

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, C. C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the *Competition Act*;

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

Applicant

-and-

Respondents

**LIVE NATION ENTERTAINMENT, INC., LIVE NATION WORLDWIDE, INC., TICKETMASTER CANADA HOLDINGS ULC, TICKETMASTER CANADA LP, TICKETMASTER L.L.C., THE V.I.P. TOUR COMPANY, TICKETSNOW.COM, INC., and TNOW ENTERTAINMENT GROUP, INC.**

**AFFIDAVIT OF ADAM DONALD HUNT CHISHOLM  
(sworn November 7, 2018)**

I, Adam Donald Hunt Chisholm, of the City of Toronto, Province of Ontario,  
SWEAR THAT:

1. I am a lawyer for the Respondents in the above-noted matter and, as such, I have knowledge of the matters to which I herein depose. This affidavit is provided pursuant to the Direction to Counsel dated November 5, 2018 for use at the Case Management Conference Call scheduled for November 8, 2018.

**Background**

2. This proceeding is governed by a Scheduling Order made April 17, 2018 by the Honourable Justice Gascon. A copy of that Scheduling Order is attached as **Exhibit "A"**.

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: November 13, 2018  
CT-2018-005

Andrée Bernier for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

# 47

3. The Scheduling Order required that the parties produce documents by July 20, 2018. Both the Commissioner and the Respondents produced documents in advance of this deadline. The Commissioner produced approximately 6,800 records. The Respondents produced approximately 55,000 records.

4. After this deadline, the parties have adjusted their productions in various ways, for example by delivering additional documents, acknowledging that certain documents were improperly formatted, revising privilege claims and other steps.

5. Lawyers for the Commissioner sent lawyers to the Respondents a letter articulating certain requests with respect to document production on August 24, 2018. The letter from the Commissioner's lawyers dated August 24, 2018 is attached as **Exhibit "B"**.

#### **The Document Production Motion**

6. The Scheduling Order required that the parties file any motions arising from Affidavits of Documents and/or productions by September 14, 2018.

7. A document production motion brought by the Commissioner proceeded on October 12, 2018 (the "**Document Production Motion**").

8. The Honourable Justice Phelan issued his Order on October 17, 2018 (the "**Production Order**") and ordered certain relief in favour of the Commissioner. The Reasons for Order and Order Regarding the Commissioner's Motion for Further and Better Affidavits of Documents and Other Relief are attached as **Exhibit "C"**. Broadly speaking, they rule on the necessity and manner of production of certain categories of documents, and require the Respondents to deliver new Affidavits of Documents recording new documents to be produced and incorporating the instructions set out in the Reasons by November 2, 2018.

### **The Respondents' Efforts to Comply with the Production Order**

9. As summarized below the Respondents have worked vigorously to meet the requirements of the Production Order. However, it became apparent that not everything required by the Production Order could be done by November 2.

#### **Additional Custodian Collection, Review & Production**

10. The Respondents collected and reviewed approximately 1 million records. These records came from the original 28 custodians, whose productions were updated, and an additional two custodians. This brought the total population of unique records from the relevant time period collected by the Respondents to more than 3.5 million. From these, nearly 30,000 additional documents were produced on November 2.

#### **Clickstream Data**

11. One of the concerns expressed by the Respondents in advance of the Document Production Motion was the burden of producing the "clickstream data" sought by the Commissioner. During the Document Production Motion, the Respondents and Commissioner agreed that the Respondents would produce "clickstream data" in its native form without providing additional materials such as software or training (although the Respondents did agree that they would produce a "handbook" if it were available). The Respondents' lawyers advised the Competition Tribunal of this agreement in the course of the Document Production Motion. That advice was confirmed in my letter to lawyers for the Commissioner dated October 26, 2018, which is attached as **Exhibit "D"**.

12. On October 30, 2018, lawyers for the Respondents wrote to lawyers for the Commissioner regarding proposed methodology for the production of "clickstream data". A letter from my colleague involved in this matter, Mark Opashinov, to the Commissioner's lawyers on this issue, dated October 30, 2018 is attached as **Exhibit "E"**.

13. On November 2, 2018, the Commissioner was provided with access to “clickstream data” by the Respondents, along with technical instructions on how to access it. A letter from my colleague involved in this matter, Mark Opashinov, to the Commissioner’s lawyers on this issue, dated November 2, 2018 is attached as **Exhibit “F”**.

### **Transactional Data**

14. During the Document Production Motion, I articulated a concern about the undefined nature of the Commissioner’s request for “transactional data”. During his reply submissions, the Commissioner’s lawyer advised the Competition Tribunal that the “transactional data” sought was that set out in the August 24, 2018 letter attached as Exhibit “B”.

15. Following issuance of the Production Order, on the same day, the Commissioner’s lawyers wrote to the Respondents’ lawyers making a fresh “data request” purportedly “further to” the Production Order. This “data request” sought three times the number of fields of “transactional data” previously articulated by the Commissioner’s lawyers. The Commissioner’s “data request” made October 17, 2018 is attached as **Exhibit “G”**.

16. On October 26, 2018, I advised counsel to the Commissioner, Derek Leschinsky, what information sought in the new “data request” existed. I also advised that the Respondents would not be able to produce this information until November 16, 2018 owing to its volume. I inquired as to whether the Commissioner would consent to an order varying the Production Order to accommodate this timing. My letter dated October 26, 2018 is already attached above as Exhibit “D”.

### **Training Videos**

17. One of the requirements of the Production Order was that the Respondents advise the Commissioner by November 2, 2018 as to how approximately 7,000 videos would be reviewed and produced by the Respondents. The Respondents identified a strategy for reviewing videos in the Respondents position. I wrote to counsel for the

Commissioner advising of the related workflow on October 26, 2018. My letter regarding production of videos is attached as **Exhibit “H”**.

### **The Need for an Extension**

18. Notwithstanding the Respondents’ efforts, it became obvious that the Respondents’ compliance with some portions of the Production Order would be unavoidably delayed. The deficiencies are:

- The above-noted delay in delivery of the transactional data;
- Updated collection and review of documents from a couple of custodians;
- Updated privilege logs (which cannot be completed until the two above issues are resolved); and
- Updated Affidavits of Documents (which cannot be completed until all of the above issues are resolved).

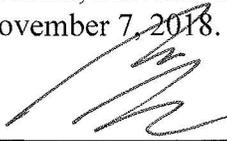
19. Mr. Opashinov sent a letter to the Commissioner’s lawyers advising of outstanding production issues on November 1, 2018. This letter is attached as **Exhibit “I”**.

20. On November 2, 2018, lawyers for the Commissioner sent lawyers for the Respondents two letters:

- (a) One letter advised of the Commissioner’s position with respect to the various production issues raised by the Respondents over the prior week. Among other things, this letter took issue with the Respondents’ response to the “data request”. This letter is attached as **Exhibit “J”**; and
- (b) The other letter advised of a deficiency in the Commissioner’s productions. This letter is attached as **Exhibit “K”**.

21. Upon receiving the Commissioner's position on document production issues, the Respondents requested a case conference for the purpose of seeking to amend or vary the Production Order.

SWORNBEFORE ME at the City of  
Toronto, Province of Ontario, on  
November 7, 2018.



Commissioner for taking affidavits

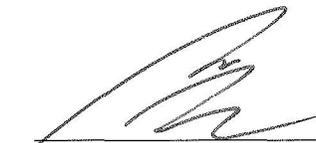
William S. Wu  
LSO #. 68950K.



ADAM DONALD HUNT CHISHOLM

**TAB A**

This is Exhibit "A" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_

A Commissioner, etc.

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2018 Comp Trib 8

File No: CT-2018-005

Registry Document No: 16

**IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

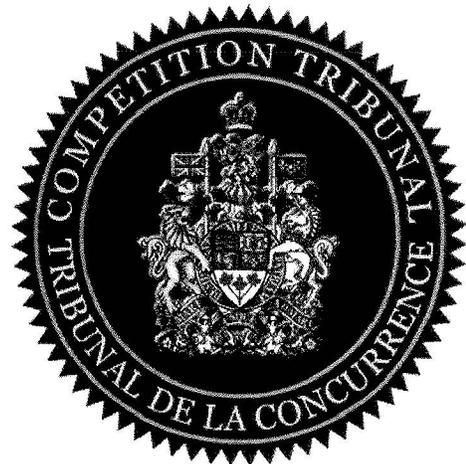
**AND IN THE MATTER OF** a case management conference held on April 9, 2018 to discuss the proposed schedule for the disposition of this application.

BETWEEN:

**The Commissioner of Competition**  
(applicant)

and

**Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and Tnow Entertainment Group, Inc**  
(respondents)



Date of case management conference: April 9, 2018  
Before Judicial Member: D. Gascon J. (Chairperson)  
Date of Order: April 17, 2018

**SCHEDULING ORDER**

[1] **FURTHER TO** the application filed by the applicant, the Commissioner of Competition (“**Commissioner**”), against the respondents, Live Nation Entertainment, Inc et al (“**Respondents**”), for orders pursuant to section 74.1 of the *Competition Act*, RSC, c C-34, as amended (“**Act**”) regarding conduct allegedly reviewable under paragraph 74.01(1)(a) and section 74.05 of the Act (“**Application**”);

[2] **AND FURTHER TO** the jointly proposed timetable submitted by the parties on March 27, 2018 and to the discussions with counsel for both parties at a case management conference held on April 9, 2018 (“**CMC**”);

[3] **WHEREAS** the parties’ jointly proposed timetable provides for a total period of over 20 months for the disposition of this Application, from the filing of the Notice of Application to the hearing on the merits, which is proposed to start in October 2019;

[4] **AND WHEREAS** the Tribunal has indicated to the parties and their counsel that it would be available and ready to hear this matter earlier, in the first half of 2019;

[5] **AND WHEREAS** the Tribunal aims at issuing scheduling orders that contemplate completing the various discovery and pre-hearing disclosure steps of its proceedings within benchmarks that the Tribunal considers to be reasonable timelines;

[6] **AND WHEREAS** the Tribunal nonetheless remains mindful of the fact that the actual timetable of each matter may vary depending on the particular context and circumstances of each case;

[7] **AND WHEREAS** further to the submissions made by counsel for the parties at the CMC, the Tribunal was informed that this Application is not a typical deceptive marketing practices case, that the alleged conduct covers a long period of time, that the number of relevant documents to be produced is expected to be large and to involve numerous custodians, and that expert evidence will be required;

[8] **AND WHEREAS** the Tribunal further notes that, in this case, the longer proposed timeframe for the service of Affidavits of Documents and the delivery of documents will allow for a single production of documents by all parties on the proposed date for this step;

[9] **AND WHEREAS** counsel for the parties have indicated to the Tribunal that the jointly proposed timetable is realistic and achievable, and will considerably limit the risk of any adjournment of the hearing on the merits scheduled to start in October 2019;

[10] **AND WHEREAS** counsel for the parties have mentioned to the Tribunal that, in their view, reducing the proposed timetable by four months or more in order for the hearing on the merits to take place in the Spring of 2019 would not be reasonably possible or feasible;

[11] **AND WHEREAS** neither the Commissioner nor the Respondents have proposed a timetable that would contemplate a hearing on the merits in the first half of 2019, despite the fact that the Tribunal has informed the parties that it would have been available and ready to deal with this matter more expeditiously;

[12] **AND WHEREAS** in light of the foregoing and in the particular circumstances of this case, the Tribunal is satisfied that the following scheduling order is appropriate and respects the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> supp) and, in particular, the considerations of procedural fairness;

**THE TRIBUNAL ORDERS THAT:**

[13] The schedule for the discovery and pre-hearing disclosure steps of the Application shall be as follows:

April 20, 2018	Filing of any preliminary motion brought by the Respondents, including in respect of venue
May 4, 2018	Deadline to file any response to preliminary motions
May 10, 2018	Hearing of any preliminary motion brought by the Respondents, including in respect of venue
July 20, 2018	Service of Affidavits of Documents and delivery of documents by all parties
September 14, 2018	Last day to file motions arising from Affidavits of Documents and/or productions, including motions challenging claims of privilege
October 1, 2018	Deadline to file any responses to motions arising from Affidavits of Documents and/or productions, including motions challenging claims of privilege
October 11, 2018	Hearing of any motions arising from Affidavits of Documents, productions and/or claims of privilege
November 2, 2018	Deadline for delivery of any additional productions resulting from Affidavits of Documents, productions and/or claims or privilege motions
November 30, 2018	Deadline for completion of examinations for discovery, in accordance with a schedule to be settled between counsel
January 14, 2019	Deadline for fulfilling answers to discovery undertakings
February 11, 2019	Last day to file motions arising from answers to undertakings and refusals
February 18, 2019	Deadline to file any responses to motions arising from answers to undertakings and refusals
February 21, 2019	Hearing of any motions arising from answers to undertakings or refusals
March 22, 2019	Last day for follow-up examinations for discovery

April 10, 2019	Deadline to provide and deliver mediation briefs
April 17-18, 2019	Mediation
April 25, 2019	Case management conference on pre-hearing disclosure steps and preliminary issues
June 5, 2019	Applicant to serve and file documents relied upon, witness statements and expert reports, if any
	Applicant to serve list of documents proposed to be admitted without further proof
	Applicant to indicate documents on which privilege is waived
June 12, 2019	Last day to file motions for further examination for discovery following waivers of privilege
June 19, 2019	Deadline to file any responses to motions for further examination for discovery following waivers of privilege
June 27, 2019	Hearing of any motions for further examination for discovery following waivers of privilege
August 9, 2019	Respondent to serve and file documents relied upon, witness statements and expert reports, if any
	Deadline for delivering any requests for admissions
August 27, 2019	Applicant to serve and file list of reply documents, witness statements and expert reports, if any
	Last day to file motions for summary disposition and/or any motions related to the evidence (documents relied upon, witness statements and expert reports)
September 6, 2019	Deadline to file any responses to motions for summary disposition and/or motions related to the evidence (documents relied upon, witness statements and expert reports)
September 10, 2019	Pre-trial case management conference
September 12, 2019	Hearing of any motions for summary disposition and/or any motions related to the evidence (documents relied upon, witness statements and expert reports)

September 20, 2019      Deadline to provide documents to the Tribunal for use at the hearing  
(e.g., briefs of authorities, witness statements, expert reports)

Deadline for responding to any requests for admissions

September 27, 2019      Deadline for delivering any agreed statement of facts.

**[14]** The hearing of the Application shall commence at 9:30 a.m. on Tuesday, October 8, 2019, at the place to be determined by the Tribunal in a subsequent order, and the schedule for the hearing shall be as follows:

October 8-11, 2019                      First week of hearing (4 days)

October 15-18, 2019                      Second week of hearing (4 days)

October 22-25, 2019                      Third week of hearing (4 days)

October 30-31, 2019                      Oral arguments (2 days)

DATED at Ottawa, this 17 day of April 2018.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

**COUNSEL OF RECORD:**

For the applicant:

The Commissioner of Competition

François Joyal  
Derek Leschinsky  
Kenneth Jull  
Ryan Caron

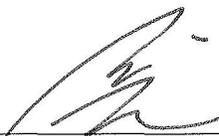
For the respondents:

Live Nation Entertainment, Inc et al

Mark Opashinov  
David W. Kent  
Guy Pinsonnault  
Adam D.H. Chisholm  
Joshua Chad

**TAB B**

This is Exhibit "B" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Ministère de la Justice  
Canada

Department of Justice  
Canada

PROTÉGÉ B – PROTECTED B

Bureau de la concurrence  
Services juridiques

Competition Bureau Legal  
Services

Place du Portage, Tour I  
22e étage  
50 rue Victoria  
Gatineau QC K1A 0C9

Place du Portage, Phase I  
22nd Floor  
50 Victoria Street  
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Téléphone/Telephone  
(819) 953-3884

Télécopieur/Fax  
(819) 953-9267

VIA E-MAIL

24 August 2018

David Kent  
Mark Opashinov  
Guy Pinsonnault  
Adam Chisholm  
Joshua Chad  
McMillan LLP  
Brookfield Place  
181 Bay Street, Suite 4400  
Toronto, ON M5J 2T3

Dear Counsel,

**Re: *Commissioner of Competition v Live Nation et al.* – CT2018-005**

We have commenced our review of your productions. There appear to be various deficiencies and areas for which information is missing. We are writing to you to advise of these deficiencies in order to give you an opportunity to address them. The following lists our areas of concern at this stage:

**i. No documents have been produced by five (5) of the Respondents**

1. Live Nation Entertainment, Inc.
2. Ticketsnow.com, Inc.
3. The V.I.P. Tour Company
4. Live Nation Worldwide, Inc.
5. Ticketmaster Canada Holdings ULC

The pleadings refer to the various roles played by the above entities. Based on these allegations and admissions, we would expect there to be relevant documents in possession of these corporate entities.

**ii. Custodians are missing**

It is apparent from the productions that officers such as Michael Rapino, Jared Smith and Amy Howe are involved in discussions about fee display. Curiously, none of these corporate officers are listed as custodians.

Please provide documents in the custody of these officers and/or an explanation as to why they are not listed as custodians.

**iii. Schedules for relevant documents that were, but no longer are, in the possession of the Respondents are missing**

For each Respondent, please provide a formal sworn response to the issue of relevant documents that were, but no longer are, in that Respondent's possession, power or control.

**iv. 46 documents "Withheld with Privilege": Absence of specifics**

There are a series of documents with a note "Withheld for Privilege" which do not specify the type of the privilege that is asserted, nor is the document listed in any of the Respondents' Schedules of privileged documents. Based on the metadata available, we are unclear about the nature of privilege of these documents. For example, PROD054381 is a document from Randall Hofley, then at Stikeman Elliott, to Larry Bryenton of the Competition Bureau. Given that the recipient is the Bureau, it is unclear why the content of the document would not be shared.

These documents lack a title and in some cases it appears that a document has a date associated with it and in other cases there appears to be no date.

Please elaborate on the particulars of the privilege that is claimed for these 46 documents.

**v. Litigation Privilege is claimed on documents that pre-date 2017, as far back as 2009, with insufficient particulars**

As you know, on May 12, 2017, the Competition Bureau delivered a letter to Mr. Jared Smith, President and CEO of Ticketmaster Canada Holdings ULC. (As noted above, this is one of the entities for which no documents have been produced, which raises a separate issue of why documents such as this have not been listed in the schedules in relation to that entity, particularly given the Respondents' admission in the Response that Ticketmaster Canada Holdings ULC controls the content on the Ticketing Platforms (paragraph 12).) We have attached this letter for your review. It is listed in our affidavit of documents at PEJG00479\_00000289.

In that May 12, 2017 letter, Josephine Palumbo, (Deputy Commissioner of Competition, Deceptive Marketing Practices Directorate) referred to concerns under the misleading advertising provisions in relation to Ticketmaster Canada Holdings ULC, its subsidiaries and related entities (referred to therein as "Ticketmaster"). Ms. Palumbo referred to "drip-pricing" and indicated that Ticketmaster's practices raised significant concerns that needed to be addressed. This letter referred to the potential for enforcement action.

As a result of the May 2017 letter, we can understand why documents created after this date might be considered litigation privileged. With respect to documents that pre-date May of 2017, we are unclear as to why some documents are claimed to have litigation privilege. The claim for litigation privilege dates back for some documents to 2009. For example, the document listed in the Affidavit of Documents of Ticketmaster Canada LP as #3417, PRIV06708, Outlook Email 5/13/2009 is claimed as "Litigation Privileged". The claim for litigation privilege lacks sufficient particulars to explain why litigation was contemplated prior to May of 2017 and lacks sufficient particulars to explain any relation to the present litigation as defined in the pleadings.

Please elaborate on the particulars to explain why litigation privilege is claimed on documents that pre-date May of 2017.

**vi. Solicitor-Client Privilege is claimed on documents for which no counsel is listed in the index**

There are a number of entries in the Affidavits of Documents where solicitor-client privilege is claimed, but there is no reference to any specific counsel in relation to the entry.

Please elaborate on the particulars of the privilege that is claimed.

**vii. Settlement Privilege is claimed on documents with insufficient particulars**

We do not have enough context to assess the claims for settlement privilege. Please explain the context within which settlement privilege is claimed.

**viii. Claims for Privilege and relation to the pleading of an estoppel defence**

In their Response, the Respondents plead that the Commissioner should be estopped from bringing this Application in respect of Ticketmaster's past conduct.

The claim that “Over the past eight years, Ticketmaster has had knowledge of and relied upon the fact that the Commissioner chose not to take action against Ticketmaster’s buyflows in 2010” puts in issue any legal advice and/or discussions that Ticketmaster would have had in relation to past discussions with the Commissioner and their legal impact. While we cannot demand that the Respondents waive solicitor-client privilege, we are putting you on notice that we will take the position at the hearing that an estoppel defence in these circumstances cannot be raised in the absence of a waiver of solicitor-client privilege with respect to the narrow issue of estoppel and legal discussions in that regard.

**ix. Source code and HTML code of the Ticketing Platforms are missing**

The pleadings relate to the Respondents’ websites and mobile applications. However the Respondents have failed to produce the source code (such as front-end HTML, CSS, or JavaScript, or back-end Ruby or Python) for these sites and applications. Please identify and produce such source code while maintaining the directory structure(s) for the period since 2009 (or another mutually agreed upon period of time).

**x. Results from recent research and testing are missing**

It is apparent from the productions that the Respondents have carried out research with respect to matters such as fee display in 2018. For example, such testing is referred to in documents PROD054303 and PROD054304. However, results of this testing have not been produced.

Please provide all documents, including memoranda, reports, studies, surveys, analyses, presentations, evaluations, recommendations, directives, policies and guidelines (including any drafts thereof), in relation to any research and testing done in 2018 up to the present date and, of course, this will be a continuing disclosure obligation.

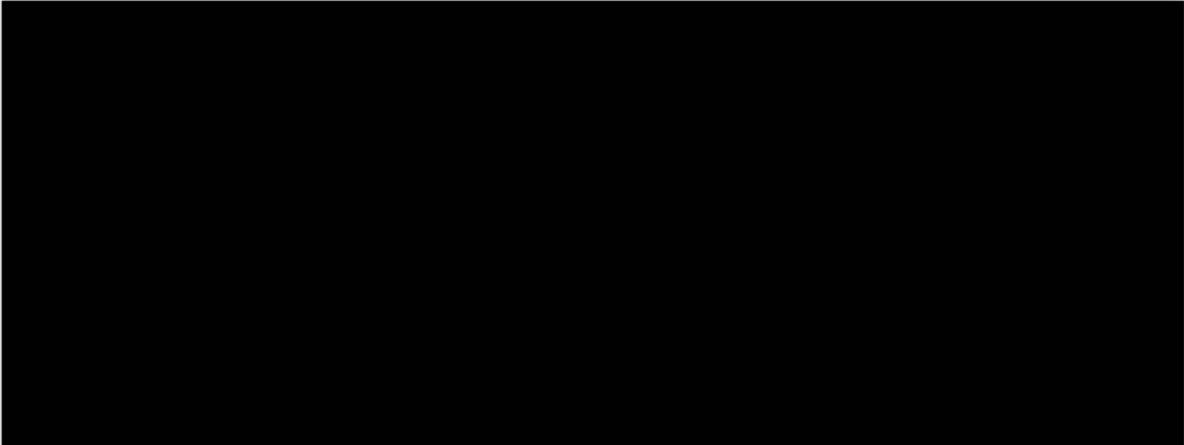
**xi. Testing videos are missing**

It is apparent from the productions that the Respondents have carried out consumer research to determine how users perceive the websites as well as pricing and fee disclosures. More particularly, videos were generated as part of various research efforts, some of which going back to 2008. In some cases, it would appear that the Respondents have been working closely in collaboration with specialized firms such as UserTesting.

Please produce all of these videos.

**xii. Tests, research, studies conducted prior to 2010 are missing**

The document in PROD049788, dated in August of 2010, states as follows (emphasis added):



We do not appear to have the data referred to in this document or the data and documents in general in relation to the studies conducted prior to 2010 in this regard.

Please produce this data and any documents, including memoranda, reports, studies, surveys, analyses, presentations, evaluations, recommendations, directives, policies and guidelines (including any drafts thereof), in relation to the studies conducted prior to 2010.

**xiii. Clickstream data and transactional data are missing**

As already indicated, it is apparent from the productions that the Respondents have carried out analyses since at least 2014 to determine how users have been interacting with the relevant websites/mobile applications. In some cases, it would appear that the Respondents have been working closely in collaboration



More particularly, the Respondents have conducted tests, such as "A/B testing", whereby they presented to different users various options for displaying tickets prices and measured the effect of such options on consumer behaviour and revenues.

These tests are relevant the allegations made in the pleadings. The production indicates that for the purpose of conducting the tests referred to above, the

Respondents have relied on and utilized “web analytics” (or clickstream) data as well as transactional data. The production is missing much of this data.

The relevant “web analytics” (or clickstream) data would include detailed information collected while consumers interact with and navigate through the Respondents’ websites/mobiles applications.

It would include, at a minimum, information identifying the particular user, the device and browser used, pages visited, user queries, links the user clicked on, user actions such as sorting, selecting tickets, buying tickets, etc.

For example, it would include the following:

1. visitor identification (e.g., ID, IP address, login, cookies, daily/weekly visits)
2. browser and device information
3. geo information (e.g. language, country, region)
4. page information (e.g. page URL and name, referrer, page events, queries)
5. click information (e.g., actions (e.g. sort), type, context, source, tag)
6. timestamp of all clicks and events

The relevant transactional data would include detailed information on each ticket purchase concluded on the Respondents’ websites/mobiles applications. It would include at, a minimum, information on the purchaser, the ticket price (including the fees), the event for which tickets were paid, the venue or facility in question, etc.

For example, it would include the following:

1. Site/platform ID and name (e.g., ticketmaster.ca, ticketweb.ca)
2. Channel (e.g., web, mobile)
3. Sale date and time (i.e., timestamp)
4. Invoice date, invoice number, and line item for each transaction
5. Price of ticket
6. Service fee
7. Facility charge
8. Order processing fee
9. Delivery fee
10. Other fees
11. Taxes
12. Event name
13. Venue/facility name

This data is relevant, is within the Respondents’ control and possession, and can be retrieved without creating an undue burden.

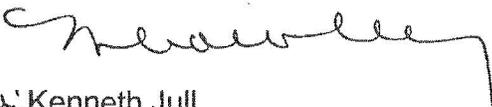
Please identify and produce the data repositories, databases or data files which have contained the relevant clickstream and transactional data since 2009 (or another mutually agreed upon period of time). As you are aware, FC Rule 230b confirms that a party is still required to list a document even if the party is of the opinion that its production for inspection could be onerous. We would therefore expect at a minimum the listing of documents in relation to the above entities.

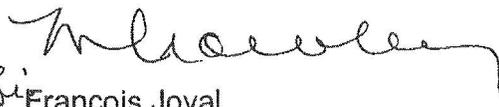
For each repository, database or file, provide a data dictionary that includes a list of field names and a definition for each field contained.

## CONCLUSION

We are asking for productions as requested above to be provided before August 31, 2018. This timeframe is necessitated by the timing set out in the scheduling order made by the Tribunal in this matter.

Best regards,

  
for: Kenneth Jull  
General Counsel  
Competition Bureau Legal Services

  
for: François Joyal  
General Counsel  
Department of Justice  
For the: Competition Bureau Legal  
Services

TAB C

This is Exhibit "C" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2018 Comp Trib 17

File No: CT-2018-005

Registry Document No: 35

**IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

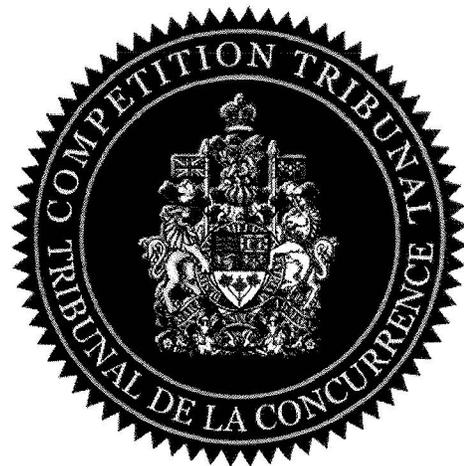
**AND IN THE MATTER OF** a motion filed by the Commissioner of Competition for further and better affidavits of documents and other relief.

BETWEEN:

**The Commissioner of Competition**  
(applicant)

and

**Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and Tnow Entertainment Group, Inc**  
(respondents)



Date of hearing: October 12, 2018

Before Judicial Member: M. Phelan J.

Date of Reasons for Order and Order: October 17, 2018

**REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S MOTION FOR FURTHER AND BETTER AFFIDAVITS OF DOCUMENTS AND OTHER RELIEF**

## **I. NATURE OF PROCEEDING**

[1] The Commissioner of Competition (“**Commissioner**”) made a motion for the production of further and better affidavits of documents (“**AODs**”) from the Respondents and other such relief stemming from the alleged failure to properly search for and produce relevant documents.

[2] The motion arises in the context of an Application by the Commissioner alleging conduct prohibited under s 74.01(1)(a) and s 74.05 of the *Competition Act*, RSC 1985, c C-34 (“**Act**”) in that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public at prices that are not in fact attainable.

[3] The Tribunal has established a schedule through to a hearing date which provided for the delivery of AODs. As time is critical, it is necessary to quickly decide the Commissioner’s motion.

[4] Five of the Respondents (Live Nation Entertainment, Inc., Live Nation Worldwide, Inc., Ticketmaster Canada Holdings ULC, The V.I.P. Tour Company and Ticketsnow.com, Inc.) provided AODs which did not list any documents (“**nil AODs**”). These five and the remaining three Respondents are inter-related companies with Live Nation Entertainment, Inc. at the top of the corporate ladder.

[5] In the nil AODs, the affidavit contained the following explanation:

This affidavit discloses, to the full extent of my knowledge, information and belief, all of the documents relevant to the matters in the application that are in (name of Respondent)’s possession, power or control. The documents listed herein, if any, were located through the use of technology-assisted review and in the possession, power or control of a custodian primarily employed by (name of Respondent).

[6] The Commissioner raised the following points:

- (a) that the search for documents was clearly inadequate as it has produced fewer documents than expected; that it was simply implausible that these Respondents did not have relevant documents. In some cases, documents which the Commissioner had from the particular Respondent were not listed in the applicable AOD.
- (b) that the AODs failed to list the documents which were actually in the possession, power and control of the relevant Respondent even if the document’s existence was disclosed in some other AOD.
- (c) that several categories of documents going to issues of marketing practice, consumer conduct and impact of the Respondents’ advertising were not produced.
- (d) that certain legal privilege claims were either insufficiently detailed or unsubstantiated on their face.

[7] The Commissioner requests that the Respondents conduct a further and better search for documents, and that they produce further and better AODs curing the deficiencies noted or failing to do so, the right to cross-examine the affiant of the AODs.

## **II. SUMMARY OF FACTS**

[8] The Respondents have explained away the various deficiencies on the basis that they conducted searches in a more modern manner using computer assisted technology aided by a litigation support company – the technology assisted review (“**TAR**”). The result was the identification of 2.5 million documents which were then vetted through the TAR and lawyers trained in the TAR system and who trained the TAR system, and ultimately approximately 55,000 relevant documents were identified. All of this was accomplished in a relatively short period of time.

[9] The first step in document collection had been interviews with “custodians” – people likely to have some of the relevant documents. There were 28 original custodians who had documents and who were said to be able to identify others who might have relevant documents. If any individual was not so identified, even if at the most senior levels where decisions on corporate policy and practice were made, no one asked if that individual had any potentially relevant documents. In fact, the Respondents even refused to ask for documents from a Mr. Rapino – the chief executive officer of the parent Live Nation Entertainment, Inc.

[10] Ultimately the Respondents sorted the relevant records in these AODs without attribution as to which documents were in the possession, power or control of which of the Respondents. The Respondents say that the relevant documents were produced just not identified and listed in the manner required by the *Competition Tribunal Rules*, SOR/2008-141 (“**Rules**”). The general explanation is that the documents were identified in accordance with the Sedona Principles and dealt with in accordance with the Respondents’ view of what was “proportionate” in terms of the legal requirement to produce.

[11] The Respondents had initially proposed delivering a single AOD covering all of the Respondents. The Commissioner objected and required separate AODs from each Respondent. The Respondents then delivered three AODs based on the fact that all of the custodians were primarily employed by that Respondent (although some custodians were employed by more than one Respondent). However, the eight AODs were signed by the same corporate officer – the Vice President, Legal Affairs – Litigation for Live Nation Entertainment, Inc.

[12] This manner of proceeding and the resultant disclosures led to this motion.

## **III. MATTERS TO BE RESOLVED**

### **A. Further and Better Searches**

[13] The Commissioner’s request in this regard is premature. Two senior officials whose documents have yet to be produced but whom the Respondents agree will be produced may shed

further light on what is no more than suspicion that the search was inadequate – but it is not an unreasonable suspicion given the way in which the Respondents produced their AODs.

[14] However, there has been no attack on the Respondents’ use of TAR, and other computer technology to assist in the identification and collection of documents. At this point the major problem is the attribution of documents to each of the Respondents.

[15] The Tribunal encourages the use of modern tools to assist in these document-heavy cases where they are as or more effective and efficient than the usual method of document collection and review.

[16] The issue of further and better searches should await the delivery of further and better AODs in form and content complying with the Rules.

## **B. Further and Better AODs**

[17] The Respondents’ defence to what are clearly non-compliant AODs is that in the end all the relevant documents were produced and that the way in which the Respondents proceeded is consistent with s 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19, to the effect that proceedings are to be dealt with “informally and expeditiously” and consistent with the principle of proportionality. The Respondents also rely on Rule 2(1) which permits the Tribunal to vary the application of any rule.

[18] Firstly, the Tribunal notes that Rule 60(1) requires that each respondent in a case is to serve an affidavit of documents within the time prescribed by the Tribunal. In this case, Justice Gascon set the time for such service of the AODs but no mention was made of the Respondents’ different approach to producing AODs.

[19] Rule 60(2) sets out the specifics for an affidavit of documents. The requirements are more than formalities; the requirements are to elicit a listing of the relevant documents held by each relevant party.

[20] A party’s unilateral view of the operation of the principle of proportionality is not a waiver of the Rules. Where a party wishes to depart from a rule on the basis of proportionality, they are required to seek the concurrence of the judicial member responsible for case management of the matter. *Ex post facto* variation of the operation of a rule should be a rare exception and I am not prepared to grant such variation.

[21] In addition to the principle of compliance with the Rules and obtaining prior approval of exception to the operation of a rule, there is good reason for the Commissioner’s insistence on the service of proper affidavits of documents.

[22] Section 69(2), in particular s 69(2)(c), contains provisions, relevant to civil proceedings, for the authority of documents created and the presumptions of proof based upon possession of documents in the hands of a “participant”.

**69 (2)** In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

**(a)** anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

**(b)** a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

**(c)** a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

**(i)** that the participant had knowledge of the record and its contents,

**(ii)** that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

**(iii)** that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and,

**69 (2)** Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

**a)** toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

**b)** un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

**c)** s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :

**(i)** que le participant connaissait le document et son contenu,

**(ii)** que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

**(iii)** que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par

**where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.**

**l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.**

[Emphasis added by the Tribunal]

[23] The presumptions are important. Despite the Respondents' desire to serve a single AOD for all Respondents, the Respondents are insisting on being treated separately, defending separately and in some cases pleading that they are not proper parties to the action.

[24] The issue of knowledge within the related corporations and how high up and how far out knowledge of the alleged deceptive advertising extended can be important to liability, and damages or other relief.

[25] Therefore, each Respondent will prepare a further and better AOD listing the documents required in respect of that Respondent. These proper AODs may give rise to the need for further and better searches for relevant documents.

### **C. Missing Documents**

[26] There are three categories of documents which have not been produced for various reasons – transactional and clickstream data; testing documents; and videos.

#### **a. Transactional and Clickstream Data**

[27] As a result of the motion, during argument, the Respondents agreed to produce the clickstream data – a record of the computer “clicks” made by potential purchasers of tickets. It includes data collected while consumers interact with the Respondents' websites and mobile apps. It is recognized that this data may be relevant to consumer behaviour in response to the alleged deceptive advertising. Absent the Respondents' concession, the Tribunal would have ordered production.

[28] Transactional data is similar to clickstream and it captures detailed information collected on each ticket purchase concluded on the Respondents' websites and mobile apps.

[29] This data is relevant to how the computer display of ticket prices affects the purchasing conduct and may assist in quantifying the overcharging amount in the alleged “drip pricing” conduct of one or more of the Respondents.

[30] It is to be produced. To the extent that the Commissioner can further define what part of this relevant data set he requires, he should do so.

**b. Missing Testing Materials**

[31] The Respondents have not provided any substantial reason for not producing the tests of test consumers' reaction to various display alternatives. The evidence presented on this motion establishes its potential relevance in terms of the impact of fees as presented as well as the impact on revenue of such displays.

[32] It should be produced except to the extent that some 2010 tests have already been produced.

**c. Videos**

[33] There are 436 hours of videos, some of which apparently relate to fee displays. The videos have been identified through the Respondents' own document collection process. What is not known is how many videos are relevant to the litigation because the Respondents have refused to review the videos due to cost and time constraints.

[34] The Respondents have an obligation to make reasonable efforts to obtain and determine relevancy (see *Eli Lilly and Co v Apotex Inc*, 2000 CarswellNat 185, 94 ACWS (3d) 1193 at para 6). The principle of proportionality does not eliminate hard work.

[35] The fact that the Respondents either do not now have or did not create documents, such as contracts, scripted questions and similar material, which would assist in this relevancy exercise, is not a reason to deprive the Commissioner of the relevant videos.

[36] The alternative is for the Respondents to turn all 7,000 videos over to the Commissioner for his review and relevancy determination.

[37] The relevant videos are to be produced. The Respondents will have 10 days to advise the Commissioner how and when the relevant videos will be produced; failing which the Commissioner may seek an order requiring the delivery to him of all videos for his relevancy review.

**D. Mr. Rapino**

[38] As indicated earlier, Rapino is the senior executive of Live Nation Entertainment, Inc. The Commissioner has requested that the Respondents produce any relevant documents that he may have. Two other senior officers' documents are, as requested by the Commissioner, being produced.

[39] The Respondents have expressed reluctance bordering on refusal to even inquire of Rapino on the basis that he has not previously been identified as a person likely to have relevant documents. They simply do not know and have not made reasonable inquiry.

[40] Given his position within the Respondent's organization, it is more than reasonable to make inquiries of Rapino. Whether he has any documents or which documents he may have is

potentially telling evidence of the extent of involvement of the various Respondents in the alleged misleading activities.

[41] As indicated at the hearing, the Respondents are to inquire of Rapino as to relevant documents he may have and, if any, to produce them forthwith.

#### **E. Privileged Documents**

[42] The Commissioner complains that the Respondents' claim of privilege does not comply with Rule 60 in respect to a number of documents. The Commissioner asks that the Tribunal inspect the documents in question to determine the privilege claim.

[43] The search for privileged documents was somewhat different than the TAR search. The privileged documents search was a key word search. It appears that there has been some shifting of documents from one category of privilege to another as the review of these documents settles out.

[44] Before the Tribunal would make an order for individual privilege document review or even a sampling, the Respondents should provide further and better privilege details.

[45] With respect to litigation privilege, the Respondents are to identify the particular litigation over which the privilege is claimed.

[46] With respect to the Respondents' claim of solicitor-client privilege, the fact that the communication was not between a solicitor and a client is not determinative but it is *prima facie* evidence of the privilege. Several of the documents listed have no description of the basis of the claim; this is particularly important where the communication is not with a lawyer.

[47] The Respondents, in the further and better AODs to be served, are to provide a more fulsome description of the subject matter of the claim without disclosing the privilege. Such descriptions as "re: employment claim" or "re: contract interpretation" and similar type descriptions should be sufficient to *prima facie* satisfy the disclosure obligation.

[48] Following compliance with these instructions, should there be problems with the privilege claim, the matters may be raised with the Tribunal.

#### **IV. TIMING**

[49] The Respondents have indicated that revised AODs to record new documents produced will be served on November 2, 2018. Given the forthcoming discoveries, absent agreement with the Commissioner, the Respondents' new AODs shall by that same date incorporate the instructions in these Reasons.

**THE TRIBUNAL ORDERS THAT:**

**[50]** The Respondents are to comply with these Reasons.

**[51]** The Commissioner is to have his costs of this motion in any event of the cause.

DATED at Ottawa, this 17<sup>th</sup> day of October 2018.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) Michael Phelan

**COUNSEL OF RECORD:**

For the applicant:

The Commissioner of Competition

François Joyal  
Derek Leschinsky  
Ryan Caron  
Katherine Rydel  
Paul Klippenstein

For the respondents:

Live Nation Entertainment, Inc et al

Mark Opashinov  
David W. Kent  
Guy Pinsonnault  
Adam D.H. Chisholm  
Joshua Chad

**TAB D**

This is Exhibit "D" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Reply to the Attention of: Adam D.H. Chisholm  
Direct Line: 416.307.4209  
Email Address: adam.chisholm@mcmillan.ca  
Our File No.: 251233  
Date: October 26, 2018

## EMAIL

Derek Leschinsky  
Counsel, Competition Bureau Legal Services  
Department of Justice / Government of  
Canada

Dear Mr. Leschinsky,

**Re: Live Nation et al ats The Commissioner of Competition  
Data Request made October 17, 2018**

We write further to your email dated October 17, 2018 attaching a data request relating to both "Transactional Data" and "Clickstream Data".

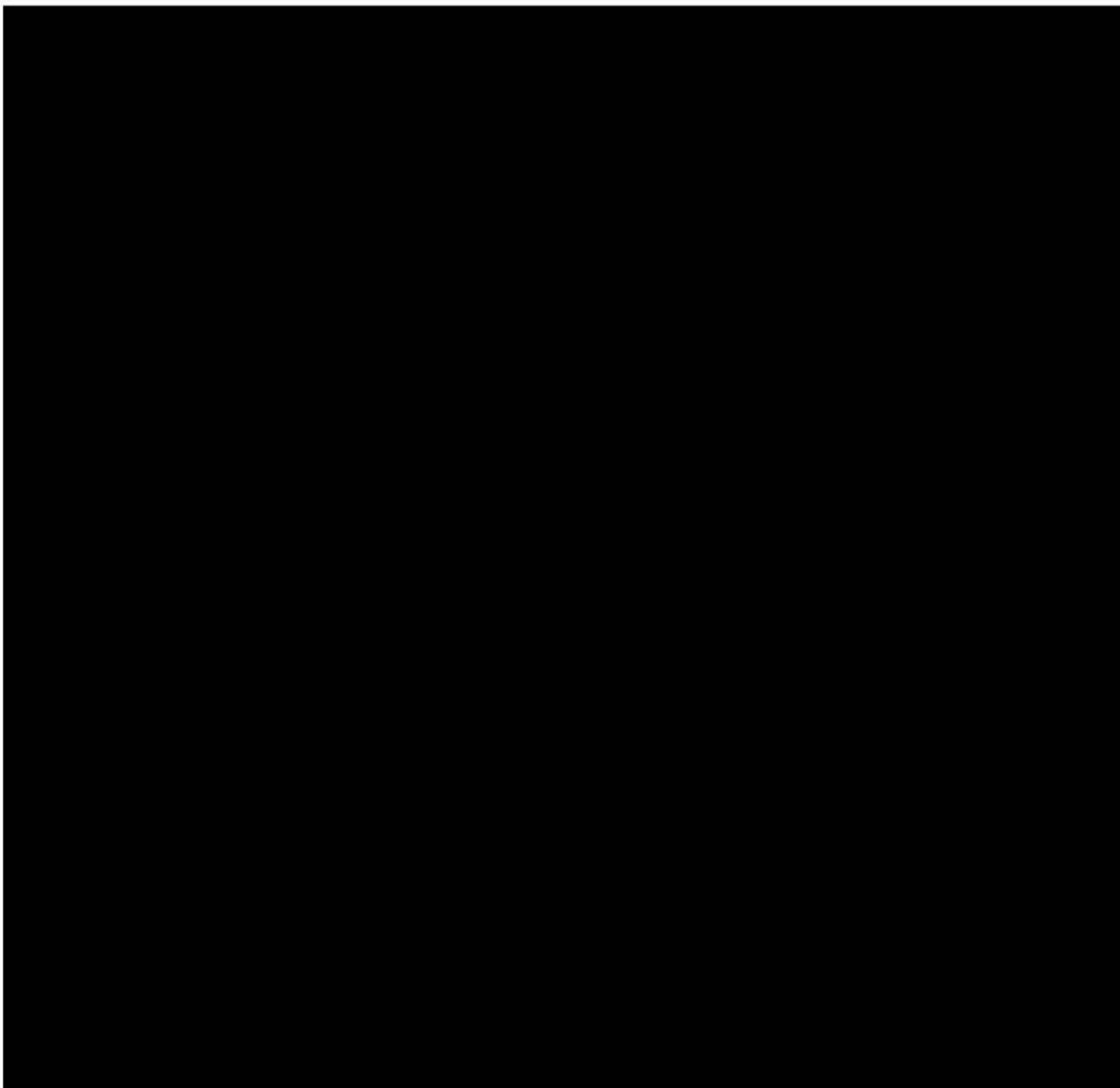
At the outset, we can indicate our client's intention to comply with both the Tribunal's order made October 17, 2018 and the agreement reached between counsel on clickstream data during the hearing on October 12, 2018.

During your Reply submissions to the Tribunal on October 12, 2018, you indicated that the transactional data which you were requesting was outlined in the August 24, 2018 letter from Commissioner's counsel.

In that letter, the Commissioner sought 13 categories of transactional data.

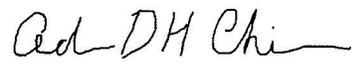
The Data Request you delivered on October 17, 2018 requests information beyond the transactional data which you indicated to the Tribunal in Reply that you were seeking. Instead of 13 categories of data, you have listed 37 categories of data. In addition, you have asked for three entirely new categories of transactional data.

We have set out below the data that is available and responsive to your requests and the Order as well as the timing for the Respondents to produce it.



**Timing.** Our clients have already commenced processing the foregoing requests. It will, however, take time to produce so much information. Our clients require until **November 16, 2018** to produce the transactional and clickstream data requested. Please confirm that you are willing to consent to receipt of the transactional data on or before that date or whether we should deliver a motion to vary Mr. Justice Phelan's order made October 17, 2018 to reflect such timing.

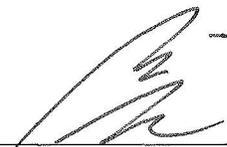
Yours truly,

A handwritten signature in black ink, appearing to read "Ad-DH Chi". The signature is written in a cursive, somewhat stylized font.

Adam D.H. Chisholm

# TAB E

This is Exhibit "E" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Reply to the Attention of: Mark Opashinov  
Direct Line: 416.865.7873  
Email Address: mark.opashinov@mcmillan.ca  
Our File No.: 251233  
Date: October 30, 2018

## EMAIL

Competition Bureau Legal Services  
Place du Portage, Phase I  
22nd Floor  
50 Victoria Street  
Gatineau QC K1A 0C9  
Attn : Derek Leschinsky, Francois Joyal and  
Paul Klippenstein

Dear Sirs,

**Re: Live Nation ats CCB - Respondent Video Review and Production**

We write further to the Honourable Justice Phelan's Order made October 17, 2018, our letter dated October 26, 2018 and the Respondents' production of clickstream data.

The Respondents have isolated a static copy of the entirety of the clickstream data set, capturing all available clickstream data from 2014 to October 19, 2018 in the Amazon Web Services ("**AWS**") environment. However, the data set is very large, approximately 13.5 *terabytes* in total.

We had hoped to download the data set and produce it to you on a physical drive but it is so large that any download of it will take several weeks and well past Justice Phelan's November 2, 2018 deadline for production. Likewise, were we to produce to you on a physical drive, it will likely prove an unwieldy data set to move again from that physical medium to your own systems for analysis.

We propose, as an alternative, that we provide a link to the segregated space on AWS where the data set is stored, together with instructions for access. This approach will allow you to download as much or as little of the data set directly to your own analytic platform as you require. Because the data would be organized in folders organized by month and year, you would also be able to download just the parts in which you are interested. If this is acceptable, please let us know and will make arrangements this week to send you the required link.

If you would nevertheless prefer production on a physical medium, please confirm that production in several weeks time is acceptable.

We can also advise that it has come to our attention that there is additional clickstream data, which relates specifically to the [REDACTED] testing platform. This clickstream data specifically relates to comparisons between versions of the Respondents websites when performing tests. Similar logistical issues arise with production of this clickstream data as the other more general set and we would propose to deal with production from it in the same way.

Please advise if neither receipt this week of links to static copies of the clickstream on AWS nor production of the data sets on physical medium several weeks from now is acceptable to the Commissioner. In such instance, the Respondents intend to seek an appropriate order from the Competition Tribunal.

Yours truly,

A handwritten signature in black ink, appearing to read 'Mark Opashinov', with a long horizontal flourish extending to the right.

Mark Opashinov

**TAB F**

This is Exhibit "F" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Reply to the Attention of: Mark Opashinov  
Direct Line: 416.865.7873  
Email Address: mark.opashinov@mcmillan.ca  
Our File No.: 251233  
Date: November 2, 2018

**PRIVATE & CONFIDENTIAL  
VIA EMAIL**

Competition Bureau Legal Services  
Place du Portage, Phase I  
22nd Floor  
Gatineau, QC K1A 0C9

Attention:  
Derek Leschinsky, Francois Joyal and Paul Klippenstein

Dear Sirs,

**Re: Provision of Clickstream Data**

I write further to our letter of October 30, 2018 concerning the provision of the clickstream data referred to in Mr. Justice Phalen's October 17, 2018 Order.

As noted in that letter, the Respondents have isolated a static copy of the entirety of the clickstream data set, capturing all available clickstream data from 2014 to October 19, 2018 in the Amazon Web Services ("**AWS**") environment in a so-called "file bucket". This, as noted, is a very large data set at about 13.5 terabytes.

In addition, the Respondents have also isolated a static copy of the entirety of the available Monetate clickstream data in the same AWS environment, although this is a fraction as large at about 100 megabytes.

***Downloading the Clickstream Data***

This letter will serve to explain the steps necessary for the Commissioner's technical staff to download all or part of the data sets that the Respondents have shared in the AWS cloud storage service platform called Amazon S3 for the Commissioner's use. (Note that all underlined words and phrases in this letter are hyperlinks to online resources of relevance.)

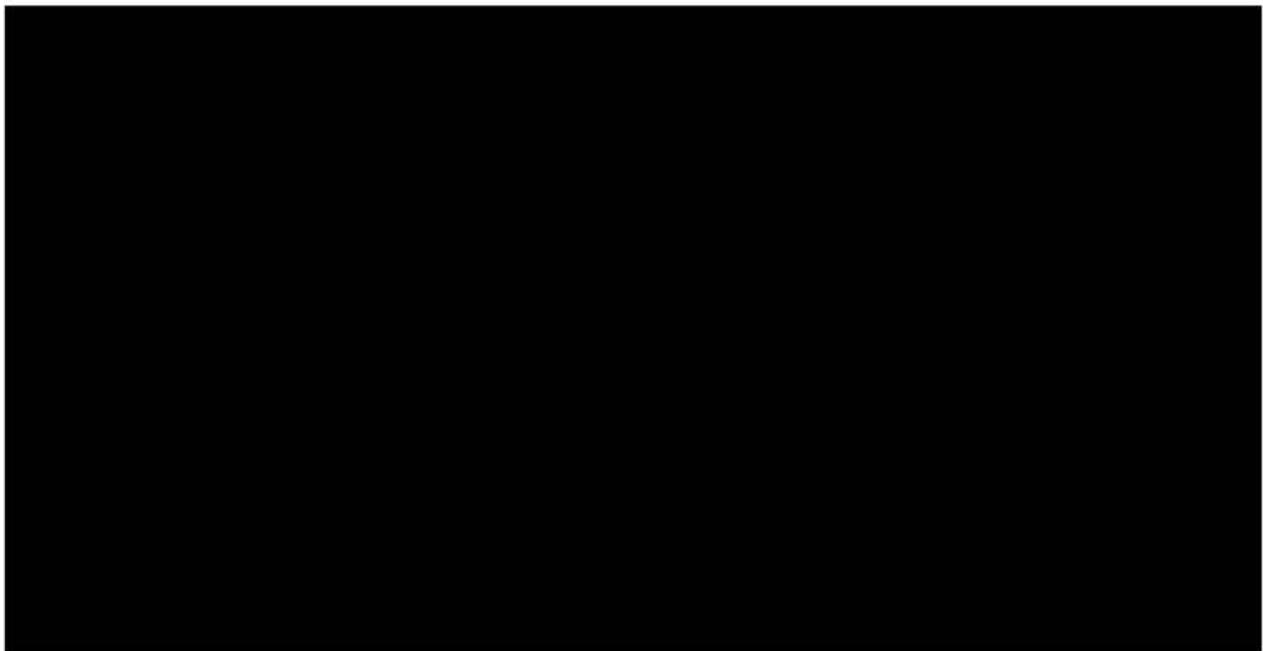
While these data sets are now available for the Commissioner to download, we note that the sheer size of the larger data set would mean that — given typical effective download speeds of approximately 80Mbit/s — downloading the 13.5 terabyte data set to physical medium would, equate to more than 400 ours or nearly three weeks of download time.

***Moving Clickstream Data between File Buckets***

As a result, we would suggest that the Commissioner consider creating an Amazon S3 file bucket of his own. That would allow the data to be efficiently transferred *within* the S3 cloud from the Respondents' file bucket to the Commissioner's file bucket without the bottlenecks associated with downloading the data set to a physical storage device, since all such data is merely moving from one part of the Amazon S3 platform to another.

If the Commissioner took the step of creating such an Amazon S3 file bucket, the Respondents' IT staff could then **copy** the data sets to the Commissioner's file bucket. Once such a copy is complete, the Commissioner could revoke external access to his file bucket and have full ownership of the copied data set.

Regardless of whether the Commissioner chooses to download all or some of the data set that has been made available to him in the Respondents' file bucket or to copy the data set to his own file bucket in the Amazon S3 platform, the remainder of this letter sets out the pertinent facts concerning the data sets and how to access them.

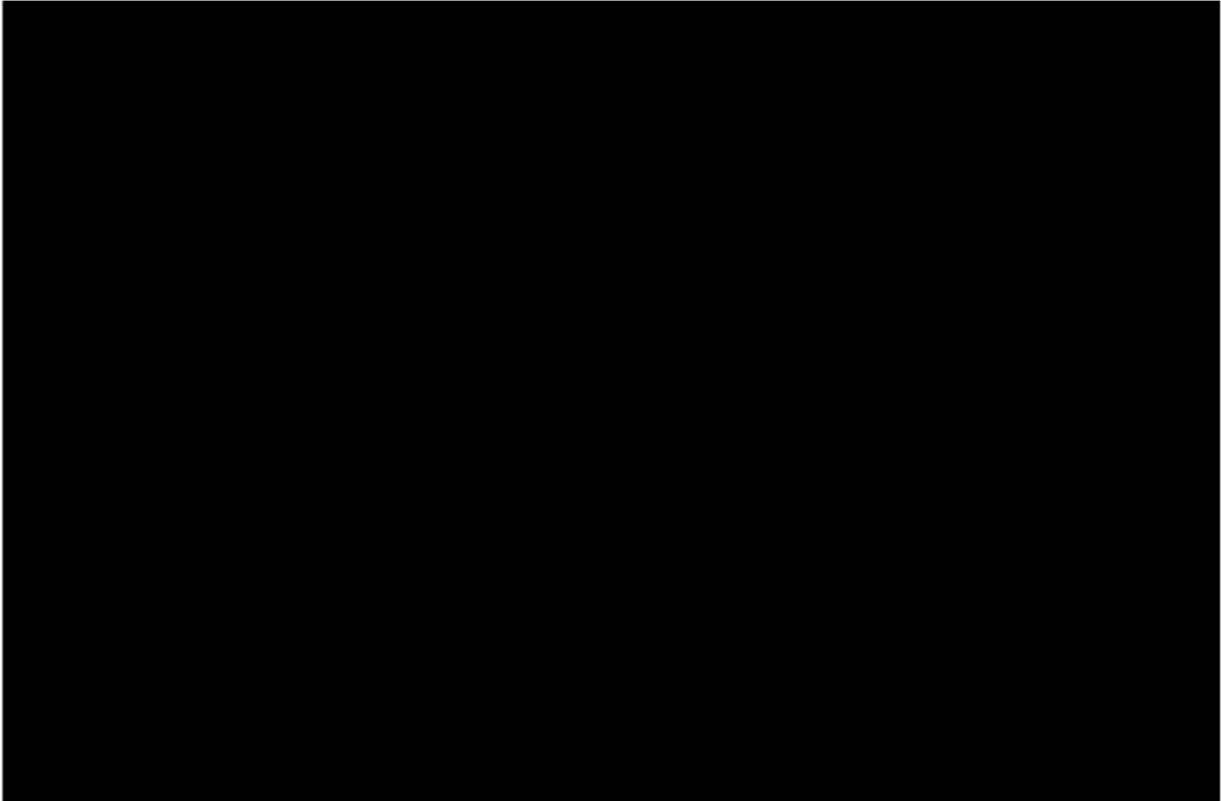
***Using the AWS Command Line Interface***

All these data sets can be accessed using the [AWS Command Line Interface](#).

The steps to do so are as follows:

1. Install the AWS Command Line Interface. (Instructions for [Linux](#), [Windows](#), or [Mac](#).)

2. Use an existing or new AWS account to access the **Identity and Access Management (IAM)** module and create a new user. The user will have a unique **Access key ID** and **Secret Access Key** to access the Amazon S3 File Bucket.



### **Technical Assistance**

McMillan's technical staff stand ready to assist the Commissioner's technical staff with any aspect of the downloading or transfer of the clickstream data. Please let us know if we can set up a call among the Respondents', McMillan's and the Commissioner's technical staff for this purpose.

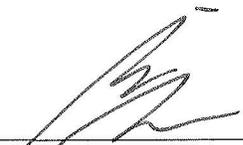
Yours truly,

A handwritten signature in black ink, appearing to read 'Mark Opashinov', written over a horizontal line.

Mark Opashinov

**TAB G**

This is Exhibit "G" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.

## DATA REQUEST

### Transactional Data

1. Please provide detailed transaction-level ticket sales data for transactions with persons located in Canada (including in Quebec) in respect of ticketmaster.ca, ticketweb.ca and ticketsnow.com, as well as each of the Respondents' mobile applications (an "**Online Ticketing Platform**") from January 1, 2017 through October 17, 2018 (the "**Relevant Period**"). The relevant data elements should include at a minimum:
  - a. Site/platform ID and name (e.g., ticketmaster.ca, ticketweb.ca, ticketsnow.com)
  - b. Channel (e.g., desktop web, mobile web, mobile application)
  - c. Sale date and time (i.e., timestamp)
  - d. Invoice date, invoice number, and line item for each transaction
  - e. Price of ticket
  - f. Type of sale (e.g., primary ticket, verified resale ticket)
  - g. Original face value / list price of ticket
  - h. Currency
  - i. Quantity of tickets
  - j. Service fee
  - k. Facility charge
  - l. Order processing fee
  - m. Delivery fee
  - n. Other fees
  - o. Discounts (e.g., 2 for 1 tickets, Me+3, % off)
  - p. Adjustments (e.g. credits, debits, returns)
  - q. Taxes
  - r. Non-ticket charges (e.g., parking, meals, upsells)
  - s. Payment method
  - t. Ticket type (e.g., Standard adult, senior, student, child)
  - u. Ticket level (e.g. floor, 100 level, 200 level, balcony)
  - v. Ticket category (e.g., General admission, premium, VIP package, Platinum)

- w. Seat (section and seat number)
  - x. Wheelchair accessible
  - y. Event ID
  - z. Event name
  - aa. Event category (e.g., music, sports, family, arts & theatre)
  - bb. Event subcategory (e.g., classical, rock and pop, jazz and blues)
  - cc. Event date and time (i.e., timestamp)
  - dd. Venue/facility ID
  - ee. Venue/facility name
  - ff. Venue/facility street address
  - gg. Venue/facility province
  - hh. Venue/facility region (e.g., Calgary & Southern Alberta, Toronto, Hamilton & Area)
  - ii. Venue/facility capacity for event
  - jj. Customer ID
  - kk. Customer address (Postal Code, City, province, country)
2. For each *Customer ID* who had visited an Online Ticketing Platform, please provide the following data:
    - a. All visits to the platform during the previous year;
    - b. All searches and purchases from the platform during the previous year; and
    - c. Postal code (when available).
  3. For each *Event ID* and *Venue/Facility ID* for which a ticket was sold via a Relevant Platform during the Relevant Period, please provide a detailed listing of the type and number of seats that were made available for sale in each category, level, and sector.
  4. For each *Event ID* and *Venue/Facility ID* for which a ticket was sold during the Relevant Period, please provide a seating chart reflecting the general layout for the venue and event.

### **Clickstream Data**

5. Please provide all clickstream data for each Online Ticketing Platform. Clickstream data refers to data collected while consumers navigate a website, which includes all pages and user visits and the sequential stream of clicks they create as they move across the web. The path a visitor takes through a website is called the clickstream. This includes, but is not

limited to, user logins, user queries, links the user clicked on while on one of Ticketmaster's webpages, user actions such as sort-by-price or other sorting methods, etc.

Depending on the specific web hosting and data warehouse solutions, the data fields, tag names, and format of the data might vary. Generally, clickstream data includes, among other things, information about:

- a. visitor identification (e.g., ID, IP address, login, cookies, daily/weekly visits)
- b. browser and device information
- c. geo information (e.g., language, country, region)
- d. page information (e.g., page URL and name, referrer, page events, queries)
- e. click information (e.g., actions (e.g., sort), type, context, source, tag)
- f. timestamp of all clicks and events

### **General**

For all requested data, please include sufficient documentation of the organization and structure of the databases or data sets, including i) a general description; ii) a list of data field names; iii) a definition for each data field, and iv) a description of the meanings of all possible data field values.

**TAB H**

This is Exhibit "H" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Reply to the Attention of: Adam D.H. Chisholm  
Direct Line: 416.307.4209  
Email Address: adam.chisholm@mcmillan.ca  
Our File No.: 251233  
Date: October 26, 2018

## EMAIL

Competition Bureau Legal Services  
Place du Portage, Phase I  
22nd Floor  
50 Victoria Street  
Gatineau QC K1A 0C9  
Attn : Derek Leschinsky, Francois Joyal and  
Paul Klippenstein

Dear Sirs,

### **Re: Live Nation ats CCB - Respondent Video Review and Production**

We write further to the Honourable Justice Phelan's Order made October 17, 2018 and the Respondents' production of relevant videos.

The Respondents have devised a workflow relating to the production of videos. The workflow involves:

- review of file paths;
- review of file names;
- consideration of the provenance of the videos by reference to the custodians from whom they were collected; and
- manual review of samples of the collected videos.

We note that the Respondents ran voice-to-text conversion on a sample of the videos in the Respondents' possession for use in conjunction with predictive coding or word searches; however, the quality of transcription generated by the technology was inadequate and this option is not viable.

This process has commenced. We anticipate being in a position to provide the videos to you by **November 16, 2018**.

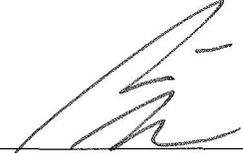
Yours truly,

A handwritten signature in black ink that reads "Ad-DH Chi". The signature is written in a cursive style with a long horizontal flourish at the end.

Adam D.H. Chisholm

# TAB I

This is Exhibit "I" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Reply to the Attention of: Mark Opashinov  
Direct Line: 416.865.7873  
Email Address: mark.opashinov@mcmillan.ca  
Our File No.: 251233  
Date: November 1, 2018

## EMAIL

### **Private and Confidential**

Competition Bureau Legal Services  
Department of Justice Canada  
Place du Portage, Phase 1, 22nd Floor, 50 Victoria Street  
Gatineau, QC K1A 0C9

Attn: Derek Leschinsky and Francois Joyal

Dear Derek and Francois,

Re: ***Commissioner of Competition v Live Nation et al. ("Live Nation") – CT-2018-005***

We write in connection with the motion hearing dated October 12, 2018 and Justice Phelan's Order and Reasons dated October 17, 2018 (the "**Order**").

The Respondents have been working in earnest to respond to the Order by the ordered deadline. However, as you will see from the update below, we will not be in a position to provide all of the requested information required by the Order by November 2, 2018. As a result, we hope that you will be open to submitting a joint motion for an extension on consent to the Order on the terms described in this letter.

As discussed in our letter of September 27, 2018, we have been engaged in the process of collecting, processing, analyzing for responsiveness and privilege, and producing records collected from Amy Howe and Jared Smith. We have also engaged in a "refresh" process for all 28 prior-identified custodians, which involved collecting and reviewing all newly potentially responsive records created by these custodians since the July 20, 2018 production of records to you. In addition, we have been working to provide the additional "testing materials" that were described in the Order.

As a result of these very significant collection efforts, we have collected approximately 1,000,000 additional records from the Respondents, without counting the additional documents currently being collected from Mr. Rapino and two of the original custodians that

are still being processed as further described below. The vast majority of these records have been processed and reviewed. Of these additional records, we intend to produce approximately 40,000 records on November 2, 2018.

Additionally, as noted in our letter of October 30, 2018, we will be in a position to provide the Commissioner with online access to the requested clickstream data by **November 2, 2018**, which represents approximately 13.6 terabytes of data.

In terms of the order for production of additional videos from the nearly 7,000 such videos collected from custodians, we have, as described in our letter of October 26, 2018, identified and are pursuing a process for identifying and producing responsive videos. We anticipate producing these videos by **November 16, 2018**.

We have also been reviewing all privileged records, both from our original July 20, 2018 production and in respect of any records collected since that date, in order to provide revised privilege schedules in accordance with the Order. Lastly, as alluded to above, we have inquired of Mr. Rapino and will produce any potentially responsive records that are in his possession.

However, the processing and review of the additional records collected remains ongoing. As a result, we will not be in a position to review, process and produce the records from Mr. Rapino, as well as additional documents collected from two of the original custodians, by November 2, 2018.

Moreover, while all claims of privilege made in connection with the Respondents' production of July 20, 2018 have, in accordance with the Order, been updated to augment the related descriptions we are still reviewing a portion of the newly-collected documents for privilege. We propose to provide the Commissioner with complete privilege schedules and signed Affidavits of Documents once all of these records have been fully reviewed. As part of this review, we expect that a number of records that have not yet been reviewed may be found to not be privileged; we will produce such additional, non-privileged records.

We expect to be in a position to produce the remaining responsive records, including the vast majority of Mr. Rapino's records, by no later than **November 16, 2018**. As such, we are not in a position to produce sworn Affidavits of Documents on November 2, 2018. We would ask you please to **confirm** that you are willing to consent to receipt of the records and Affidavits of Documents as described above. Upon hearing from you, we will deliver the appropriate motion to vary Mr. Justice Phelan's order made October 17, 2018.

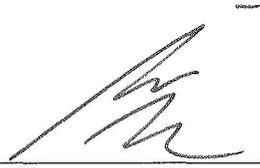
Yours truly,



Mark Opashinov

**TAB J**

This is Exhibit "J" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

A handwritten signature in black ink, appearing to be 'A. Chisholm', written over a horizontal line.

A Commissioner, etc.



Ministère de la Justice  
Canada

Department of Justice  
Canada

Cote de sécurité – Security classification

PROTÉGÉ B – PROTECTED B

Bureau de la  
concurrence  
Services juridiques

Competition Bureau  
Legal Services

Place du Portage, Tour  
|  
22e étage  
50, rue Victoria  
Gatineau QC K1A 0C9

Place du Portage, Phase  
|  
22nd Floor  
50 Victoria Street  
Gatineau, QC K1A 0C9

Téléphone/Télécopieur Telephone/Fax  
(819) 956-2842 (819) 953-9267

November 2, 2018

David W. Kent  
McMillan LLP  
Brookfield Place  
181 Bay Street, Suite 4400  
Toronto, Ontario  
Canada M5J 2T3

Dear Mr. Kent:

**Re: Commissioner of Competition v. Live Nation Entertainment Inc., et al.  
Competition Tribunal File. CT-2018-005**

I write further to the Order of the Honourable Mr. Justice Phelan dated October 17, 2018 and Mr. Opushinov's letter November 1, 2018, which we received at approximately 4:30 PM.

We cannot agree with your request as framed for the following reasons. We will first review the terms of the order of Phelan J., the correspondence exchanged since then, and set out our concerns flowing from the Respondents' substantial non-compliance with the Tribunal's order.

In this decision, his Honour ordered the Respondents to prepare further and better Affidavits of Documents listing the documents in the possession power or control of each Respondent (#1); produce the clickstream and transactional data the Commissioner requested, subject to any further narrowing agreed to by the Commissioner (#2); produce testing materials (#3); produce relevant testing videos\* (#4); make inquiries and produce relevant documents of Michael Rapino forthwith (#5); to provide more fulsome descriptions concerning the subject matter of the Respondents' privilege claims (#6). The

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\* The Order provides Respondents will have 10 days to advise the Commissioner how and when the relevant videos will be produced; failing which the Commissioner may seek an order requiring the delivery to him of all videos for his relevancy review.

Respondents also agreed before this motion was heard to produce relevant documents of Jared Smith and Amy Howe (#7). Justice Phelan delayed ruling on the Commissioner's request for the Respondents to conduct further and better searches until after the Respondents each delivered Affidavits of Documents listing the documents in the possession power or control of each Respondent (#8). Justice Phelan ordered the parties to comply with items 1-6 by November 2, 2018 in keeping with the Scheduling Order for this matter, which we also understand to apply to item 7.

We heard from your firm in respect of only some of these outstanding matters by way of two letters dated October 26 and a letter dated October 30, 2018. In these letters, the Respondents proposed to extend the time for producing item 2 (clickstream and transactional data) and 3 (testing videos) until November 16, 2018. We did not hear from your firm regarding the balance of the items until late in the day yesterday, on November 1.

While we had been proceeding on the basis that the Respondents would comply with their obligations in respect of items 1 and 4-7 by November 2, it is apparent from Mr. Opashinov's November 1 letter that they will not. He has advised that the Respondents "expect to be in a position to produce the remaining records, including the vast majority of Mr. Rapino's records by no later than November 16, 2018" and have asked for our consent to vary Mr. Justice Phelan's order.

We cannot subscribe to the Respondents' unilateral narrowing of the Commissioner's data request set out in Mr. Chisholm's October 26 letter. The Commissioner's position with respect to clickstream and transactional data was that the Respondents should produce all such data because, among other things, the Respondents should not be permitted to set up an objection about the dataset being too big, when their response to this motion deprived the Commissioner of information that he could use to put forward a more focused request. In this regard, the Respondents had not provided the Commissioner with a list of fields or associated data dictionaries or engaged in any discussion regarding the portions of the Respondents' data that would be responsive to the Commissioner's request. Nor have they done so to date.

Pursuant to the Tribunal's admonition, the Commissioner provided a narrowed data request the same day Justice Phelan issued his decision. We heard back from Mr. Chisholm approximately a week later on October 26. Unfortunately, Mr. Chisholm's letter incorrectly suggests the Commissioner agreed during his Reply to limit data production to certain fields referred to in our letter of August 24. As noted above, the Commissioner's position was just the opposite. In addition, and contrary to the suggestion in Mr. Chisholm's October 26 letter that the Commissioner's post-hearing data-request seeks new categories of data, our August 24 letter was clear that the data being sought "would include" certain fields and provided "example[s]" only.

Further, and contrary to the contention that the Commissioner "agreed to receive production without additional information", at no point did we ever agree that the Respondents should not "provide unique software", which would of course be a document for the purpose of the *Competition Tribunal Rules*. Among other things, we specifically

requested data dictionaries and a description of the relevant software during our discussions with you at the hearing.

In addition, while Mr. Chisholm's October 26 letter indicates that the Respondents' "data is not sorted by domain name" and "seating charts are not collected as part of transactional data", the Respondents have still not disclosed the fields of data they maintain and whether any additional data could serve as a substitute. The Respondents' documents indeed indicate this data exists and is used by the Respondents in their

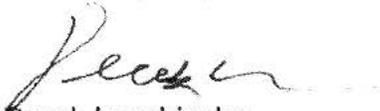
[REDACTED] We also maintain our request for seating charts or suitable alternatives, among other things.

The Commissioner's position is that the Respondents should either provide all of the transactional data (inclusive of all fields, etc.) from January 1, 2017 through October 17, 2018 or provide a complete list of the fields they *do* keep so that we can focus the Commissioner's data request accordingly. As set out at paragraphs 20 and 21 of Justice Phelan's decision, it is not for the Respondents to unilaterally circumscribe the Commissioner's request without his prior authorization or an order of the Tribunal.

The Respondents' significant non-compliance with not only the deadline imposed by the Tribunal, but also the substance of its order, is a matter that in and of itself warrants attention by the Tribunal. Moreover, the Respondents' proposed approach leaves several matters outstanding, having a bearing not only on the Respondents' disclosure obligations, but also the timelines set out in the Scheduling Order.

In view of the foregoing, the Commissioner is not in a position to consent to your request as framed. We propose that you prepare a letter to the Tribunal (an informal motion under the *Competition Tribunal Rules*) requesting a case conference where the parties can speak to these unresolved issues.

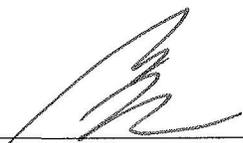
Yours very truly,

  
Derek Leschinsky

c. François Joyal, Paul Klippenstein (*Department of Justice Canada*)

**TAB K**

This is Exhibit "K" referred to in the affidavit of  
.....Adam D. H. Chisholm.....  
sworn before me this 7<sup>th</sup> day of November, 2018

  
\_\_\_\_\_  
A Commissioner, etc.



Ministère de la Justice  
Canada

Department of Justice  
Canada

Cote de sécurité – Security classification

PROTÉGÉ B – PROTECTED B

Bureau de la  
concurrence  
Services juridiques

Competition Bureau  
Legal Services

Place du Portage, Tour  
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50, rue Victoria  
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Téléphone/Télocopieur Telephone/Fax  
(819) 956-2842 (819) 953-9267

November 2, 2018

David W. Kent  
McMillan LLP  
Brookfield Place  
181 Bay Street, Suite 4400  
Toronto, Ontario  
Canada M5J 2T3

Dear Mr. Kent:

**Re: Commissioner of Competition v. Live Nation Entertainment Inc., et al.  
Competition Tribunal File. CT-2018-005**

Please find enclosed a Supplemental Affidavit of Documents of the Commissioner of Competition. I should note that it has come to our attention that certain website downloads for [www.ticketmaster.ca](http://www.ticketmaster.ca), [www.ticketmaster.com](http://www.ticketmaster.com) and [www.ticketsnow.com](http://www.ticketsnow.com) that were produced to the Respondents in July were inadvertently omitted from Schedule A of the Affidavit of Documents of the Commissioner dated July 19, 2018. The website downloads were included in the Commissioner's initial production in a folder labelled "NFR" and could be accessed by using the index.html file. Those website downloads are now reflected in Schedule A of the Affidavit of Documents of the Commissioner dated October 31, 2018.

Yours very truly,



Derek Leschinsky

c. François Joyal, Paul Klippenstein (*Department of Justice Canada*)

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the *Competition Act*;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

LIVE NATION ENTERTAINMENT, INC., LIVE NATION WORLDWIDE, INC.,  
TICKETMASTER CANADA HOLDINGS ULC, TICKETMASTER CANADA LP,  
TICKETMASTER L.L.C., THE V.I.P. TOUR COMPANY, TICKETSNOW.COM, INC., and  
TNOW ENTERTAINMENT GROUP, INC.

Respondents

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**SUPPLEMENTAL AFFIDAVIT OF DOCUMENTS  
OF THE COMMISSIONER OF COMPETITION  
SWORN OCTOBER 31, 2018**

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I, SOPHIE BEAULIEU, of the Town of Mount Royal, in the Province of Québec, solemnly affirm that:

1. I am a Senior Competition Law Officer with the Competition Bureau and am an authorized representative of the Commissioner of Competition (the "**Commissioner**") for the purpose of this affidavit.
2. A diligent search of the Commissioner's documents has been conducted and I have made appropriate inquiries of others to inform myself in order to make this affidavit.
3. This Supplemental Affidavit of Documents in combination with the Affidavit of

Documents of the Commissioner dated July 19, 2018 discloses, to the full extent of my knowledge, information and belief, all of the documents relevant to the matters in issue in this Application that are or were in the possession, power or control of the Commissioner.

4. I have listed and described in **Schedule A** of this Supplemental Affidavit of Documents the relevant documents in the Commissioner's possession, power or control not listed in Schedule A of the Affidavit of Documents of the Commissioner dated July 19, 2018 for which no privilege is claimed.
5. I have listed and described in **Schedule B** of this Supplemental Affidavit of Documents the relevant documents in the Commissioner's possession, power or control not listed in Schedule B of the Affidavit of Documents of the Commissioner dated July 19, 2018 for which the Commissioner claims privilege, including the grounds for each such claim.
6. I have listed and described in **Schedule C** of this Supplemental Affidavit of Documents the relevant documents that were, but are no longer in the Commissioner's possession, power or control not listed in Schedule C of the Affidavit of Documents of the Commissioner dated July 19, 2018.

AFFIRMED before me at the City of Montreal  
in the Province of Quebec  
on October 31, 2018

  
A Commissioner for taking Oaths

  
Sophie Beaulieu



**CT-2018-005**

**COMPETITION TRIBUNAL**

**B E T W E E N:**

**The Commissioner of Competition  
(Applicant)**

**and**

**LIVE NATION ENTERTAINMENT, INC., LIVE  
NATION WORLDWIDE, INC., TICKETMASTER  
CANADA HOLDINGS ULC, TICKETMASTER  
CANADA LP, TICKETMASTER L.L.C., THE V.I.P.  
TOUR COMPANY, TICKETSNOW.COM, INC., and  
TNOW ENTERTAINMENT GROUP, INC.  
(Respondents)**

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**AFFIDAVIT OF DOCUMENTS OF THE  
COMMISSIONER OF COMPETITION  
SWORN OCTOBER 31, 2018**

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**ATTORNEY GENERAL OF CANADA**  
Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22nd Floor  
Gatineau, QC K1A 0C9  
Fax: (819) 953-9267

François Joyal  
Tel: (514) 283-5880

Derek Leschinsky  
Tel: (819) 956-2842

Paul Klippenstein  
Tel:(819) 934-2672

Ryan Caron  
Tel: (819) 953-3889

Katherine Rydel  
Tel: (819) 997-2837

**Counsel to the Commissioner of Competition**

**THE COMPETITION TRIBUNAL  
IN THE MATTER OF the *Competition Act*,  
RSC 1985, c C-34, as amended;  
AND IN THE MATTER OF an application by  
the Commissioner of Competition for orders  
pursuant to section 74.1 of the *Competition Act*  
regarding conduct reviewable pursuant to  
paragraph 74.01(1)(a) and section 74.05 of the  
*Competition Act*;**

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION  
Applicant**

**- and -**

**LIVE NATION ENTERTAINMENT, INC.,  
LIVE NATION WORLDWIDE, INC.,  
TICKETMASTER CANADA HOLDINGS  
ULC, TICKETMASTER CANADA LP,  
TICKETMASTER L.L.C., THE V.I.P. TOUR  
COMPANY, TICKETSNOW.COM, INC., and  
TNOW ENTERTAINMENT GROUP, INC.  
Respondents**

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**AFFIDAVIT OF ADAM DONALD HUNT  
CHISHOLM, SWORN NOVEMBER 7, 2018**

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**McMILLAN LLP**  
Brookfield Place  
181 Bay Street, Suite 4400  
Toronto, Ontario M5J 2T3

Tel: (416) 865-7000

Fax: (416) 865-7048

Mark Opashinov  
David W. Kent  
Guy Pinsonnault  
Adam D.H. Chisholm  
Joshua Chad

Lawyers to Live Nation Entertainment, Inc., Live  
Nation Worldwide, Inc., Ticketmaster Canada  
Holdings ULC, Ticketmaster Canada LP,  
Ticketmaster L.L.C., The V.I.P. Tour Company,  
Ticketsnow.Com, Inc. and Tnow Entertainment  
Group, Inc.