitrust Division was joined in the suit by the Attorneys General of the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania. In addition, under the Tunney Act, 15 U.S.C. § 16(b)-(h), the Final Judgment does not become effective until at least sixty days after being filed, during which time any person can submit comments to the U.S. Other papers filed for the case included an Explanation of Consent Decree Procedures, Hold Separate Stipulation and Order, and a Competitive Impact Statement.

<sup>2</sup> Competitive Impact Statement at 3, *United States v. Ticketmaster Entertainment Inc. and Live Nation, Inc.*, No.1:10-cv-00139 (D. D.C. Jan. 25, 2010).

<sup>3</sup> Complaint at 8-9, *United States v. Ticketmaster Entertainment Inc. and Live Nation, Inc.*, No.1:10-cv-00139 (D. D.C. Jan. 25, 2010). This contains a detailed description of these different roles.

manages for selling concert tickets through Ticketmaster's website, and (2) Paciolan, which is technology that enables a venue to sell tickets through its own website.<sup>4</sup> Live Nation is currently the largest concert *promoter* in the U.S., operating more than 70 major concert venues.

In late December 2008, however, using its established reputation as a promoter, Live Nation decided to enter the primary ticketing services industry by selling tickets to events at its own venues. In essence, Live Nation combined the promoter, venue, and primary ticketing services steps into one. In the market for primary ticketing services to major venues, Live Nation steadily grabbed market share from Ticketmaster. In fact, within about three months of Live Nation's entry, Ticketmaster's market share dropped from 82.9% to 66.4%.<sup>5</sup> But in February 2009, within a few months of Live Nation's aggressive entry, the parties agreed to merge.

#### *The Market: Primary Ticketing Services to Major U.S. Concert Venues*

The Antitrust Division identified the market as primary ticketing services. But the market definition analysis did not stop there. The Antitrust Division determined that the sophistication and heavy transaction volume of major venues constituted a separate customer base than smaller venues. It takes time to build a primary ticketing service with the ability to meet the large-scale needs of major venues. And no other viable substitutes existed to serve major concert venues. This particular market was the smallest set of services that satisfied the SSNIP test.<sup>6</sup> The United States was the relevant geographic market.

#### **Theory of Competitive Harm**

The Antitrust Division's analysis started as it traditionally does – measuring and comparing market share and the number of consumer choices available premerger and postmerger. The postmerger Herfindahl-Hirschman Index, which is calculated by summing the squares of all the market participants, was off the charts: 6,900.<sup>7</sup> Furthermore, postmerger Ticketmaster-Live Nation would hold about 82% of the market for major venue primary ticketing services. Of the remaining market share, no other company held more than 5%.<sup>8</sup>

More specifically, the Antitrust Division was concerned that the merger would remove from the market one of the only companies positioned to compete head-to-head with Ticketmaster. Live Nation successfully entered the market within a few months of

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<sup>4</sup> Competitive Impact Statement, *supra* note 2, at 4.

<sup>5</sup> Complaint, *supra* note 3, at 10-13. In February 2009, when the merger was announced by the parties, Ticketmaster had 66.4% of the market and Live Nation had 16.5%, with multiple fringe companies holding less than 5% of the market each.

<sup>6</sup> U.S. DEPARTMENT OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 1.11 (1997).

<sup>7</sup> This is significant in light of the Horizontal Merger Guidelines, where an "unconcentrated" market registers below 1,000, a "moderately concentrated" market is between 1,000 and 1,800, and a "highly concentrated" market is above 1,800. *Id.* § 1.5.

<sup>8</sup> Complaint, *supra* note 3, at 13.

the merger, but postmerger there were no other companies with the reputation, experience, scale of operation, and technology to replace the constraining effect that Live Nation had on Ticketmaster. For example, prior to the merger, Live Nation stole a major Ticketmaster customer, SMG, which had “the ability to control or influence the selection of primary ticketing companies at more than 40 major concert venues.”<sup>9</sup>

So the Antitrust Division was concerned primarily with the merged firm’s ability to unilaterally force major concert venues to accept higher prices (i.e. ticketing fees). This dominant position would also eliminate incentives for Ticketmaster-Live Nation to innovate: no viable market participants existed to keep Ticketmaster-Live Nation “on their toes” to provide high quality service.

In addition, there were no countervailing factors that outweighed these anticompetitive concerns. First, fringe companies or companies entirely new to the industry could not enter the market in a timely, successful, and profitable way.<sup>10</sup> Entry was difficult because the technology required to provide primary ticketing services to major concert venues was complicated and costly, and an established reputation was extremely desirable to concert venues because of the high volume of sales. Furthermore, Ticketmaster-Live Nation could combine their individual expertise to bundle primary ticketing services (Ticketmaster) and concert promotion (Live Nation); an effective entrant would have to offer both of these services to major venues. Therefore, the large profit margins Ticketmaster had enjoyed prior to the merger would be even more sheltered after the transaction. Second, the nature of the industry was conducive to concert venues renewing contracts at a high rate. The cost of retraining employees and using new technology discouraged venues from switching to another primary ticketing company. Finally, there was no power buyer able to keep in check the merged firm.

### **The Remedy: Creating Two New, Independent Market Participants Via Divestiture and Enacting an Anti-Retaliation Agreement**

The Antitrust Division and the merged firms agreed to a divestiture package that directly addressed the potential anticompetitive effects of the transaction. Given the rigorous entry barriers described above, the remedy aimed to create two independently viable companies to compete directly with Ticketmaster-Live Nation.

First, the remedy facilitates the entry of Anschutz Entertainment Group (AEG), the second leading *promoter* in the U.S. behind Live Nation, into the primary ticketing service market. To this end, Ticketmaster has to provide AEG access to its “primary ticketing platform,” so that AEG can create its own website capable of offering primary ticketing services such as selling tickets. AEG also has the option to purchase a license to Ticketmaster’s platform technology.<sup>11</sup> Second, Ticketmaster has to divest Paciolan, a platform for selling tickets through a venue’s own website, to a firm currently in the

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<sup>9</sup> Competitive Impact Statement, *supra* note 2, at 10.

<sup>10</sup> See HORIZONTAL MERGER GUIDELINES, *supra* note 6, § 3.0; Competitive Impact Statement, *supra* note 2, at 9.

<sup>11</sup> Competitive Impact Statement, *supra* note 2, at 14.

primary ticketing services market with 2% market share, Comcast-Spectacor. Comcast-Spectacor currently owns two major concert venues in the U.S. and manages 15 other major venues, so the Paciolan technology will enable it to participate more vigorously in the primary ticketing market.<sup>12</sup>

An interesting dimension of the settlement is that the Antitrust Division did not decide to fully pursue a vertical remedy. Because Ticketmaster-Live Nation would be vertically integrated to participate in multiple stages of the live concert market, there was the temptation for the merged entity to retaliate against venue owners who choose a competitor to provide primary ticketing services, or managing or advertising services.<sup>13</sup> More specifically, the Antitrust Division was concerned that the defendants would “abuse[] their position in the primary ticketing market to impede competition among promoters and artist managers.”<sup>14</sup>

This concern was addressed by provisions in the Final Judgment that prevent Ticketmaster-Live Nation from engaging in certain conduct that injures equally capable competitors who are not vertically integrated. Arguably, the Antitrust Division could have taken more aggressive action with respect to the anticompetitive effects from the vertical integration of the merged entity. In any event, Ticketmaster-Live Nation cannot use its strong market presence in the primary ticketing services market against concert promoters and artist managers. And Ticketmaster-Live Nation cannot require a venue that contracts for primary ticketing services to also accept concerts that Ticketmaster-Live Nation promotes or artists that Ticketmaster-Live Nation manages.<sup>15</sup>

In sum, the divestiture serves to create two new companies in the market. The divestiture to AEG will enable it to use its presence in the promotion market to shift into the primary ticketing market. And Paciolan enables Comcast-Spectacor to transition from a fringe role into a more prominent market position. Furthermore, although the Antitrust Division could have pursued a broader vertical remedy, it determined that these concerns could be adequately addressed by Ticketmaster-Live Nation agreeing not to unfairly use its market power in primary ticketing services to retaliate against venue owners and competitors.

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<sup>12</sup> *Id.* at 13-18 (discussing the terms of the Final Judgment).

<sup>13</sup> *Id.* at 16-17.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.*