

★ **SEP 08 2016** ★

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

LONG ISLAND OFFICE

-----X  
DAVID HIMBER, :  
on behalf of plaintiff and a class, :  
 :  
Plaintiff, :  
 :  
vs. :  
 :  
LIVE NATION WORLDWIDE, INC.; :  
and LIVE NATION MARKETING, INC., :  
 :  
Defendants. :  
-----X

**CV 16 5001**

**WEXLER, J.  
BROWN, M. J.**

**COMPLAINT – CLASS ACTION**

**INTRODUCTION**

1. Plaintiff brings this action to secure redress for the conduct of defendants in deceptively advertising theatre tickets at one price and selling them at a higher price.
2. Plaintiff alleges violation of New York General Business Law §§ 349 and 350.

**JURISDICTION AND VENUE**

3. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332(d) (Class Action Fairness Act). There are over 100 proposed class members. Plaintiff and members of the class are of diverse citizenship from defendants. The claims of the proposed class members exceed the sum or value of \$5,000,000, exclusive of interest and costs. As set forth below, plaintiff estimates that there are 60,000 class members per year and statutory damages of at least \$3 million per year, for a class period of 3 years.
4. Personal jurisdiction and venue are proper because defendants' conduct concerns their advertising and sale of tickets for performances at the Nikon at Jones Beach Theatre at Jones Beach State Park, located within this District.

**PARTIES**

5. Plaintiff David Himber is a resident, domiciliary and citizen of New York.

6. Defendant Live Nation Worldwide, Inc., is a Delaware corporation. Its principal place of business is 9348 Civic Center Drive, Beverly Hills, CA 90210. It does business in New York. Its address for service of process is c/o Corporate Creations Network Inc., 15 North Mill Street, Nyack, New York 10960.

7. On information and belief, Live Nation Worldwide, Inc., as successor by merger to Beach Concerts, Inc., is the licensee of the State of New York authorized to operate what is now known as the Nikon at Jones Beach Theatre at Jones Beach State Park. *Perez v. Beach Concerts, Inc.*, 158373/13, 2016 WL 3566115 (N.Y.Co. Sup.Ct., June 30, 2016).

8. Defendant Live Nation Marketing, Inc., is a Delaware corporation. Its principal place of business is 9348 Civic Center Drive, Beverly Hills, CA 90210. Its address for service of process is c/o Corporate Creations Network Inc., 15 North Mill Street, Nyack, New York 10960. It is also involved in the operation of the Nikon at Jones Beach Theatre.

9. Defendants Live Nation Worldwide, Inc., and Live Nation Marketing, Inc., also operate numerous other entertainment venues in New York, including Radio City Music Hall, Madison Square Garden, The Space At Westbury, and B.B. King's Blues Club & Grill.  
(<http://www.livenation.com/#>)

**FACTS**

10. Plaintiff David Himber was interested in purchasing 3 concert tickets for the September 1, 2016 Rascal Flatts concert at Nikon at Jones Beach Theatre, 1000 Ocean Parkway, Wantagh, New York 11793.

11. Plaintiff accessed the Live Nation website selling tickets for the performance and

saw that the price of the tickets was \$49.50 each, but there was a \$15.25 per ticket surcharge or fee for purchasing on line. (See Exhibit A)

12. Plaintiff was about 20 minutes away from the box office and decided to go there in person to avoid the surcharge.

13. Although the price of each ticket was \$49.50, plaintiff was charged \$55.50 per ticket at the box office. (Exhibit B)

14. The tickets were purchased from the box office, not from a third party.

15. Plaintiff paid \$55.50 each as he had already incurred the time and expense of visiting the box office and there was no cheaper alternative.

16. Nothing on the web site disclosed that there was a charge of \$6 for purchasing tickets at the box office.

17. Since it is impossible to avoid a charge of at least \$6 for purchasing a ticket, the true price of each ticket was \$55.50.

18. It is the policy and practice of defendants to charge at least \$6 in addition to the face value of the ticket to persons purchasing tickets at the Nikon at Jones Beach Theatre box office.

19. On information and belief, the same policy and practice is applied at other entertainment venues operated by defendants.

20. The practice of advertising one price for a ticket and then charging a higher price when people arrive at the box office is deceptive and injurious.

#### **CLASS ALLEGATIONS**

21. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class.

22. The class consists of (a) all persons (b) who paid either or both defendants (c) an amount in excess of the ticket price listed on defendants' web site (d) for tickets purchased at the box office (e) on or after a date 3 years prior to the filing of this action.

23. Excluded from the class are defendants; any affiliate, parent, or subsidiary of defendants; any entity in which defendants have a controlling interest; any officer, director, or employee of defendants; any successor or assign of defendants; anyone employed by counsel for plaintiff in this action; and any judge to whom this case is assigned, his or her spouse, and all persons within the third degree of relationship to them, as well as the spouses of such persons.

24. The class is so numerous that joinder of all members is not practicable. There are more than 100 class members.

25. Plaintiff estimates that there are in fact thousands of members of the class. The Jones Beach theater seats 15,000. There are multiple performances each week. On information and belief, at least 60,000 tickets per year are sold at the box office. Thousands more are sold at the other venues operated by defendants in New York.

26. There are common questions of law and fact with respect to the class, which common questions predominate over questions affecting only individual class members. These common questions include:

- a. What defendants' practice is regarding the advertising and sale of tickets.
- b. Whether such practice is deceptive.
- c. Whether defendants violated General Business Law §349.
- d. Whether defendants violated General Business Law §350.

27. Plaintiff's claims are typical of those of the proposed class. All of their claims have the same legal and factual basis.

28. Plaintiff will fairly and adequately represent the class. There is no conflict of interest between the plaintiff and the class members. Plaintiff has retained counsel competent and experienced in class action litigation, and intends to prosecute this action vigorously.

29. This class action is superior to other available means for the fair and efficient adjudication of this dispute. While the individual injuries suffered by each proposed class member are meaningful, they are sufficiently small that individual actions are not economical. Even if class members could afford individual litigation, there is no reason to burden the courts with multiple actions.

**COUNT I – N.Y. GBL §349**

30. Plaintiff incorporates paragraphs 1-29.

31. Defendants' practice of advertising one price for a ticket and then charging a higher price when people arrive at the box office violates New York General Business Law §349, damaging each purchaser in the amount of the excess.

32. Section 349 provides:

**§ 349. Deceptive acts and practices unlawful**

**(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful. . . .**

**(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.**

**(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff. . . .**

WHEREFORE, the Court should enter judgment in favor of plaintiff and the class members for the following relief:

- i. Actual damages;
- ii. Statutory damages of \$50 per ticket;
- iii. Attorney's fees, litigation expenses and costs;
- iv. Such other or further relief as the Court deems proper.

**COUNT II – NEW YORK GENERAL BUSINESS LAW § 350**

33. Plaintiff incorporates paragraphs 1-29.

34. Defendants' conduct violated New York General Business Law § 350, which

provides:

**False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.**

35. Specifically, defendants violated New York General Business Law §350 through their practice of advertising one price for a ticket and then charging a higher price when people arrive at the box office, damaging each purchaser in the amount of the excess.

36. New York General Business Law § 350-a, subd. 1 provides:

**1. The term "false advertising" means advertising, including labeling, of a commodity . . . if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. . . .**

37. The increased price of the ticket is a material fact.

38. Plaintiff is entitled to sue under New York General Business Law §350-e, subd. 3,

which provides:

**3. Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages, up to ten thousand dollars, if the court finds that the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.**

WHEREFORE, the Court should enter judgment in favor of plaintiff and the class members for the following relief:

- i. Statutory damages of at least \$500 per purchase;
- ii. Attorney's fees, litigation expenses and costs;
- iii. Injunctive relief against further violations;
- iv. Such other or further relief as the Court deems proper.

**JURY DEMAND**

Plaintiff demands trial by jury.

s/Abraham Kleinman  
Abraham Kleinman  
KLEINMAN LLC  
626 RXR Plaza  
Uniondale, NY 11556-0626  
(516) 522-2621  
(888) 522-1692 (fax)  
akleinman@akleinmanllc.com

s/Tiffany N. Hardy  
Tiffany N. Hardy  
EDELMAN, COMBS, LATTURNER  
& GOODWIN, L.L.C.  
20 S. Clark Street, Suite 1500  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)



**NOTICE OF ASSIGNMENT**

Please be advised that all rights relating to attorney's fees have been assigned to counsel.

s/Abraham Kleinman  
Abraham Kleinman

Abraham Kleinman  
KLEINMAN LLC  
626 RXR Plaza  
Uniondale, NY 11556-0626  
(516) 522-2621  
(888) 522-1692 (fax)  
[akleinman@akleinmanllc.com](mailto:akleinman@akleinmanllc.com)

**DOCUMENT PRESERVATION DEMAND**

Plaintiff hereby demands that each defendant take affirmative steps to preserve all recordings, data, documents, and all other tangible things that relate to plaintiff, the events described herein, any third party associated with any telephone call, campaign, account, sale or file associated with plaintiff, and any account or number or symbol relating to them. These materials are likely very relevant to the litigation of this claim. If defendant is aware of any third party that has possession, custody, or control of any such materials, plaintiff demands that defendant request that such third party also take steps to preserve the materials. This demand shall not narrow the scope of any independent document preservation duties of the defendant.

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Abraham Kleinman

**EXHIBIT A**

Sec 7L, Row N

You'll get 3 tickets together in this row.



Standard Ticket  
STADIUM 1  
Sec 7L, Row N

Standard Ticket  
\$49.50 ea

3

3 Seats  
\$148.50+ Fees

Rascal Flatts: My Own Lane

9.1.16 @ 7:00

10:00

SEAT  
11

W  
11

SEAT  
3-5

## Get something extra



Add an ALL ACCESS Rascal Flatts Fan Club Membership to your ticket order!



\$24.95

Package includes Exclusive Content Including Photos, Audio, and Video, Exclusive Contests and the Chance to Win Tickets, Merchandise, and More, The Chance to Win a Meet & Greet with Rascal Flatts\*\*, Members-only Message Board, Blog, and Commenting. \*\* Meet & Greets are subject to availability. You will receive an email with activation details within five (5) business days of your ticket purchase.

Rascal Flatts Fan Club Membership

\$24.95



Nikon at Jones Beach Theater - Fast Lane



\$5.00

US \$194.25 w/ Fees

**EXHIBIT B**



JB0901 7L P 13 ADULT EJB0901 Page 16 of 16 P  
 EVENT CODE SECTION/AISLE ROW/BOX SEAT ADMISSION EVENT CODE  
 55.50 ENTER GATE D 55.50 32X  
 SECTION/AISLE 7L RASCAL FLATTS  
 VI 32X CN 47348  
 ROW SEAT SEC 7L  
 P 13 VI997YLC  
 YLC212A RHYTHM & ROOTS TOUR 2016  
 NIKON JONES BEACH THTR A 55.50  
 14JUN16 THU SEP 01 2016 7:30PM SEAT 13  
 LIVENATION.com

240952306395



LIVE NATION

JB0901 7L P 12 ADULT EJB0901  
 EVENT CODE SECTION/AISLE ROW/BOX SEAT ADMISSION EVENT CODE  
 55.50 ENTER GATE D 55.50 32X  
 SECTION/AISLE 7L RASCAL FLATTS  
 VI 32X CN 25844  
 ROW SEAT SEC 7L  
 P 12 VI997YLC  
 YLC212A RHYTHM & ROOTS TOUR 2016  
 NIKON JONES BEACH THTR A 55.50  
 14JUN16 THU SEP 01 2016 7:30PM SEAT 12  
 LIVENATION.com

721703431903



LIVE NATION

JB0901 7L P 11 ADULT EJB0901  
 EVENT CODE SECTION/AISLE ROW/BOX SEAT ADMISSION EVENT CODE  
 55.50 ENTER GATE D 55.50 32X  
 SECTION/AISLE 7L RASCAL FLATTS  
 VI 32X CN 04340  
 ROW SEAT SEC 7L  
 P 11 VI997YLC  
 YLC212A RHYTHM & ROOTS TOUR 2016  
 NIKON JONES BEACH THTR A 55.50  
 14JUN16 THU SEP 01 2016 7:30PM SEAT 11  
 LIVENATION.com

601444346591



LIVE NATION

**CUSTOMER RECEIPT**  
 EVENT CODE SECTION/AISLE ROW/BOX SEAT ADMISSION EVENT CODE  
 EJB0901 YLC212  
 HIMBER/DAVID  
 87959  
 VISA \*\*\*\*\*0463  
 14-JUN-16 \$166.50  
 TICKETS  
 SIGNED: LIVENATION.com

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LIVE NATION



The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

U.S. DISTRICT COURT E.D.N.Y. SEP 08 2016

I. (a) PLAINTIFFS

DAVID HIMBER, on behalf of plaintiff and a class

(b) County of Residence of First Listed Plaintiff NASSAU (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

KLEINMAN LLC 626 RXR PLAZA UNIONDALE, NEW YORK 11556-0626 (516) 522-2621

DEFENDANTS

LIVE NATION WORLDWIDE, INC. and LIVE NATION MARKETING, INC.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

CV 16 5021

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File.

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C § 1332(d)

Brief description of cause: Complaint for deceptive pricing and advertising

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

Handwritten signature of attorney

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Abraham Kleinman, counsel for David Himber, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason  
Matter filed as a putative class action.

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

Not applicable

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No.
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? Yes.
  - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes.

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants; if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes  No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain)  No

I certify the accuracy of all information provided above.

Signature: 