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HIDDEN FEES AND SCALPERS ARE THE WORST, SO PUT FANS FIRST: WHY THE FANS FIRST ACT IS A MORE RESOURCEFUL OPTION OVER STRUCTURAL RELIEF OF LIVE NATION-TICKETMASTER

INTRODUCTION

Following the pandemic, the demand for live entertainment saw a drastic increase.¹ Astounding revenue and attendance rates show that both artists and fans were eager to return to the community the live entertainment space offers.² However, the excitement subsided when artists and fans noticed significant changes in the industry.³ Fans and artists alike were frustrated and confused when they discovered ticket rates that surpassed the average rent or car payment. Even those who could afford the astronomical prices found themselves waiting for hours in a virtual queue, where technology posed as another obstacle.⁴

While fans and artists have been outspoken about numerous issues that are currently plaguing the concert ticketing process, deceptive hidden fees, and predatory resale practices such as “ticket scalping” are consistently the starkest concerns.⁵ While various forms of legal action have been introduced to remedy these concerns, the Justice Department’s suit against Live Nation-Ticketmaster and the introduction of the Fans First Act have dominated this discussion. The logistics of these actions will be discussed in more depth in the following section, but put simply, the Justice Department attributes the current state of the live entertainment industry to Live Nation-Ticketmaster operating as a monopoly, and is seeking structural relief of the entity.⁶ Likewise, the Fans First Act was introduced in the Senate in late 2023 with the goal of promoting ticketing transparency and competition in the entertainment industry.⁷

The Fans First Act has been met with mixed judgment.⁸ Proponents of the act see it as a step in the right direction for live entertainment.⁹ Critics, however, claim that it hands even more market power to Ticketmaster.¹⁰ They believe that while the act may be well-intended, it will not

¹ See Grace Connelly, *I Think I’ve Seen This Film Before: How Taylor Swift’s Eras Tour has Exposed the Need to Investigate Ticketmaster’s Market Dominance*, 35 LOY. CONSUMER L. REV. 248, 253 (2023).

² See *id.* at 252; Jake Viswanath, *Taylor Swift’s Eras Tour has Already Made History 13 Times*, BUSTLE (Mar. 1, 2024), <http://www.bustle.com/entertainment/taylor-swift-eras-tour-records-history>.

³ See Connelly, *supra* note 1, at 253.

⁴ See Vanessa Nirode, *Why are Concert Tickets so Expensive? And can Anyone do Anything About it?*, TIME STAMPED (May 30, 2024), <http://time.com/shopping/article/why-are-concert-tickets-so-expensive/#:~:text=%E2%80%9CArtists%20wield%20varying%20degrees%20of,affordability%20for%20their%20fan%20base>.

⁵ See Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate As Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP. L. REV. 1, 2 (2014) (“[S]calpers obtain tickets with the intention of reselling them at a profit.”).

⁶ Complaint at 8, U.S. Dep’t of Just., Antitrust Div. v. Live Nation Ent., Inc. & Ticketmaster L.L.C., No. 1:24-cv-03973 (S.D.N.Y. May 23, 2024).

⁷ Diana L. Moss, *Fans Last? How the Fans First Act Hands Live Nation-Ticketmaster More Market Power*, PROMARKET (Feb. 14, 2024), <http://www.promarket.org/2024/02/14/fans-last-how-the-fans-first-act-hands-live-nation-ticketmaster-more-market-power/>.

⁸ *Id.*; Alasdair Roberts, *Swifties, Seamheads, and Senators Unite Around Fans First Act*, TEX. L. BLOG (Sept. 30, 2024), <http://www.texaslawblog.law/2024/09/swifties-seamheads-and-senators-unite-around-fans-first-act/>.

⁹ See Connelly, *supra* note 1, at 253.

¹⁰ Moss, *supra* note 7.

be effective if Live Nation-Ticketmaster is still operating as a single entity.¹¹ Considering these two proposed solutions, the question the industry faces is what the most effective course of action is.

While there are provisions of the Fans First Act that could be further strengthened to ensure more consumer protection, passage of the act nonetheless would be more effective in protecting consumers than divestment of Live Nation would be. This is because the Fans First Act addresses issues outside the purview of the Justice Department's lawsuit, such as price transparency and targeting the resale market. Therefore, resources would be better spent ensuring the passage and strengthening of the Fans First Act opposed to the divestment of Live Nation-Ticketmaster.

The question of whether Live Nation-Ticketmaster is a monopoly is outside the purview of this essay, and this discussion should not be reflective of that. Further, in practice this is not a one-or-the-other choice because the Fans First Act and the Justice Department could both prevail. Rather, this discussion centers on the effectiveness of the legal action, considering what is best for consumers and the live entertainment industry. While the divestment of Live Nation-Ticketmaster likely could have constructive effects on competition in the entertainment industry, this alone would not be dispositive of the entire problem.¹² Another scenario is that it could result in little to no effect on the market, for it is possible that Live Nation and Ticketmaster can continue their operations quite similarly if the company is divided according to its fault lines.¹³ Given the amount of time and resources commencing legal actions consumes, it is imperative to confront issues in the most resourceful way. Furthermore, the trust between fans and artists is slowly being diminished, making it even more vital to quickly take effective measures.¹⁴

LIVE NATION-TICKETMASTER IN THEIR LEGAL "ERA"

While ticket sale trouble in the live entertainment industry is by no means novel, the mishandling of the Taylor Swift Eras Tour is key in understanding why many now are calling for the break-up of Live Nation-Ticketmaster, and why the Fans First Act was introduced. This incident, now known as the "Taylor Swift ticketing fiasco," acted as the final straw for law makers and the federal government to take legal action.¹⁵ In November 2022, Ticketmaster made headlines when its technology known as Verified Fan Registration failed.¹⁶ This system was supposed to be capable of handling high-demand sales and monitor for bots.¹⁷ In a statement following the incident, Ticketmaster explained that it was the unprecedented amount of traffic the website received due to a "staggering number of bot attacks ... [and] ... fans who didn't have codes" that caused the site to crash.¹⁸ According to Ticketmaster, the sale garnered 3.5 billion

¹¹ *Id.*

¹² Alice Berry, *Does Ticketmaster Have a Monopoly on Live Entertainment?*, UVA TODAY (June 18, 2024), <http://news.virginia.edu/content/qa-does-ticketmaster-have-monopoly-live-entertainment>.

¹³ Jem Aswad, *If Live Nation and Ticketmaster are Broken Up, Will Things get Better for Fans?*, VARIETY (May 23, 2024, 3:01 PM), <http://variety.com/2024/music/news/if-live-nation-ticketmaster-broken-up-will-it-be-better-for-fans-1236015121/>; Kwoka & Valletti, *Unscrambling the eggs: breaking up consummated mergers and dominant firms*, 30 INDUS. & CORP. CHANGE 1299, 1292 (2021) (discussing how fault lines mark the distinct parts of a company).

¹⁴ See Roberts, *supra* note 8.

¹⁵ See Eric Fruits et al., *Live Nation Breakup: Are Mergers Really to Blame for Ticketmaster's Problems?*, TRUTH ON THE MKT. (May 24, 2024), <http://truthonthemarket.com/2024/05/24/live-nation-breakup-are-mergers-really-to-blame-for-ticketmasters-problems/>; Nirode, *supra* note 4.

¹⁶ Nirode, *supra* note 4.

¹⁷ *Id.*

¹⁸ Press Release, Ticketmaster Bus., Taylor Swift | The Eras Tour Onsale Explained (Nov. 19, 2022).

system requests, which was four times greater than their previous peak.¹⁹ Ultimately, the system failed—fans had codes that did not work, and many were booted from check-out when they attempted to pay.²⁰

Following the intense public backlash, on May 23, 2024, joined by 30 state and district attorneys general, the Justice Department commenced a civil antitrust lawsuit against Live Nation-Ticketmaster in the U.S. District Court for the Southern District of New York, alleging monopolization and other unlawful practices that hinder competition in the live entertainment space.²¹ In addition to various state law claims, the complaint alleges five violations under § 1 and § 2 of the Sherman Act.²² The complex and sometimes ambiguous 124-page document boils down to the notion that the Justice Department sees Live Nation-Ticketmaster as a “gatekeeper” to the live entertainment industry.²³ They allege that the company has done this by, among other forms of anti-competitive conduct, their “flywheel” business model.²⁴ Live Nation-Ticketmaster was quick to issue a response to the allegations, where they maintained that the unlawful conduct asserted in the complaint did not have anything to do with the combination of a ticketing company and a concert promoter.²⁵ Rather, they attribute the lawsuit to long-term lobbying and political pressure on the Justice Department from rivals attempting to suppress competition and ticket brokers looking for government protection of their business model.²⁶ Specifically, Live Nation-Ticketmaster emphasized that the lawsuit will not reduce ticket prices or service fees, and it distracts from truly effective solutions.²⁷

The same day the Fans First Act was proposed, Live Nation-Ticketmaster endorsed the legislation as an effective solution for the issues the entertainment industry is facing.²⁸ The Fans First Act was introduced in December 2023 by Senator Klobuchar and Senator John Cornyn.²⁹ The act requires both sellers and resellers to implement an all-in pricing model, where the seller must disclose the full price of a ticket upfront, including all associated fees.³⁰ Sellers and resellers must also disclose information like seat location, and whether the ticket is sold by a reseller.³¹ The bill further targets the secondary market and ticket scalping by prohibiting the use of bot programs and preventing resellers from selling tickets they do not have constructive possession of.³² Additionally, the act seeks to garner a deeper understanding of the market through requiring a study to be conducted by the Government Accountability Office to analyze

¹⁹ *Id.*

²⁰ *Id.*

²¹ Press Release, Off. of Pub. Aff., Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry (May 23, 2024).

²² Complaint at 78-84, *U.S. Dep’t of Just., Antitrust Div.*, (No. 1:24-cv-03973); 15 U.S.C. § 1 (2004); 15 U.S.C. § 2 (2004).

²³ See Complaint at 1, *U.S. Dep’t of Just., Antitrust Div.*, (No. 1:24-cv-03973).

²⁴ See *id.* at 23.

²⁵ Dan Wall, *Update: Breaking Down the DOJ Lawsuit*, LIVE NATION ENT., <http://www.livenationentertainment.com/2024/05/update-breaking-down-the-doj-lawsuit/> (last visited Nov. 7, 2024).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Roberts, *supra* note 8; Moss, *supra* note 7.

²⁹ Olivia Perreault, *Touring Artists Signal Support of Live Nation-Backed Legislation*, TICKET NEWS, <http://www.ticketnews.com/2024/04/nearly-300-artists-sign-fix-the-tix-letter/#:~:text=Billie%20Eilish%2C%20Green%20Day%2C%20and,supporting%20the%20Fans%20First%20Act> (last visited Nov. 7, 2024).

³⁰ Roberts, *supra* note 8.

³¹ Nirode, *supra* note 4.

³² Roberts, *supra* note 8.

factors such as cost of tickets in relation to their face value, assessment of primary and secondary markets, and percentages of tickets being acquired by professional resellers.³³

WHY THE FANS FIRST ACTS TRUMPS THE DIVESTMENT OF LIVE NATION-TICKETMASTER

The passage of the Fans First Act is more productive than divestment of Live Nation-Ticketmaster would be in meeting the needs of the entertainment industry because it addresses the issues fans are most vocal about in a direct, industry-wide manner. Specifically, the break-up of Live Nation-Ticketmaster will likely not have the impact on hidden fees and the secondary market that consumers and artist wish to see.

Hidden fees are a common criticism of the ticketing process.³⁴ As a consumer makes their way through the purchase process, the ticket seems to get more expensive with each click.³⁵ On average, fees are responsible for 27% of the final price a consumer pays.³⁶ Further, hidden fees are especially damaging to consumers and competition because they prevent comparison shopping.³⁷ The Fans First Act targets this issue through requiring “all-in pricing,” where a ticket seller must clearly show, during the first instance the ticket is displayed to the consumer, the total ticket price.³⁸ Along with this, sellers must provide the purchaser with “an itemized breakdown of the face value of the event ticket and all applicable taxes and ancillary fees.”³⁹ This provision promotes transparency and trust between sellers and consumers, and helps crack down on one of the most disfavored aspects of the ticketing process.⁴⁰

Similar legislation has already been passed in jurisdictions across the United States, which demonstrated how compelling this issue is to consumers.⁴¹ On August 29, 2022 the Arts and Cultural Affairs Law section 25.07(4) became effective in the state of New York, which provides that operators of places of entertainment must disclose the total ticket price, including all ancillary fees in the ticket listing, before the ticket is selected to be purchased.⁴² Since December of 2023, at least 25 lawsuits alleging violations of this statute have been filed in New York state and federal courts.⁴³ Likewise, the trend can be seen in other states such as California and Connecticut.⁴⁴ In October of 2023, the California Legal Remedies Act (“CLRA”) was amended so that it is now illegal to advertise a certain price initially and add fees later in the purchase process.⁴⁵ Connecticut has followed suit with the introduction of Governor’s Bill No. 15, which requires fee disclosures for consumer goods and services, which includes event tickets.⁴⁶

³³ *Id.*

³⁴ See Aswad, *supra* note 13; Nirode, *supra* note 4.

³⁵ See Nirode, *supra* note 4.

³⁶ *Id.*

³⁷ Moss, *supra* note 7.

³⁸ S. 3457, 118th Cong. § 3 (c)(1)(A) (2023).

³⁹ *Id.* at (c)(1)(A)-(B).

⁴⁰ Moss, *supra* note 7.

⁴¹ *Say Goodbye to “Junk” Fees: A Wave of US and State Laws Target Hidden Fees*, DENTONS (Mar. 6, 2024), <http://www.dentons.com/en/insights/alerts/2024/march/6/say-goodbye-to-junk-fees>.

⁴² *Id.*; N.Y. Arts & Cult. Aff. Law § 25.07(4) (2022).

⁴³ *Say Goodbye to “Junk” Fees: A Wave of US and State Laws Target Hidden Fees*, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ *Id.*; S.B. 478, 2023 Leg., Reg. Sess. (Cal. 2023).

⁴⁶ *Say Goodbye to “Junk” Fees: A Wave of US and State Laws Target Hidden Fees*, *supra* note 41; S.B. 15, Gen. Assemb., Feb. Sess. (Conn. 2024).

Transparent ticket pricing is a forefront issue for consumers that states have already acted on and accordingly should be implemented at the federal level.⁴⁷ The Justice Department recognizes the public frustration with “fees,” given that the term is mentioned in the document 100 times.⁴⁸ Nonetheless, divestment of Live Nation-Ticketmaster does not set a clear path in accomplishing this goal. After referencing the hidden fees and technological failures that consumers have been most outspoken about, even Attorney General Merrick B. Garland stated “we are not here ... because Live Nation and Ticketmaster’s [consumers] are frustrated. We are here because as we allege that conduct is anticompetitive.”⁴⁹ The Justice Department maintains that the breakup of Live Nation-Ticketmaster will open venues to more ticketing options, which will induce lower fees.⁵⁰ It is true that when competition thrives, consumers are placed in a better position.⁵¹ However, the divestment of Live Nation-Ticketmaster is not the most productive remedy for this issue because it does not address other actors who engage in the same practices.⁵² Although Live Nation-Ticketmaster is the dominant entity in the entertainment space, other actors such as SeatGeek and AXS are charging the same deceptive service charges and fees.⁵³ Furthermore, the bulk of the fees often come from the venue, and not Ticketmaster.⁵⁴ For any tangible change to occur, industry-wide standards must be implemented.

The most controversial prong of this dispute is how to handle the current state of the ticket resale market.⁵⁵ Consumers are faced with numerous obstacles when shopping on the secondary ticketing market. For example, the internet is riddled with deceptive websites that suggest they are affiliated with a venue or performer, as well as consumers are often purchasing from “speculative sellers,” which are those that sell tickets they do not have constructive possession of.⁵⁶ The Fans First Act addresses both issues. Section 3(a) implements a ban on deceptive URLs and the improper use of intellectual property by making it illegal for a secondary ticket exchange or reseller to use things such as an artist’s name, venue, or event organizer’s name in promotional materials without an agreement.⁵⁷ Likewise, section 3(b) makes it illegal to offer to resell tickets when the seller does not have actual, constructive possession of the ticket.⁵⁸

The secondary market has fostered distrust between consumers and ticket sellers, and has caused consumers to develop a distaste for the live entertainment industry.⁵⁹ This notion is damaging to the industry and is causing divide between artists and fans.⁶⁰ In response to the rising tension, almost 300 musicians signed a letter in support of the Fans First Act, which claimed that the predatory practices of resellers scooping up mass amounts of tickets to resell them at a premium, as well as deceptive marketing tactics in the secondary market are damaging the relationship between musicians and their fans.⁶¹ The backbone of the music and

⁴⁷ *Say Goodbye to “Junk” Fees: A Wave of US and State Laws Target Hidden Fees*, *supra* note 41.

⁴⁸ *See* Complaint at 1, *U.S. Dep’t of Just., Antitrust Div.*, (No. 1:24-cv-03973).

⁴⁹ Aswad, *supra* note 13.

⁵⁰ Complaint at 4-5, *U.S. Dep’t of Just., Antitrust Div.*, (No. 1:24-cv-03973).

⁵¹ Aswad, *supra* note 13.

⁵² Wall, *supra* note 25.

⁵³ *Id.*

⁵⁴ Aswad, *supra* note 13.

⁵⁵ *See* Stein, *supra* note 5, at 3.

⁵⁶ Roberts, *supra* note 8.

⁵⁷ S. 3457 § 3 (a)(1)(A).

⁵⁸ *Id.* at (b)(1).

⁵⁹ *See* Perreault, *supra* note 29.

⁶⁰ Roberts, *supra* note 8.

⁶¹ *Id.*; Perreault, *supra* note 29 (“An array of artists ... signed the letter, organized by the Fix the Tix coalition, which largely echoes Live Nation Entertainment’s preferred legislative agenda. Duran Duran, Fall Out Boy, Jason Mraz,

entertainment industry rests on the relationship between artists and their supporters.⁶² While it is true that Live-Nation Ticketmaster has a stake in the resale market, the divestment of the entity would barely scratch the surface of the problems plaguing the secondary market. Whether Live Nation-Ticketmaster operates as a single or separate entity will not stop predatory resellers from scooping up tickets and making a substantial profit since Ticketmaster does not have holistic control over setting rates on the secondary market.⁶³

CHANGES TO THE ACT THAT PROMOTE FURTHER CONSUMER PROTECTION

While the Fans First Act is a more direct and resourceful course of action, some changes should be made to the bill to further solidify consumer protection. Section 3(c)(5) implements the refund requirements for a seller in the event of a cancellation, where the seller must provide a purchaser with a full refund, except where the cause of the cancellation goes “beyond the reasonable control of the event organizer, including natural disaster, civil disturbance, or [an] otherwise unforeseeable impediment.”⁶⁴ This language should be narrowed because most cancellations can arguably be considered “unforeseeable impediments.” Where do cancellations such as an artist pulling out at the last-minute fall within this policy? This scenario is rather common, with major artists like Chappell Roan making headlines for such reasons in late September of 2024.⁶⁵ While it is imperative for artists to take the necessary measures to preserve their physical and mental well-being, what do these types of cancellations mean for fans? After all, fans often incur many other expenses when attending a concert such as overnight or travel accommodations.

Regardless of whether an event is canceled due to natural disaster, civil disturbance, or an unforeseeable impediment, fans should never be put in a scenario where the seller is totally relieved of providing compensation. A middle-ground solution to this predicament could be providing fans with a credit that can be used at a future event. While this practice could receive pushback from fans who may not consider themselves avid concertgoers, it nonetheless avoids a scenario where the consumer is left empty-handed. This would also help safeguard musicians and performers from feeling obligated to perform when it is in their best interest to do otherwise, since at least they know their fans will be compensated. Accordingly, the Fans First Act’s provision on refund requirements should be more narrowly tailored in favor of the consumer, in that it should include some degree of compensation to the consumer under any cancellation scenario.

CONCLUSION

The case against Live Nation-Ticketmaster will not be a quick proceeding, and it could be years until consumers feel any of its effects. Aside from that, there is no concrete ground for assuming consumers will be put in a better position if the entity is split up.⁶⁶ This uncertainty demonstrates that reliable solutions, like the Fans First Act, should be at the forefront of the

Sia, Pixies, ODESZA, Diplo, Chappell Roan, Halestorm, Becky G, Lorde, and Amy Lee of Evanescence were among the artists signed on.”).

⁶² Roberts, *supra* note 8.

⁶³ Nirode, *supra* note 4.

⁶⁴ S. 3457 § 3 (c)(5)(B).

⁶⁵ Sandra McDonald, *Chappell Roan Pulls the Last-Minute Plug on Two Shows: ‘Things Have Gotten Overwhelming’*, LOS ANGELES TIMES (Sept. 27, 2024, 4:42 PM), <http://www.latimes.com/entertainment-arts/music/story/2024-09-27/chappell-roan-last-minute-cancellation-festival-performances>.

⁶⁶ See Aswad, *supra* note 13.

conversation. Trust between the entertainment industry and fans is at an all-time low, and it is imperative that action is expedited to rekindle this relationship.⁶⁷ With minor adjustments, the Fans First Act will make lasting changes that will benefit all stakeholders in the industry.

⁶⁷ See Perreault, *supra* note 29.