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**Commentary: TICKETMASTER – LIVE NATION**

**An AAI WHITE PAPER**

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**Executive Summary**

On February 10, 2009, Ticketmaster Entertainment, Inc. and Live Nation, Inc. announced an agreement to merge and create a new entity called Live Nation Entertainment. The proposed transaction, which currently is under review by the Department of Justice, raises substantial antitrust concerns.<sup>1</sup> This paper reviews these issues.

Before considering the specific antitrust problems, the paper provides a context for this discussion by examining the industry, the parties, and the merger itself. Turning then to the competitive issues, the paper looks at 5 discrete markets within the live entertainment performance industry: talent management, venue management, event promotion, primary ticket sales (i.e., initial sale of tickets at face value), and secondary

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<sup>1</sup> In addition to the U.S. Department of Justice, TicketNews reports that "Attorney general offices in at least eight states, Connecticut, New York, Pennsylvania, Massachusetts, Florida, Iowa, Illinois and California, where both companies are headquartered, are reportedly working together to investigate the proposed merger, primarily as it relates to their individual states where one or both of the companies have contracts with publicly owned arenas and stadiums." Branch, Jr., "Ticketmaster/Live Nation merger: Several states join in the investigation," TicketNews, <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Several-states-join-in-the-investigation4091671>, Apr. 16, 2009.

ticket sales (i.e., resale of tickets at market value). The most problematic of these from an antitrust perspective is primary ticket sales, where Ticketmaster and Live Nation are horizontal competitors and, by far, the two leading firms in the market. The paper's discussion of ticket sales concludes that primary and secondary sales should be treated as separate markets; in addition, within the primary sales market, ticket sales for events at large venues and for sports events each probably merit analysis as individual markets. Regardless of how the primary sales market is defined, combining Ticketmaster and Live Nation would create an overwhelmingly dominant entity.

The discussion considers two other attributes of the proposed transaction that make it even more problematic. First, one of the chief concerns raised by the merger is that Live Nation Entertainment would be a vertically integrated enterprise with dominance or substantial power on five market levels. The new entity would therefore be able to use its strengths in some markets as leverage to gain customers or compliance in others. This vertical integration would effectively frustrate new entry because, as a practical matter, it would require firms seeking to compete seriously against Live Nation Entertainment to enter the industry on several levels at once. The second factor is that the merged entity would likely enjoy market power not just as a seller but also as a buyer. In essence, the company's market dominance would benefit it in both ways.

The paper also considers whether the merger, suspect on its surface, might yield efficiencies that would warrant not challenging the transaction. In this regard, the Department of Justice may consider only efficiencies that (a) arise specifically from the merger and would not be attainable in other reasonable ways, (b) are not speculative and whose benefits are verifiable, and (c) outweigh the harm caused in every adversely

affected market. The efficiencies claimed by the parties satisfy none of these requirements.

Finally, the paper assesses whether any conduct remedy (i.e., prohibitions on behavior) or an imposed structural requirement (e.g., a party's prior sale of some divisions) would likely resolve the problems raised by the proposed merger. The answer is no. The paper concludes, therefore, that the appropriate disposition is for the Department of Justice to challenge the merger and seek its complete prohibition.

## **I. Introduction**

On February 10, 2009, Ticketmaster Entertainment, Inc. and Live Nation, Inc. announced their agreement to engage in a "merger of equals" and create a new entity called Live Nation Entertainment.<sup>2</sup> In almost all of the markets within in the live performance industry, extending from the management of artists to the sale of tickets, the proposed merger appears likely either to have or threaten adverse competitive effects. Consequently, the merger, as currently structured, probably violates Section 7 of the Clayton Act and warrants legal challenge.

Although the managements of the two companies have reached agreement, government regulatory agencies and the companies' shareholders and lenders have not yet endorsed the deal. As part of the regulatory review process, the parties, before consummating the merger, must submit information to the U.S. Department of Justice Antitrust Division ("DOJ"), which may challenge the merger in court. This paper

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<sup>2</sup> United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster Entertainment, Inc, p. 9 (Feb. 10, 2009) ("8-K, Feb. 13, 2009"), available at <http://investors.ticketmaster.com/>. The parties filed a copy of the agreement itself with the SEC on February 13, 2009. Live Nation Entertainment will be a wholly owned subsidiary of Live Nation, Inc.

considers some of the key antitrust issues presented by the proposed transaction. These concerns include the following:

1. Horizontal overlap in market for primary ticket sales (i.e., the initial sale of tickets at face value);
2. Elimination of potential competition in the market for the management of artists;
3. Elimination of potential competition in the market for management of performance venues;
4. Elimination of potential competition in the market for promotion of live entertainment events;
5. Elimination of potential competition for secondary ticket sales (i.e., the re-sale of tickets at market value);
6. Vertical foreclosure of market entry, which would enable Live Nation Entertainment to use its possession of dominant or powerful positions in most of the industry's markets to frustrate new entry or vigorous competition in any one of the markets; and
7. Monopsony problems (i.e., problems stemming from market power as a buyer).

Two additional attributes are critical to any antitrust review of the proposed merger.

8. Lack of demonstrable efficiencies due specifically to the merger that would outbalance the merger's likely anticompetitive effects in every injured market; and

9. Lack of workable conduct or structural remedies, short of prohibiting consummation of the merger, that would adequately protect consumer welfare and promote competition in the affected markets.

Although all of these matters warrant investigation and consideration, the ones involving the existing horizontal overlap in the market for primary ticket sales and the concerns arising from vertical integration are the most problematic. This paper's overall conclusion is that if the merger proceeds, the benefits from the competition that has been blooming in the last 18 months will likely be lost, pathways to new competition will be blocked, and the industry will be dominated at almost all levels by a single massive entity. We believe it likely that this entity, operating free of significant competition, would charge prices above those that would prevail in a competitive market, and that consumers would have little recourse but to pay that price or not attend at all.

Before turning to the specific antitrust concerns, this White Paper will consider the nature of the industry, the parties, and the proposed transaction.

## **II. The Industry<sup>3</sup>**

The live performance entertainment industry earns most of its revenues from sporting events and concerts, although theatrical productions, art exhibits, and festivals also contribute. In 2007, concerts attracted \$6.7 billion in primary sales, sporting events commanded \$14.3 billion, and the industry overall enjoyed an additional \$2.6 billion in

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<sup>3</sup> Excellent descriptions of the operation and economics of the popular music industry are: Connolly and Krueger, "Rockonomics: The Economics of Popular Music," NBER Working Paper No. 11282 (2005), <http://irs.princeton.edu/pubs/pdfs/499.pdf>, and Krueger, "The Economics of Real Superstars: The Market for Rock Concerts in the Material World," 23 *Journal of Labor Economics* 1 (2005) (University of Chicago Press), <http://www.irs.princeton.edu/pubs/pdfs/484.pdf>.

online secondary ticket sales.<sup>4</sup> Between 1996 and 2003, revenue per show increased by 60%, the super-star artists performed 18% fewer shows, and the total number of tickets sold by the industry declined. The increase in revenue per show results from both an increase in the number of tickets sold per show and an increase in ticket price.

Most top-tier concert artists – those drawing the largest crowds and appearing at the largest venues – use talent management companies to handle their performance and business needs. Talent managers guide the artist’s career. This typically involves not just advising the artist on image and performance decisions. It may also include coordinating an array of services provided by specialists, such as booking agents, who contact promoters on behalf of artists and help arrange performances; lawyers, who help prepare and review contracts and avoid or resolve legal disputes; and business managers, who provide business advice, collect fees, and maintain organized records. Frequently, talent management relationships are long-term in nature. Ticketmaster’s Front Line subsidiary is the dominant provider of artist management services.

The artist, often through the efforts of a booking agent, will contract with a promoter to perform an individual concert or arrange a tour. The market for booking agents is diverse, led by the William Morris Agency, Creative Artists Agency (“CAA”), and International Creative Management (“ICM”). Neither Live Nation nor Ticketmaster compete in the booking agency market, although some members of that market fear that Live Nation Entertainment might provide its own booking agent services or have artist’s

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<sup>4</sup> Testimony of Robert W. Doyle, Jr. before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy, “Competition in the Ticketing and Promotion Industry: The Potential Anticompetitive Effects of the Proposed Combination of Ticketmaster Entertainment Inc. and Live Nation, Inc.”, p.7, February 26, 2009.

managers deal directly with promoters and bypass independent booking agents altogether.

The promoter is responsible for renting the venue, marketing the event, and covering or reimbursing expenses for such needs as transportation, technical equipment, lodging, and security. Some promoters may have exclusive, long term-relationships with companies such as Ticketmaster to sell tickets for their events. Live Nation is the world's largest promoter. Until recently, when it inaugurated its own ticket distribution service, Live Nation used Ticketmaster to provide these services for events it promoted.

In the past 18 months, Live Nation has entered into several widely-publicized, multi-faceted deals with some of the industry's most prominent artists. Under these arrangements, known as "360-degree" deals, Live Nation gives the artist a large initial payment in return for a share of the artist's revenues from that artist's entire array of activities over a set period of years. These activities include not just concerts and tours, but also recording, advertising, and merchandise sales. Similar 360-degree deals are also used in the recording industry, although typically Live Nation has focused on superstars, whereas the recording industry has focused on artists that are emerging or established, but not of the highest stature. Many members of the recording industry believe that, after the merger, Live Nation Entertainment will go beyond Live Nation's current emphasis on superstars and undermine the recording companies' relationships with its own artists.

From the revenues on primary ticket sales, the artist usually receives a guaranteed advance, after which the promoter recovers its expenses plus a guaranteed profit. The artist and promoter then split the remaining ticket revenues, with the artist often receiving 85% or more of this amount. Among the promoter's expenses are the amounts that the

promoter pays to the venue. These typically include fees for the use of the building (calculated as a daily rate or a percentage of ticket sales), plus amounts to cover staffing, heating, electricity, air conditioning, and other costs related to usage. The venue may also require a percentage of the ticket seller's convenience fees, perhaps 25%, and up to 30–40% of the artist's merchandise sales. Revenue from concert ticket sales generally dwarf the royalties generated by the artist's musical compositions and sound recordings. Artists generally pay their managers commissions calculated as a percentage of the artist's revenues.

Many of the large venues, including stadiums and arenas, are owned or managed by companies such as SMG, Live Nation, or AEG, the three leading firm in this market.<sup>5</sup> Regardless of who owns or manages them, most major venues have agreements with companies such as Ticketmaster or Live Nation to provide primary ticket sale distribution services. These agreements typically are exclusive, long-term arrangements, usually lasting from three to six years. Ticketmaster, by far the largest provider with over 10,000 ticket distribution agreements, generally installs its own hardware at the venue and uses its proprietary software to process ticket inquiries and sales, whether made online, at retail outlets, or by telephone, and sometimes at the venue box office as well.

Many sporting events are tied to specific venues. Baseball teams, for example, play in their own or their rivals' stadiums. Sports teams, their leagues, and/or their arenas and stadiums typically have exclusive agreements with ticket sellers to manage and

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<sup>5</sup> AEG, a subsidiary of Anschutz Entertainment Group, is the nation's second largest promoter of live entertainment events. AEG owns or controls approximately 60 venues. It is particularly well known for promoting sporting events, concerts, festivals, and other events in large venues. Live Nation, the largest promoter, draws over three times the concert revenue as AEG. [http://leisureblogs.chicagotribune.com/turn\\_it\\_up/2009/02/live-nationticketmaster-merger-to-hit-music-fans-in-the-wallet.html](http://leisureblogs.chicagotribune.com/turn_it_up/2009/02/live-nationticketmaster-merger-to-hit-music-fans-in-the-wallet.html); [http://aegworldwide.com/03\\_music/music.html](http://aegworldwide.com/03_music/music.html); [http://www.aegworldwide.com/08\\_corporate/about\\_us.html](http://www.aegworldwide.com/08_corporate/about_us.html).

coordinate primary ticket sales online, by telephone, and at retail outlets. As with concerts, ticket sellers may sometimes also handle sales made at the venue box office.

Providers of ticket distribution services, such as Ticketmaster and Live Nation, market and sell tickets on behalf of the venue. Ticketmaster and its rivals get their revenue not from the amounts they receive for the face value of the tickets but from the convenience fees and various service charges added to the price of each ticket or order. In return for the exclusive right to sell tickets, the provider of ticket distribution services shares the fees with the event's venue. The split may be negotiated as a percentage of the fees or as a fixed payment, which usually is substantial and frequently paid at the commencement of an exclusivity agreement. On some occasions, the ticket distribution service provider may also give a portion of the fees to the artist or promoter.<sup>6</sup>

Individuals or companies that have purchased tickets at face value may turn to the online secondary market to resell those tickets. These sales are often at above face value for desirable events, although in other instances, the tickets may be sold at less than face value. While many view sales at above face value as "scalping," others view them effectively as constituting merely an auction that provides tickets to consumers at the prevailing market price. Objections to the secondary market are exacerbated by the fact that brokers often manage to purchase tickets in bulk from primary ticket sellers, sometimes by using a large cadre of purchasers, and other times by using sophisticated computer programs known as "bots" that are designed to quickly make bulk purchases. In still other instances, brokers get tickets, legally or illegally, through "private connections," for the express purpose of selling them at inflated prices on the secondary

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<sup>6</sup> : Connolly and Krueger, "Rockonomics: The Economics of Popular Music," NBER Working Paper No. 11282, p 6-7 (2005), <http://irs.princeton.edu/pubs/pdfs/499.pdf>,

market. Artists, managers, or personnel connected with venues or primary ticket sellers also sometimes “divert” tickets to the secondary sales market. The leading, individual online secondary sellers are Stubhub, owned by E-bay, and TicketsNow, owned by Ticketmaster.

Several developments are having a profound impact on the industry’s dynamics. First, an increasing portion an artist’s revenues come from concerts and touring, as opposed to recordings. Previously, concerts stimulated demand for recordings; now the reverse is true. This change has been largely generated by piracy. Many consumers now download or stream music in ways that do not result in payments going to the artists or recording companies. Consequently, the revenues from concerts now dwarf those attributable to recordings, although recordings, whether pirated or not, may serve to increase demand for concert tickets.

A second, closely related development is that data and ticket sale trends in the industry suggest the presence of monopolization. If so, this circumstance would certainly raise serious questions regarding the wisdom of permitting the two most dominant entities in the industry, by far, to join forces. Princeton University economist (and assistant treasury secretary for designate for economic policy) Alan Krueger has studied this situation in depth. As he describes it:

After growing mildly faster than consumer price inflation – and in unison with other entertainment events – the price of concert tickets exploded from 1996 to 2003. The average ticket price increased 82% from 1996 and 2003 while the CPI increased 17 percent. Moreover, the number of tickets sold, fraction of seats in the venue sold, and number of shows performed by star performers have all trended slowly downward for more than a decade. These trends are consistent with the industry becoming more monopolized. The question is, why?<sup>7</sup>

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<sup>7</sup> Krueger, “The Economics of Real Superstars: The Market for Rock Concerts in the Material World,” 23 *Journal of Labor Economics* 1 (2005) (University of Chicago Press),

More particularly, Krueger notes that despite the falling ticket sales, concert revenues grew, with top artists drawing an increasing percentage of these revenues.<sup>8</sup>

Krueger attributes the decrease in primary ticket sales to the growth in prices. After examining several reasons for the extraordinary price increases, Krueger concludes that it is likely due to the breakdown in “complementarities” between sales of concert tickets and sales of recordings. Prior to this development, he suggests, concerts were priced at below market value in order to increase the sales of recordings; now, however, piracy has substantially undermined this latter revenue source. Consequently, the connection between the two markets has weakened. The prices for primary sales of concert tickets, therefore, have been rising to the level that would be charged without consideration of the impact that those sales might have on revenues from recordings.<sup>9</sup> While piracy and other free downloading has made recorded music more available, the impact of this increased availability has been to increase the demand to see live performances. In essence, Krueger concludes, “it is likely that the downloading of music will put upward pressure on concert prices and revenue in the near future.”<sup>10</sup> Whether the upward pressure on prices has been pushing prices toward monopolistic levels while reducing ticket sales to below competitive market levels – and whether it will do so more easily if the merger proceeds – are issues that will likely be closely studied by the Justice Department.

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<http://www.irs.princeton.edu/pubs/pdfs/484.pdf>, p.4. Professor Krueger has recently been nominated to become the assistant treasury secretary for economic policy.

<http://www.dailyprincetonian.com/2009/03/09/23031>. March 9, 2009.

<sup>8</sup> *Id.* at 10-17.

<sup>9</sup> *Id.* at 21

<sup>10</sup> *Id.* at 29.

Third, the online secondary market has become a significant factor in the industry. Primary ticket sellers are now looking with a jealous eye at the large profit margins secondary sellers can make on tickets for popular events, and consumers often wonder why tickets for these events are sometimes not available even to purchasers who place timely orders with primary ticket sellers.

Commenting on these three developments, Live Nation's President and CEO, Michael Rapino, testified:

Album sales – which used to be the foundation for the business – have fallen by almost half since 2000. Artists are subjected to rampant piracy that steals their creativity and their livelihood. 95% of all the songs that are downloaded are downloaded illegally.

In the concert business, 40 percent of concert seats go unsold. Others sell for far more than they should because of scalpers. . . .

Computer-driven bulk purchasers suck tickets out of the primary market and deny fans a chance to see their favorite performers at a reasonable price. That benefits scalpers, but it doesn't help stakeholders in the value chain. Fans pay more, but the performers, the promoters and the venues don't get a dime. And fans who never get a chance to buy a ticket at face value are rightfully angry about it.

As for the record companies, most of those once-dominant American labels are now owned by companies based in Europe and Asia.<sup>11</sup>

While Rapino points both to piracy in the recording market and to the operation of the secondary market as serious problems, Krueger doubts that the secondary market is the key factor underlying the growth in the primary ticket sale prices. Even when brokers manage to purchase tickets in bulk, the transactions still count as purchases. When sales are made, whether individually or in bulk, artists, venues, promoters, and primary ticket sellers receive all the revenue to which their contracts entitle them. It is true that some consumers may then be forced to acquire their tickets from resale brokers when primary

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<sup>11</sup> Testimony of Michael Rapino Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, <http://judiciary.senate.gov/pdf/09-02-24RapinoTestimony.pdf>, p.3-4. Notwithstanding Mr. Rapino's generalization, Warner Music Group is located in the United States.

tickets are no longer available. But the concert market increasingly is characterized by unsold capacity, a situation that would normally trigger price reductions in competitive markets. With many tickets unsold, it is unlikely that the secondary market is responsible for the remarkable increase in primary ticket prices experienced over the past dozen or more years.<sup>12</sup>

The fourth development is that both parties to the proposed merger are vertically integrated, and becoming more so. Each is powerful in at least three aspects of the business, ranging from talent management to ticket sales. Live Nation ranks first in event promotion, second in venue management, and second in primary ticket sales, whereas Ticketmaster ranks first in artist management, first in primary sales, and second in secondary ticket sales. With this vertical power, each is able to use its strengths in some areas to secure new business in others. Only one other firm in the industry is vertically integrated – AEG owns sports teams and venues and promotes special events and concerts – and no others are on the horizon.<sup>13</sup> Live Nation and Ticketmaster are significantly larger than AEG, however, and the two leaders are increasingly challenging each other. Whereas Live Nation’s traditional strength has been in event promotion, i.e. bringing the artist to the fan, and Ticketmaster’s traditional strength has been in primary ticket sales, i.e., bringing the fan to the artist, each party has recently extended its reach. In 2008 alone, Live Nation entered the market for primary ticket sales, and Ticketmaster achieved equity control of the industry’s leading talent management company. Overall, it

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<sup>12</sup> Krueger, “The Economics of Real Superstars: The Market for Rock Concerts in the Material World,” 23 *Journal of Labor Economics* 1 (2005) (University of Chicago Press), <http://www.irs.princeton.edu/pubs/pdfs/484.pdf>, pp13-17.

<sup>13</sup> At present, Ticketmaster provides AEG with ticket distribution services, although, if the merger proceeds, AEG may seek to terminate that relationship. AEG Worldwide website, “About Us,” [http://aegworldwide.com/08\\_corporate/about\\_us.html](http://aegworldwide.com/08_corporate/about_us.html), and internal links.

is fair to conclude that, for most of the markets in the industry, the merger holds the prospect of eliminating actual or potential competition and ceding control of the market to the combined entity.<sup>14</sup>

### III. The Parties

#### A. Live Nation, Inc.

Live Nation is “the world’s largest live music company.”<sup>15</sup> The company states that it has “the most live concerts, music venues and festivals in the world and the most comprehensive concert search engine on the web.”<sup>16</sup> In its recent report on its fourth quarter and full year 2008 financial results, Live Nation elaborates:

Live Nation is the largest producer of live concerts in the world, annually producing over 22,000 concerts for 1,600 artists in 33 countries. During 2008, the company sold over 50 million concert tickets and drove over 70 million unique visitors to LiveNation.com. Live Nation is transforming the concert business by expanding its concert platform into ticketing and building the industry’s first artist-to-fan vertically integrated concert platform.<sup>17</sup>

As the music industry’s leading live event promoter, Live Nation arranges appearances and performances, whenever possible in venues that it owns, operates, or rents. With its subsidiaries, Live Nation owns, has an equity interest in, operates, or has the booking

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<sup>14</sup> The only exceptions are the booking agent market and the secondary sales market. Booking agents, however, are dependent on talent managers and promoters to make deals, and secondary sellers are initially dependent on the primary sales market to acquire their inventory.

<sup>15</sup> Live Nation Press Release, “Live Nation Reports Strong Fourth Quarter and Full Year 2008 Financial Results,” [http://media.corporate-ir.net/media\\_files/irol/19/194146/news/LYV\\_Q4\\_FY08\\_Earnings\\_Release.pdf](http://media.corporate-ir.net/media_files/irol/19/194146/news/LYV_Q4_FY08_Earnings_Release.pdf).

<sup>16</sup> PR Newswire, “Live Nation’s Artist Nation Redefines the Music Industry with Unified Rights Model,” Oct. 16, 2007, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/10-16-2007/0004683291&DATE=>.

<sup>17</sup> Live Nation Press Release, “Live Nation Reports Strong Fourth Quarter and Full Year 2008 Financial Results,” [http://media.corporate-ir.net/media\\_files/irol/19/194146/news/LYV\\_Q4\\_FY08\\_Earnings\\_Release.pdf](http://media.corporate-ir.net/media_files/irol/19/194146/news/LYV_Q4_FY08_Earnings_Release.pdf). See also United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster Entertainment, Inc, p. 8 (Feb. 10, 2009) (“8-K, Feb. 10, 2009”), <http://investors.ticketmaster.com/secfiling.cfm?filingID=1104659-09-8026>; Live Nation, <http://www.livenation.com/company/getCompanyInfo>.

rights for 159 venues worldwide, 140 domestically.<sup>18</sup> The company also promotes events and tours for many of the industry's most popular artists, including Shakira, Beyoncé, U-2, James Taylor, Nickelback, and Phish. For some major artists, such as Madonna, Shakira, Nickelback, and Jay-Z, Live Nation has long-term, multi-faceted contracts that cover activities ranging from concerts and touring to merchandise sales.

Live Nation grew largely by acquisition, “consolidat[ing] the promoter industry from over 20 companies.”<sup>19</sup> In 2006 Live Nation “acquired a 51% interest in Musictoday, the acknowledged leader in the direct-to-fan market niche.”<sup>20</sup> In this role, Musictoday serves as the online site for official merchandise sales for over 500 artists and athletes, including Elvis Presley and the Rolling Stones, and provides ticketing for many artist fan clubs.<sup>21</sup>

At the end of 2008, Live Nation let expire its 10-year agreement with Ticketmaster, pursuant to which Ticketmaster sold tickets for events promoted by Live Nation. Prior to the agreement's expiration, Live Nation had been the source of 17% of Ticketmaster's 2007 ticket sales.<sup>22</sup> By mid-2007, however, it became clear that Ticketmaster and Live Nation would not be able to settle on terms for renewing their agreement. In late 2007, therefore, Live Nation entered an agreement with Germany's

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<sup>18</sup> Live Nation 2008 Annual Report, Mar. 5, 2009, [http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec&secCat01.1\\_rs=11&secCat01.1\\_rc=10](http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec&secCat01.1_rs=11&secCat01.1_rc=10), p1, 8-9.

<sup>19</sup> Cohen, “Live Nation – Ticketmaster,” All Access, <http://all-access.com/2009/02/live-nation-ticketmaster/> Feb. 9, 2009.

<sup>20</sup> Waddell, “Ticketmaster, Live Nation Deal Unlikely to be Renewed,” Billboard.biz, [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i30e53e28d8226c065af0ecffa91325be](http://www.billboard.biz/bbbiz/content_display/industry/e3i30e53e28d8226c065af0ecffa91325be).

<sup>21</sup> PR Newswire, “Live Nation's Artist Nation Redefines the Music Industry with Unified Rights Model,” Oct. 16, 2007, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/10-16-2007/0004683291&DATE=>. Musictoday also manages 25 fan websites for artists such as Celine Dion and Kenny Chesney. Another Live Nation company, Ultrastar, manages 20 fan clubs and websites for stars such as the Rolling Stones.

<sup>22</sup> In its 2008 Annual Report, Ticketmaster Entertainment claims that Live Nation “represented approximately 13%, 17%, and 20% of its consolidated revenue for the years ended December 31, 2008, 2007, and 2006, respectively. Ticketmaster Annual Report, SEC Form 10-K, <http://investors.ticketmaster.com/sec.cfm>, p8, Mar. 31, 2009.

CTS Eventim, Europe's largest ticket seller and the second largest primary ticket seller worldwide. This agreement gives Live Nation licenses to use and adapt CTS Eventim's software in combination with its own hardware as the foundation for establishing a North American ticketing unit that can operate at a sufficient scale to compete with Ticketmaster.<sup>23</sup> In return, Live Nation gave CTS Eventim the right to manage ticketing on behalf of Live Nation in Europe. Both companies have confirmed that consummation of the merger will not detrimentally affect this 10-year agreement.<sup>24</sup> By setting up its own ticketing operation, Live Nation went from being Ticketmaster's largest customer to being its largest competitor in the domestic, primary ticket sales market.

In the first major test of its system, however, Live Nation encountered significant trouble in handling the overwhelming demand for a concert by Phish, stirring substantial fan anger.<sup>25</sup> Although it's reasonable to expect that Live Nation would work to overcome such problems, such problems do suggest the difficulty in entering the primary sales market at this level.

Live Nation also operates a VIP Nation Concert Club, which charges approximately a \$1500 joining fee, a \$10 per ticket fee, and a \$10 per order fee. Members are guaranteed between two and four seats in premium locations for virtually

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<sup>23</sup> Leeds, "Top Concert Promoter Sets up a Challenge to Ticketmaster," New York Times, [http://www.nytimes.com/2007/12/21/business/21music.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2007/12/21/business/21music.html?_r=1&pagewanted=print) Dec. 21, 2007.

<sup>24</sup> WebDisclosure.com, "CTS Eventim AG: CTS Eventim and Live Nation confirm partnership," <http://www.webdisclosure.com/news/52759.html>, March 6, 2009.

<sup>25</sup> Rolling Stone, Rock & Roll Daily, "Phish Fans Furious as Live Nation Fails First Major Ticketing Test," <http://www.rollingstone.com/rockdaily/index.php/2009/02/02/phish-fans-furious-as-live-nation-fails-first-major-ticketing-test>; Pareles, "Phish's Breakup? That was Then. But Tough Times Call for a Reunion." The New York Times, March 5, 2009, p. C1.

every Live Nation show at every venue. Live Nation has recently received criticism that the Club does not provide its members with all the advertised benefits.<sup>26</sup>

Recently, Live Nation bolstered its presence in both venue management and primary ticketing. On September 11, 2008, Live Nation entered into a multi-year, strategic alliance with SMG Corp., the leading venue management company, which holds a portfolio of 216 sites. The agreement grants Live Nation an exclusive right to sell tickets at SMG's North American facilities, beginning in late 2009 and expanding as SMG's current agreements with Ticketmaster expire. This Live Nation-SMG agreement strikes a double blow against Ticketmaster; it not only greatly expands the number of venues open to Live Nation's ticketing services but also removes from Ticketmaster its second largest customer and the source of 6% of its revenues. By virtue of this strategic alliance with SMG, Live Nation expects to sell 5 million tickets annually by 2011, and 25 million tickets overall.<sup>27</sup>

#### B. Ticketmaster Entertainment, Inc.

In the report of its fourth quarter and full year 2008 financial results, Ticketmaster Entertainment ("Ticketmaster") describes itself as follows:

Ticketmaster Entertainment consists of Ticketmaster and Front Line. As the world's leading live entertainment ticketing and marketing company, Ticketmaster connects the world to live entertainment. Ticketmaster operates in 20 global markets, providing ticket sales, ticket resale services, marketing and distribution through [www.ticketmaster.com](http://www.ticketmaster.com), one of the largest e-commerce sites on the Internet; approximately 7100 retail outlets; and 17 worldwide call centers. Established in 1976, Ticketmaster serves more than 10,000 clients worldwide

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<sup>26</sup> Lauria, "VIP Ticket to Deride," New York Post, [http://www.nypost.com/seven/04082009/business/vip\\_ticket\\_to\\_deride\\_163377.htm](http://www.nypost.com/seven/04082009/business/vip_ticket_to_deride_163377.htm). April 9, 2009.

<sup>27</sup> "Live Nation and SMG Announce Multi-Year Strategic Alliance Bringing 25 Million Tickets to Live Nation Ticketing," Business Week.com, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=2735506>, Sept 11, 2008.

across multiple event categories, providing exclusive ticketing services for leading arenas, stadiums, professional sports franchises and leagues, college sports teams, performing arts venues, museums, and theaters. In 2007, the company sold more than 141 million tickets valued at over \$8.3 billion on behalf of its clients. Ticketmaster acquired a controlling interest in Front Line Management Group in October 2008. Founded by Irving Azoff and Howard Kaufman in 2004, Front Line is the world's leading artist management company.<sup>28</sup>

Ticketmaster's share of the convenience and service fees effectively serves as its commission on the sale. Consumers and others, however, have persistently complained that Ticketmaster's charges on primary ticket sales are excessive, and made possible only due to Ticketmaster's monopoly power.<sup>29</sup> The charges that Ticketmaster's North American secondary ticket sales subsidiary, TicketsNow, adds to sales are far larger than the ones that Ticketmaster adds to primary ticket sales.<sup>30</sup>

In addition to TicketsNow, Ticketmaster also offers TicketExchange, a service that provides a "halfway house" between its primary and secondary market operations. TicketExchange operates a conduit for buyer-seller contact in reselling tickets at a seller-determined price, thereby allowing buyers to purchase them without being in an auction-type competition with other buyers, as is typical of secondary market sites. This service also serves as an outlet for "Platinum" tickets, that is, particularly desirable primary

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<sup>28</sup> "Ticketmaster Entertainment, Inc. Reports Fourth Quarter and fiscal year 2008 Financial Results," <http://investors.ticketmaster.com/secfiling.cfm?filingID=1104659-09-8026>, March 19, 2009. See also United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster Entertainment, Inc., p. 9 (Feb. 10, 2009) ("8-K, Feb. 10, 2009").

<sup>29</sup> See, for example, *Campos v. Ticketmaster*, 140 F.3d 1166 (8<sup>th</sup> Cir. 1998) (permitting plaintiffs to sue only for injunctive relief, but not treble damages.) A class action suit recently filed in Canada asserted that Ticketmaster charged fees higher than the ticket face value, contrary to the laws of Ontario, which govern the matter. Pollstar, "Another TM Suit in Canada," <http://pollstar.com/blogs/news/archive/2009/02/17/649152.aspx>, Feb. 17, 2009; Branch, Jr., "Ticketmaster faces second class action lawsuit in Canada," <http://www.ticketnews.com/Ticketmaster-faces-second-class-action-lawsuit-in-Canada209123>, Feb. 12, 2009.

<sup>30</sup> Ticketmaster also owns GetMeIn, a secondary ticket sales subsidiary, which it describes as "providing access to the largest supply of sport, concert, theatre, and other event tickets in the UK and Europe." <http://www.getmein.com/aboutus.html>.

tickets, often provided by the artists, promoters, and venue managers. These tickets, which have not been previously sold, are sold for the original price plus added fees.

In its early years, Ticketmaster bested the market's then-dominant firm, Ticketron, by providing better service, especially online, and ultimately acquired Ticketron in 1991. Subsequently, Ticketmaster's focus has been on developing integrated, full-service, ticket distribution services, that is, coordinated services that can provide ticket sales through all four major methods: (a) venue box office sales, (b) purchases from retail outlets, often found in chain stores, (c) telephone sales, and (d) the fastest growing of these methods, internet sales. Ticketmaster reports that in 2008, 73% of its sales were online, 16% were through independent sales outlets, and 11% were through call centers.<sup>31</sup> Venues usually, although not always, handle their own box office sales. Providing the necessary speed and coordination is an especially difficult task, particularly for a firm handling Ticketmaster's number of events, thousands of outlets, variety of seat prices and locations, and volume of inquiries and sales for each event. Current developments include services such as print at home tickets, mobile ticketing from BlackBerries, and paperless ticketing.

Few other firms have the software, or can offer the installed base of hardware, to provide integrated services comparable to that offered by Ticketmaster. Competitors, such as Tickets.com, try to compete in bidding for venue contracts, but they are far from formidable. Other firms, such as Etix and TicketWeb (associated with Ticketmaster), do offer Internet links for venues that want to handle ticket distribution on their own, but these options tend to be more appropriate for smaller venues, such as theaters and clubs,

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<sup>31</sup> Ticketmaster Annual Report, SEC Form 10-K, <http://investors.ticketmaster.com/sec.cfm>, p6, Mar. 31, 2009.

rather than larger venues, such as major arenas and amphitheaters where the most popular artists give their concerts. Still other venues manage their own ticket sales.

Ticketmaster's many thousands of ticket distribution arrangements with venues, plus the fact that these contracts are usually exclusive and for long terms, commonly 3 - 6 years, helps secure Ticketmaster's dominance in primary ticket sales. Live Nation currently provides the most significant competition in primary ticket sales.

Like Live Nation, Ticketmaster has grown primarily through the acquisition of rivals and companies in vertically related or complementary markets. In just the past two years, Ticketmaster has acquired Front Line, the world's leading artist management company; Paciolan, a leading software supplier especially to universities and colleges; and TicketsNow and GetMeIn, which provide internet sites for secondary ticket sales. Significantly, when Irving Azoff revived Front Line Management in 2004 – he had actually started it in 1974 but shifted to other industry positions before returning -- Azoff quickly expanded Front Line through a series of over 60 acquisitions of smaller management companies<sup>32</sup>. When Ticketmaster achieved equity control over Front Line in late 2008, Azoff became Ticketmaster's Chief Executive. If Ticketmaster successfully merges with Live Nation, Azoff would become the new company's Executive Chairman.

### **III. The Proposed Merger**

The proposed merger would create an entity, Live Nation Entertainment, with an aggregate enterprise value of approximately \$2.5 billion. The parties characterize the deal as a “merger of equals,” since each of the parties had, at the time the merger was

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<sup>32</sup> Smith, “Can He Save Rock ‘n’ Roll,” Irving Azoff Wants to Concentrate Power in the Music World Like Never Before; Bruce Springsteen Objects,” *Wall Street Journal* pg A-1, Feb. 21, 2009, <http://online.wsj.com/article/SB123517105948436743.html>

announced, a market capitalization of approximately \$400 million.<sup>33</sup> The deal itself is a tax-free, all stock transaction in which Ticketmaster's shareholders will own 50.01% of the new company's stock, and Live Nation's will own 49.99 per cent.

The new company will be managed by a board of 14 directors, comprised of 7 directors appointed by each party. Barry Diller from Ticketmaster will be Chairman of the Board, Michael Rapino from Live Nation will be Chief Executive Officer and President, and Irving Azoff from Ticketmaster and Front Line will be Executive Chairman.<sup>34</sup> The merging companies assert that the combination will result in approximately \$40 million in operating synergies. The parties assume that the transaction will close in the second half of 2009 if they receive all necessary approvals.

The merger has raised substantial concerns in Congress and among shareholders. Judiciary Committee subcommittees of the Senate and House of Representatives held hearings on February 24 and 26, 2009, respectively.<sup>35</sup> Some Ticketmaster shareholders instituted a lawsuit alleging that the deal undervalues Ticketmaster.<sup>36</sup> Live Nation's largest shareholder, holding approximately a 15% stake, has declared opposition to the agreement due to the "poor record" of Ticketmaster's Chairman, Barry Diller.<sup>37</sup> Some major artists, most notably, Bruce Springsteen, have prominently announced their

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<sup>33</sup> The valuations provided are accurate as of the time the merger was announced. Recent, substantial drops in the stock market have probably caused current valuations to be smaller.

<sup>34</sup> BusinessWeek.com, Merger/Acquisition, "1.18B for Ticketmaster Entertainment, Inc.," announced 2/10/09, <http://investing.businessweek.com/research/stocks/transactions/transactions.asp?symbol=LYV>.

<sup>35</sup> U.S. Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?" Feb. 24, 2009, <http://judiciary.senate.gov/hearings/hearing.cfm?id=3674>; U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy, "Competition in the Ticketing and Promotion Industry," Feb. 26, 2009, [http://judiciary.house.gov/hearings/hear\\_090226.html](http://judiciary.house.gov/hearings/hear_090226.html).

<sup>36</sup> Alfred Branch, Jr., "Ticketmaster/Live Nation merger: Shareholder lawsuit details deal's undervaluation," Ticketnews, <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Shareholder-lawsuit-details-undervaluation209203> Feb. 20, 2009.

<sup>37</sup> [http://www.nypost.com/seven/02132009/business/live\\_wire\\_imperils\\_live\\_nation\\_deal\\_154851.htm](http://www.nypost.com/seven/02132009/business/live_wire_imperils_live_nation_deal_154851.htm)

opposition to the merger, asserting that the combination will result in higher prices for consumers. Some industry members have told us that many other artists also oppose the merger, but are afraid to make their concerns public for fear of retribution. Some artists, such as Shakira, Van Halen, and Seal, have publicly supported the merger;<sup>38</sup> these supporters, however, are all managed by Ticketmaster's Front Line.

Stock market reaction to the merger has apparently been poor, although it is not clear how much of the drop in the parties' stock market prices reflects overall market trends rather than responses to the proposed merger. In the six months prior to the merger's announcement, that is, from August 12, 2008 when Ticketmaster Entertainment began trading and February 10, 2009, Ticketmaster Entertainment's (TKTM) share price dropped by 74%; in the month following the merger's announcement, the company's share value dropped by approximately 37.7% from the already depressed February 10<sup>th</sup> level. Live Nation's stock shows a similar pattern. In the six months preceding the merger announcement, the company's stock lost 70.5% of its value, and in the month following the announcement, it lost 43.8%.<sup>39</sup> By way of comparison, the Standard & Poors 500 Index dropped 35.9% between August 12, 2008 and February 10, 2009, and it fell 13.0% in the four weeks following the merger's announcement.<sup>40</sup>

The parties' recent financial returns appear to be less bleak than its stock market valuations. Live Nation's Michael Rapino stated "Our fourth quarter results capped an outstanding year for Live Nation." The company reported that full year 2008 revenues

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<sup>38</sup> Adegoke, "Shakira, Seal support Live Nation/Ticketmaster deal,"

<http://www.reuters.com/article/innovationNewsTechMediaTelco/idUSTRE51N1BQ20090224>.

<sup>39</sup> Rowley and Satariano, "Live Nation-Ticketmaster Combination Probed by U.S. (Update 4),"

<http://www.bloomberg.com/apps/news?pid=20670001&refer=us&sid=awanigSDYaCw>; Charles Schwab, Inc. online quotes <https://investing.schwab.com/trading/center?PwdMsg=Msg1>.

<sup>40</sup> <https://investing.schwab.com/trading/center?PwdMsg=Msg1>. Other benchmarks, such as ones focused on various aspects of the live entertainment industry, might be more revealing, but they would also be very difficult to define, compute, and meaningfully apply, especially to vertically integrated companies.

rose 11%, adjusted operating income grew by 20%, and the company's core business metrics not only rose but outpaced the industry's.<sup>41</sup> While not so stellar, Ticketmaster Entertainment reported that its fourth quarter 2008, and full-year 2008 revenues increased by 9.4% and 17.3% respectively. Its free cash flow increased by 81% for the year. Adjusted operating income, however, decreased by 12.2% in 2008, a development that the company ascribed to "ticket volume declines and severance costs incurred in the latter part of 2008."<sup>42</sup> Overall, CEO Irving Azoff noted that the company was in transition especially with respect to its entry into the artist management market, and that he was "pleased" with the increased free cash flow notwithstanding "an evolving music industry and a challenged consumer environment."<sup>43</sup>

#### **IV. Antitrust Concerns**

The proposed merger raises substantial antitrust concerns. In determining whether to permit the transaction to proceed, the Department of Justice will examine whether or not the transaction is likely to violate the Clayton Act's proscription on mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."<sup>44</sup> As of March 24, 2009, the

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<sup>41</sup> "Live Nation Reports Strong Fourth Quarter and Full Year 2008 Financial Results," [http://media.corporate-ir.net/media\\_files/irol/19/194146/news/LYV\\_Q4FY08\\_Earnings\\_Release\\_FINAL.pdf](http://media.corporate-ir.net/media_files/irol/19/194146/news/LYV_Q4FY08_Earnings_Release_FINAL.pdf), March 2, 2009.

<sup>42</sup> "Ticketmaster Entertainment, Inc. Reports Fourth Quarter and Fiscal Year 2008 Financial Results," <http://press.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8166&fragment=0&SearchType=OR&terms=>, March 19, 2009.

<sup>43</sup> *Id.*

<sup>44</sup> 15 U.S.C. §18.

Department had reviewed the parties' initial filings and issued a "second request," during which more searching information is sought and a more intensive analysis is conducted.<sup>45</sup>

In its merger reviews, the Department of Justice follows the analytical approach set forth in the 1992 Horizontal Merger Guidelines, as revised April 8, 1997, jointly issued by the Federal Trade Commission and the Department of Justice.<sup>46</sup> While a merger evaluation under the Guidelines requires expert economic analysis based on substantial, proprietary information that is not presently available, sufficient public information is available to make reasonable judgments about the likely impact of this merger on various markets in the live entertainment industry.

One key issue is whether the merger is best characterized as a horizontal merger, combining firms that engage in head-to-head competition, or a vertical merger, combining firms involved in different markets within the same chain of distribution, or as a merger displaying both horizontal and vertical attributes. Although vertical mergers may be problematic in some circumstances, horizontal mergers typically raise the most pressing concerns.

The proposed merger is best characterized as having both horizontal and vertical attributes. The reason is that at one critical level of industry activity, primary ticket sales, the firms engage in direct competition. Indeed, they are the top two firms in that market. Even in the other affected markets, where there is no actual head-to-head competition,

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<sup>45</sup> "Live Nation and Ticketmaster Entertainment Receive Second Request from U.S. Department of Justice Regarding Proposed Merger," <http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8168&fragment=0&SearchType=OR&terms=>, March 20, 2009.

<sup>46</sup> U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, rev'd 1997)("Horizontal Merger Guidelines") reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, <http://www.ftc.gov/bc/docs/horizmer.shtm>. These Guidelines update the Merger Guidelines issued by the U.S. Department of Justice in 1984 and the Statement of Federal Trade Commission Concerning Horizontal Mergers issued in 1982." *Id.* at fn.4. In 2006, the Agencies issued a commentary on the Guidelines, elaborating on their interpretation and application. <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

potential entry by one the parties remains a reasonable possibility. To the extent that the merger obviates entry (other than by acquisition) by one of the parties into a market occupied by the other party, the transaction may forestall increased horizontal rivalry and market deconcentration.

The vertical aspects of the merger are also problematic. The merger is between two, already vertically integrated firms. Live Nation now ranks first in event promotion, second in venue management, and second in primary ticket sales, while Ticketmaster ranks first in artist management, first in primary ticket sales, and second in secondary market ticket sales. If the merger is permitted, Live Nation Entertainment will have consolidated powerful or dominant positions in five of the industry's discrete markets. Viewed in combination, the merger will give Live Nation Entertainment unarguable control of most competition within the industry, including the capacity to foreclose or discipline rivals that seek to compete vigorously in any individual market. The following discussion examines these markets individually, starting with primary ticket sales.

#### A. Primary Ticket Sales

The primary ticket sales market is likely to be the one that generates the most serious antitrust concerns. To be precise, Ticketmaster is actually in the market for ticket distribution services, rather than simply primary ticket sales. The distinction is this: if a venue sells tickets to its event, it is a primary ticket seller; if it contracts with Ticketmaster to sell the tickets for it, Ticketmaster is an agent providing ticket distribution services to the ticket owner. Ticketmaster's revenues, therefore, do not come from the excess of ticket receipts over the cost of events, but from the fees, effectively a

commission, that Ticketmaster adds to the face value of the tickets. Because providers of ticket distribution services do process sales of tickets, primary tickets sellers and providers of ticket distributions services are viewed together for many purposes. The distinction remains particularly important, however, in private antitrust suits by ticket purchasers, who may sue Ticketmaster only for injunctive relief, and not damages.<sup>47</sup>

*Market Definition.* A critical step in determining the likely impact of the merger on this market is to correctly define the product and geographic market. If, in a correctly defined market, a merger will permit the new firm to increase prices without losing significant market share to existing or new rivals, then that merger is likely to create or expand market power, restrain trade, and violate Section 7 of the Clayton Act.<sup>48</sup>

Market definition requires defining both the geographic and product markets. Specifically, the task requires determining for some product produced by the merging firms the smallest area in which some hypothetical monopolist could profitably raise prices by “a small, but significant and nontransitory” amount.<sup>49</sup>

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<sup>47</sup> *Ticketmaster v. RMG Technologies*, 536 F.Supp.2d 1191, 1196 (C.D. Cal. 2008) (holding that “the Court has no difficulty whatsoever in finding, as a matter of law, that the ticket distribution services and tickets do not belong in the same market. Whatever happens in one market may be relevant to what happens in the other market, but in no sense whatsoever are ‘ticket distribution services’ a viable substitute for tickets themselves.”) Other courts also have viewed Ticketmaster as being in the ticket distribution service market. *Campos v. Ticketmaster*, 140 F.3d 1166 (8<sup>th</sup> Cir. 1998); *Ticketmaster v. Designer Tickets & Tours, Inc.*, 2008 WL 649804 (C.D. Cal 2008) (not reported in F.Supp.2d); *Ticketmaster Corp v. Tickets.com Inc.*, 127 Fed.Appx. 346, 2005 WL 824095 (9<sup>th</sup> Cir. 2005) (unpublished), *affirming* 2003 WL 21397701 (C.D. Cal 2003) (not reported in F.Supp.2d).

<sup>48</sup> 15 U.S.C. §18.

<sup>49</sup> More specifically, the FTC/DOJ Horizontal Merger Guidelines define a market “as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a “small but significant and nontransitory” increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. Horizontal Merger Guidelines, n.46, §1.0. See also *Id.* §1.11 and 1.21 for more discussions of the Guidelines’ general standards with regarding product market and geographic market definition, respectively.

*Geographic Market.* In the present case, the likely geographic area at issue – the “geographic market” -- is the United States. Competition to sell ticket distribution services extends nationwide. There are no significant sellers outside the U.S. that provide ticket distribution services within this country and to which consumers reasonably could turn for a better deal in the event of a price increase. The merging parties typically rely on their domestic operations to handle domestic sales. One important reason is that sales made by foreign entities – even those made by the merging parties’ foreign subsidiaries and affiliates -- are usually governed by the foreign country’s law. All industry insiders to whom we have talked have said the proper geographic market is the United States.

*Product Market.* Defining the product market is much more difficult in this matter. The product market definition is the narrowest definition of the product for which the merger would allow a sole producer of that product to impose a “small but significant and nontransitory” price increase. The more broadly and inclusively the market is defined – that is, the more competitors that are included in the market – the smaller the position that the defendants will hold relative to the rest of the market, and the less likely it is that the defendants will be able to raise prices without losing market share.

The task of market definition depends on detailed factual investigation and sophisticated economic analysis. As applied here, the key to the process is determining where, if anywhere, consumers might reasonably turn for alternative sources of tickets (even if for different, but reasonably comparable, events) if the newly created Live Nation Entertainment were to raise prices or fees for their events. While detailed proprietary information is not available, publicly available information suggests that (1) primary and secondary sales ought to be treated separately, (2) primary ticket sales and

provision of ticket distribution services ought be distinguished, (3) primary sales for large events should be treated separately from other primary sales, and (4) primary sales for sporting events ought to be treated separately from primary ticket sales for concerts and other events. These following subsections will consider these distinctions in greater detail. Regardless of how the relevant product market for primary ticket sales is defined, however, the combination of Ticketmaster and Live Nation would result in the creation or expansion of exploitable market power. In essence, if the merger proceeds, consumers will be even more locked in than they are at present.

1. *Primary and Secondary sales should be treated separately.* Some might argue in favor of including primary and secondary ticket sales in one combined ticket sales market. Secondary ticket sales, however, are distinct from primary ticket sales from the perspectives of consumers, promoters, venue owners, and artists. As such, they suggest themselves as reasonable, separate product markets to investigate. Focusing more specifically on the providers of ticket distribution services, it seems highly unlikely that the prices subsequently charged in the secondary market would materially affect the providers' prices, that is, the convenience, service and other fees that they add to the ticket's face price.

The markets for primary ticket sales and secondary ticket sales operate in different fashions. Primary sales are limited in price to the face value of the ticket – set by the artist, promoter, and/or venue -- plus the primary ticket seller's convenience and service fees. Secondary ticket sales are made at whatever price the market will bear, sometimes at less but often at many times more than the face value of the ticket.

Because tickets for high demand events sold on secondary market websites are more expensive than those made on primary sales sites, a consumer will not want to purchase such a ticket from a secondary seller unless that buyer cannot acquire a comparable ticket from a primary ticket seller. Whereas the artist, venue, promoter, and primary ticket seller receive their negotiated shares of the ticket's face value and supplemental fees, they do not, in those capacities, receive a portion of the price increase enjoyed by the secondary seller. Whereas secondary sellers depend on primary sellers and customers for tickets, primary ticket sellers rely on the artist, venue or promoter for their inventory.

Even if primary and secondary sales were viewed in combination, Ticketmaster would be the market leader by far. A leading ranking of ticket sellers is compiled by Ticketnews. This company not only ranks top sellers but also computes a "power score" that indicates the seller's relative strength in the category under consideration. These power scores, which correlate highly with the number of transactions, are based on several attributes of the traffic on the seller's website. The rankings of the top combined primary and secondary sellers, and their power scores, for the week ending March 28, 2009 are:

Ticketmaster.com	37.23
StubHub.com	14.84
TicketsNow.com	6.68
LiveNation.com	5.54
TicketLiquidator.com	3.08

TicketCity.com 2.89<sup>50</sup>

Since Ticketmaster owns TicketsNow, Ticketmaster’s dominance is even greater than the ranking suggests. If the proposed merger is completed, Live Nation’s power will also be added in, granting the newly born Live Nation Entertainment a truly overwhelming dominance in combined ticket sales.

For the reasons discussed above, however, primary sales and secondary sales ought to be treated as distinct markets for purpose of antitrust analysis, each with its independent pricing and market dynamics. This subsection, therefore, continues to focus on primary ticket sales, and the following subsection will then address the secondary ticket sales market.

2. *Live Nation Entertainment would virtually eclipse all other rivals in the market for primary ticket sales.* The TicketNews ranking for the top six primary ticket sellers and their “power scores” for the week ending March 28, 2009 is:

Ticketmaster.com	68.79
LiveNation.com	10.46
Telecharge.com	2.77
ETix.com	2.75
TicketWeb.com	2.69
Tickets.com	2.29 <sup>51</sup>

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<sup>50</sup> Ticket News, Ticket Industry Rankings, [http://ticketnews.com/ticket\\_industry\\_rankings](http://ticketnews.com/ticket_industry_rankings). Rankings and power shares for prior weeks are comparable. TicketNews explains that its “Top Sellers Rankings and Top Sellers Power Scores are based on web traffic received by a ticket seller’s website. The Power Score is highly correlated at a statistically significant level with the number of transactions from the TicketNetwork Exchange™, the world’s largest secondary ticket market exchange. ... Top Seller Power Scores should only be used to compare sellers with a particular category.” *Id.* The attributes of web traffic used to determine the Power Score are the number of unique visitors, the number of visits, and the average number of page views by a unique visitor. *Id.*

In essence, Ticketmaster's power score in this market is more than 4 times greater than the combined scores of its next three rivals. After the merger, if it is permitted, the combined positions of Ticketmaster and Live Nation would be approximately 28 times larger than the power score of its next most potent rival, and approximately 7 times larger than the combined power scores of the next four competitors.

The implication of these rankings and scores is that consumers, who can now use both Ticketmaster and Live Nation, would likely have few other places to turn after the merger. Ticketmaster and Live Nation are each other's closest competitors. Smaller firms, such as Tickets.com, appear unable to readily provide the volume, range, and sophistication of services that these two can offer.

Nor can new firms easily enter the market. Live Nation had to turn to Europe's largest ticket seller, CTS Eventim, for the software necessary to develop its system, and some knowledgeable insiders have remarked that, at present, it remains inferior to Ticketmaster's. CTS Eventim has never displayed a desire to enter the U.S. market, where the necessary marketing knowledge and governing laws differ from those in Europe; indeed, by licensing its software in return for ticketing rights for Live Nation concerts in Europe, CTS Eventim suggests that it will maintain its emphasis just where it is. Moreover, the Live Nation-CTS Eventim arrangement will persist even if the

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<sup>51</sup> Ticket News, Ticket Industry Rankings, [http://ticketnews.com/ticket\\_industry\\_rankings](http://ticketnews.com/ticket_industry_rankings). Rankings and power shares for prior weeks are comparable for most firms.

Telecharge, which is owned by the Shubert Organization, concentrates on selling tickets to Broadway productions. <http://www.telecharge.com/aboutUs.aspx>. Etix and Ticketweb provide venues and promoters with self-service online ticketing based solely on an Internet link between the venue and the sellers. <http://www.etix.com/sales/about.html>; Ticketweb which describes itself as "the world's leading self-service, online ticketing and marketing company," is affiliated with Ticketmaster. <http://event.ticketweb.com/about/index.html>. Tickets.com competes with Ticketmaster in the provision of ticket distribution services. Although it is owned by Major League Baseball Advanced Media, LLP, it gets 72% of its revenues from non-baseball sources. [http://provenue.tickets.com/US/about\\_us/faqs.shtml](http://provenue.tickets.com/US/about_us/faqs.shtml).

proposed merger is consummated.<sup>52</sup> Other potential competitors, therefore, will not have access to that software to develop or improve their own ticketing systems. With expansion by domestic competitors unlikely and new entry improbable, Live Nation Entertainment would become virtually “the only game in town” for primary ticket sales.

In 2005 the Ninth Circuit Court of Appeals rejected antitrust claims by Tickets.com, which had alleged that the length and exclusivity of Ticketmaster’s contracts to provide ticketing services to venues blocked market entry and shielded Ticketmaster’s market power in primary ticketing from competition.<sup>53</sup> Since the court, decided not to publish its memorandum opinion in the Federal Reporter, however, the opinion does not have precedential value except regarding points of law or fact decided in litigation between the two parties. Tickets.com is now owned by Major League Baseball Advanced Media, although it draws 72% of its revenue from non-baseball revenues.<sup>54</sup>

3. *Primary ticket sales for major sporting events should be treated separately from primary ticket sales for concerts.* Robert Doyle, a Washington, DC attorney and former FTC staff member, observes that “sporting events will be looked at separately from musical performances in the [Department of Justice] probe, and the government will

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<sup>52</sup> WebDisclosure.com. “CTS Eventim AG: CTS Eventim and Live Nation confirm partnership,” <http://www.webdisclosure.com/news/52759.html>, March 6, 2009. By effectively bringing Ticketmaster into the Live Nation-CTS Eventim arrangement, the merger may have a horizontal impact in Europe beyond joining Live Nation and Ticketmaster.

<sup>53</sup> *Ticketmaster Corp v. Tickets.com Inc.*, 127 Fed.Appx. 346, 2005 WL 824095 (9<sup>th</sup> Cir. 2005) (unpublished), *affirming* 2003 WL 21397701 (C.D. Cal 2003) (not reported in F.Supp.2d). The Ninth Circuit reasoned that, assuming a six-year average contract length, 16% of Ticketmaster’s venues (and 26% of the top 150 venues) would become available for competitive rebidding each year. In the court’s view, this left the market sufficiently open for competition that the contracts therefore did not violate the Sherman Act. The circuit court also noted that Tickets.com had been an active bidder for open contracts.

<sup>54</sup> Frequently Asked Questions About Tickets.com, [http://provenue.tickets.com/US/about\\_us/faqs.shtml](http://provenue.tickets.com/US/about_us/faqs.shtml).

distinguish between ‘live events at big venues and live events at smaller, more intimate ones.’”<sup>55</sup> Convincing arguments can be made that both distinctions are warranted.

The market for primary sales of sports tickets is relatively well locked-up. Notwithstanding that Tickets.com is owned by Major League Baseball Advanced Media, Ticketmaster now provides primary ticketing services, including Internet and offsite sales, for 11 major league baseball teams, and provides software services to 5 others.<sup>56</sup> This augments Ticketmaster’s dominance in sports, in which Ticketmaster sells tickets for over 1000 teams,<sup>57</sup> and has agreements with the NFL, NBA, and NHL plus, in the UK, the Premier League of football. The leading industry tracking firm, Pollstar, reports that Ticketmaster also sells tickets for over 80% of the major US stadiums and arenas.<sup>58</sup> In the face of these exclusive, long-term agreements, there remains little room for others to compete, although rivals might bid for contracts as each comes open for renewal and try to nibble away at Ticketmaster’s position.

4. *Primary Ticket Sales for large events should be distinguished from primary ticket sales for smaller events.* Primary ticket sales for large venues likely warrant treatment as a separate product market from primary ticket sales for smaller ones. Premier talent, such as U2, Madonna, Jay-Z, and Shakira can regularly draw audiences of

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<sup>55</sup> Rowley and Satariano, “Ticketmaster-Live Nation Probe to Focus on Ticketing (Update1),” Bloomberg.com,

<http://www.bloomberg.com/apps/news?pid=20601109&sid=adI113CwyATc&refer=news>.

<sup>56</sup> Freeman, “Ticketmaster and MLB Advanced Media Extend Partnership,” Reuters, <http://www.reuters.com/article/pressRelease/idUS170131+14-Feb-2008+PRN20080214> February 14, 2008;

Stone and Richtel, “Baseball Gets into Resale of Tickets,” NYTimes.com,

<http://www.nytimes.com/2007/08/02/business/02tickets.html> Aug. 2, 2007.

<sup>57</sup> About Ticketmaster, [http://www.ticketmaster.com/h/about\\_us.html?tm\\_link=tm\\_i\\_abouttm](http://www.ticketmaster.com/h/about_us.html?tm_link=tm_i_abouttm).

<sup>58</sup> “Live Nation, Ticketmaster begin defending merger,” AP Digital, Feb. 10, 2009,

[http://investing.businessweek.com/research/stocks/news/article.asp?docKey=600-200902101915APDIGITLFINANCE\\_NA\\_US\\_Live\\_Nation\\_Tic-462043VLRS2OSLRLCCQS6K32BH&params=timestamp||02/10/2009%207:15%20PM%20ET||headline|Live%20Nation%2C%20Ticketmaster%20begin%20defending%20merger|docSource|AP%20Digital|provider|ACQUIREMEDIA|realtedsyms||%7CUS%3BLYV%7CUS%3BTMTM&symbol=TKTM.O](http://investing.businessweek.com/research/stocks/news/article.asp?docKey=600-200902101915APDIGITLFINANCE_NA_US_Live_Nation_Tic-462043VLRS2OSLRLCCQS6K32BH&params=timestamp||02/10/2009%207:15%20PM%20ET||headline|Live%20Nation%2C%20Ticketmaster%20begin%20defending%20merger|docSource|AP%20Digital|provider|ACQUIREMEDIA|realtedsyms||%7CUS%3BLYV%7CUS%3BTMTM&symbol=TKTM.O)

15,000 – 20,000 and more. These artists, therefore, typically opt to perform at large venues that can accommodate a large number of customers and yield the greatest revenue per performance. For such performers and high demand events, smaller venues, such as clubs and theaters, will generally not be sufficient.

Because of their popularity, events at large venues will generally require extensive marketing coupled with sophisticated hardware and software systems to handle the volume of inquiries and sales; provide all consumers with options regarding seating, price and performance; and integrate sales by internet, telephone, retail outlet, and, in some cases, venue box office. Few, if any, domestic ticketing companies other than Ticketmaster and Live Nation can efficiently and competitively supply the necessary marketing skills and ticketing services for such events. CTS Eventim software, as noted above, will not be available to current or new competitors rivals of Live Nation, regardless of whether the proposed merger proceeds. Large venues would likely be hesitant to rely on new, unproven entrants to provide the marketing and ticket distribution services for their events. Top tier artists may also be reluctant to select venues where the provider of ticket distribution services is not known to be capable of handling the event's volume and other requirements. It would be extremely difficult, therefore, for companies remaining in the market to expand, or companies outside the market to enter, and provide competitive ticketing and marketing services for performances at large venues.

If, as seems appropriate, events at large venues are treated as a separate market, the market positions of Ticketmaster and Live Nation would be even stronger than suggested in the rankings for all primary ticket sales, above. Permitting these companies

to combine would effectively eliminate almost all remnants of competition in the market for primary ticket sales for events in large venues.

Notwithstanding the precise market definition regarding primary ticket sales – Ticketmaster is dominant under any of them – Ticketmaster has been repeatedly challenged for the size of the convenience and service fees it charges. In its 2008 Annual Report, Ticketmaster states that in 2008 its “per ticket convenience charges generally ranged from \$2.50 to \$15.00 and average revenue per ticket (which primarily includes per ticket convenience charges and per order “order processing ‘fees, as well as certain other revenue sources directly related to the sale of tickets) was \$7.84.”<sup>59</sup> It does appear from the following small sampling of ticket prices and supplemental charges that Ticketmaster’s fees are substantial and that Live Nation’s fees are comparable.

**Ticketmaster:** Bruce Springsteen, Philips Arena, April 26 -- \$95 face value, \$13.55 “convenience charge,” \$4 “facility fee.” (Added charges equal 18.5 percent of ticket price). Total: \$112.55

**Live Nation:** Americana singer Lucinda Williams, the Tabernacle, Feb. 28 -- \$27.50 face value, \$13.50 “convenience” charge. (Added charge equals 49.1 percent of ticket price.) Total: \$41

**Ticket Alternative** (a small primary ticket seller): Singer-songwriters Missy Higgins and Justin Nozuka, Center Stage, Feb. 27 -- \$20 face value, \$5.50 service fee.

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<sup>59</sup> Ticketmaster 2008 Annual Report, SEC Form 10-K, <http://investors.ticketmaster.com/sec.cfm>, p4, Mar. 31, 2009.

(Added charge equals 27.5 percent of ticket price.) Total: \$25.50 (Note: The same tickets on Ticketmaster include a combined \$7.50 service and building facility charge).<sup>60</sup>

The fact that approximately 40% of seats remain unsold,<sup>61</sup> coupled with Ticketmaster's high convenience and service fees, might suggest that Ticketmaster is already so dominant that it can charge monopoly-level fees and get away with it. Although Ticketmaster might attribute the unused capacity to the fact that many seats are diverted to the secondary market, where prices for desirable concerts are far more lucrative, Princeton economist Alan Krueger believes that it is the high ticket prices (including fees) that leads to the reduced ticket sales, and that "the trends are consistent with the market becoming more monopolized."<sup>62</sup>

Ticketmaster certainly had the power to prevail in a battle with the most popular band of the 1990s, Pearl Jam. In 1994, Pearl Jam became angry when it discovered that Ticketmaster had added what it believed to be an excessive service charge to the ticket price for its Chicago concert. The group not only testified before Congress, but also provided a memorandum of its concerns and experience to the Department of Justice Antitrust Division, which was in the process of investigating the company. No enforcement action was taken, however. In further protest of Ticketmaster's pricing policies, the band cancelled its 1994 summer tour and refused to play at venues where Ticketmaster handled the ticketing. Pearl Jam also initiated an antitrust suit against Ticketmaster, but it was unsuccessful. After fans complained that the non-Ticketmaster

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<sup>60</sup> <http://www.hitsville.org/2009/03/08/ticketmaster-news-round-up/>. "Facility fees" and "building facility charges" typically go directly to the venue. See also, Wagner, "Because of fees, concert ticket prices are just the start," <http://hamptonroads.com/2009/04/because-fees-concert-ticket-prices-are-just-start>, The Virginian-Pilot, April 16, 2009.

<sup>61</sup> See note 11, and associated text.

<sup>62</sup> Krueger, "The Economics of Real Superstars: The Market for Rock Concerts in the Material World," 23 *Journal of Labor Economics* 1 (2005) (University of Chicago Press), <http://www.irs.princeton.edu/pubs/pdfs/484.pdf>, p.17.

ticketing services and domestic venues that the band used during its boycott were inadequate, Pearl Jam returned to using venues with Ticketmaster contracts for its 1998 summer tour, which was hugely successful.<sup>63</sup>

#### B. Management Services for Artists

Ticketmaster became the leading provider of management services for artists by relying on its traditional growth strategy: acquisition. In October 2008, Ticketmaster purchased for \$123 million Warner Music's 30% share of Front Line Management, by far the industry's largest talent management company. Since Ticketmaster already owned a stake in Front Line, this purchase was sufficient to secure a controlling equity interest in the company. In related deals, Ticketmaster also gave Irving Azoff, Front Line's CEO, 4.5% of Ticketmaster's stock and appointed him CEO of Ticketmaster.

Front Line has contracts with over 80 executive managers and 200 artists, many of whom, such as the Eagles, Jimmy Buffet, Neil Diamond, Van Halen, Fleetwood Mac, Guns N' Roses, Steely Dan, Christina Aguilera, and Miley Cyrus, are major draws and appear in the largest venues.<sup>64</sup> Although Ticketmaster does not have an exclusive right to sell tickets for events involving Front Line's artists, the combination nonetheless partnered the industry's largest ticket seller with the industry's premier gatekeeper for artists. As described by the Wall Street Journal, "By joining forces with Mr. Azoff and

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<sup>63</sup> DeRogatis, Jim. *Milk It!: Collected Musings on the Alternative Music Explosion of the 90's*. Cambridge: Da Capo, 2003. ISBN 0-306-81271-1, pg. 59-65.

<sup>64</sup> Lewis, "Ticketmaster Buying Artist Management Company = Huge Win for Warner Music," The Business Insider, The Biz, <http://www.businessinsider.com/2008/10/ticketmaster-buying-artist-management-company-huge-win-for-warner-music>, October 23, 2008.

his numerous high-profile clients, Ticketmaster is trying to trump rival [Live Nation]. As one person close to the deal put it, ‘We’ll see your Jay-Z and raise you Jimmy Buffett.’”<sup>65</sup>

Live Nation does not compete directly in the talent management market. It carries influence in that market, however, both through its role as the leading event promoter and through its multi-faceted contracts with some of the industry’s leading super-stars. Once Live Nation has joined with Ticketmaster, however, its promoters would have an incentive to recommend that artists shift from an independent manager to one within the Front Line fold, or that the artist’s manager join Front Line. The proposed merger, therefore, would likely stifle Live Nation’s independent voice and substitute consolidation and coordination for any ability that company might otherwise have had to balance to Ticketmaster’s market dominance.

The merger also eliminates any possibility that Live Nation might enter the talent management market on its own. A merger that eliminates potential competition could be unlawful if (1) the market in question is substantially concentrated, (2) firms already in the market view the firm as one that could potentially enter on its own, and (3) the presence of that potential entrant on the market’s fringe actually has tempered the competitive conduct of existing market participants.<sup>66</sup> These conditions appear to be satisfied here.

Although Live Nation has not made public any intention to enter the artist management market, the possibility is reasonable and one that market participants would likely not have ignored. First, it should be noted that the market appears to be

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<sup>65</sup> *Id.*, quoting the Wall Street Journal, “Ticketmaster to Acquire Star Power in Azoff Deal,” [http://online.wsj.com/article/SB122473027565161583.html?mod=rss\\_whats\\_news\\_us](http://online.wsj.com/article/SB122473027565161583.html?mod=rss_whats_news_us), Oct. 23, 2008.

<sup>66</sup> *United States v. Marine Bancorp.*, 418 U.S. 602, 624-25 (1974). For a fuller discussion, see ABA Section of Antitrust Law, *MERGERS AND ACQUISITIONS*, 3D Ed (2008) pp 409 ff.; and ABA Section of Antitrust Law, *ANTITRUST LAW DEVELOPMENTS* (6<sup>th</sup> ed. 2007) pp 371 ff.

substantially concentrated. Insiders estimate that Front Line has perhaps 40% of the top tier acts and that this market share is at least double that of any other rival. Second, existing market participants would probably have recognized Live Nation as a potential entrant, especially since Live Nation had been vertically expanding its operations, had already entered the market for primary ticket distribution services on its own, and had been engaged in an expensive program of signing major stars to long-term, multi-faceted contracts. Moreover, Live Nation's chances for success would be good because many performers would probably prefer to be managed by the world's leading promoter. Third, Live Nation might seek to parry Ticketmaster's purchase of Front Line with a move that would extend its own program of vertical expansion. Finally, the proposed "merger of equals" appears to reflect a mutual recognition on the part of the two firms that joining is preferable to competing.

### C. Control of Venues

Live Nation is the industry's second largest owner or manager of venues, holding a portfolio of 159 venues, worldwide, including 140 domestically.<sup>67</sup> Ticketmaster's February 10, 2009 SEC filing (8-K) notes that Live Nation's venues include 47 amphitheaters, 11 House of Blues, and 46 clubs and theaters.<sup>68</sup> Live Nation also handles more than 30 festivals.

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<sup>67</sup> Live Nation 2008 Annual Report, Mar. 5, 2009, [http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec&secCat01.1\\_rs=11&secCat01.1\\_rc=10](http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec&secCat01.1_rs=11&secCat01.1_rc=10), p1, 8-15.

<sup>68</sup> United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster Entertainment, Inc, p. 16 (Feb. 10, 2009) ("8-K, Feb. 10, 2009") available at <http://investors.ticketmaster.com/secfiling.cfm?filingID=1104659-09-8026>; Business Week, Live Nation, Inc., Company Description, [http://investing.businessweek.com/research/stocks/snapshot/snapshot\\_article.asp?symbol=lyv](http://investing.businessweek.com/research/stocks/snapshot/snapshot_article.asp?symbol=lyv) (providing figures as of the end of 2007).

Not content with this portfolio, Live Nation entered into a multi-year strategic alliance with SMG, the “world’s leading venue management company,” with a portfolio of 216 venues, including “75 arenas, 9 stadiums, 66 convention centers, 52 performing arts centers, and 14 other recreational facilities.”<sup>69</sup> Live Nation will assume exclusive ticketing for SMG’s North American venues as Ticketmaster’s current agreements with the SMG venues expire; Live Nation will be ticketing for all SMG venues by 2011. The spree of venue construction in the past 20 years also benefits Live Nation, which can seek venue management contracts on the ground that its promotional leadership would enable it to bring more activity to that venue. If the merger proceeds, Live Nation Entertainment’s argument would be even stronger, since it could argue, in addition, that Front Line’s managers could advise their artists to select the site as a performance venue.

One knowledgeable industry member described SMG as an attractive take-over candidate because its venue holdings would confer instant market leadership on any acquirer. Moreover, the acquirer, if Live Nation, Ticketmaster, or Live Nation Entertainment, would not need to pay a substantial percentage of convenience and service fees in return for the ticketing rights. Similarly, AEG would be an attractive candidate, not just for its venue holdings but also as an event promoter.

Ticketmaster does not own or manage any live event facilities, but it is hardly bereft of market clout with respect to venues. Ticketmaster has entered into exclusive, long-term contracts with over 10,000 venues to provide ticketing services. This includes over 80% of concert venues.<sup>70</sup> A venue that has entered a long-term, exclusive contract

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<sup>69</sup> Van Buskirk, “Live Nation Poaches SMG Venues from Ticketmaster,” *Wired*, <http://blog.wired.com/music/2008/09/live-nation-poa.html>, September 11, 2008.

<sup>70</sup> Balto, Testimony before the United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, p.2, Feb. 24, 2009.

to use Ticketmaster's services would do so, regardless of who might be the performer, manager, or promoter for a given event. Since, as Pearl Jam discovered, it is difficult to operate without using Ticketmaster's venues, Ticketmaster will frequently have influence regarding important aspects of venue operation and the promotions that appear. For example, if a venue were considering using some independent manager, after the merger Ticketmaster could well advise the venue owner to use the management services of its new parent, Live Nation Entertainment. In essence, if Ticketmaster and Live Nation are rolled together, the two powers will collaborate rather than contest with one another, a situation that may not always work to the benefit of consumers.

#### D. Event Promotion

Live Nation is the world's leading event promoter, producing annually over 22,000 events worldwide. At a recent conference, Live Nation listed the leading event promoters, ranking them according to the number of tickets sold worldwide:

Live Nation	14,449,773
AEG Live	5,991,067
CIE	1,297,394
Marek Lieberberg (Ger.)	919,261
3A Entertainment (U.K.)	818,000 <sup>71</sup>

In the event promotion market, therefore, Live Nation is 2 ½ times the size of AEG, and more than 11 times larger than any of its other rivals.

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<sup>71</sup> Live Nation presentation, Citi Global Entertainment, Media and Telecommunications Conference, Jan. 8, 2009, <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-eventDetails&EventId=2058882#> (webcast)

When it became clear in 2007 that Live Nation would not renew its ticket distribution arrangement with Ticketmaster, Live Nation sought to secure its role as a promoter of events and tours for super-stars. In late 2007 and 2008, Live Nation entered into “360-degree” deals by which, Live Nation made large upfront payments to some especially prominent artists in return for the right to receive, over a set period of years, a share of the revenue generated by virtually all of the artist’s activities, including global recording, touring, and merchandise sales. Thus, for pop music, in October, 2007 Live Nation paid Madonna approximately \$120 million for a 10 year commitment; for hip-hop Live Nation signed Jay-Z for approximately \$150 million; for Latin music it signed Shakira for approximately \$70 million;<sup>72</sup> and for rock music it signed the Canadian band Nickelback<sup>73</sup> for an estimated \$50 – 70 million in July 2008. In addition, in March, 2008 Live Nation signed the Irish rock band, U2, to a 12 year touring deal worth about \$100 million.<sup>74</sup> By these signings, Live Nation lured the artists away from major labels such as Warner Music Group, Universal Music Group, and Sony BMG.<sup>75</sup> While controversial as business moves and hard to assess in the short term, these contracts, representing an aggregate investment of approximately \$600 million, augment Live Nation’s already leading role in the market for event promotion.

Ticketmaster does not directly compete in this market. Although publicly available information does not suggest that Ticketmaster intends to enter the promotion

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<sup>72</sup> Lauria and Garrity, “Sizzling Assets: Live Nation Set to Sign Pop Star Shakira for \$70 Million,” New York Post, [http://www.nypost.com/seven/07012008/business/sizzling\\_assets\\_117975.htm](http://www.nypost.com/seven/07012008/business/sizzling_assets_117975.htm), July 1, 2008.

<sup>73</sup> Lewis, “Live Nation Addicted to “360” Deals, signs Nickelback,” The Business Insider, <http://www.businessinsider.com/2008/7/live-nation-addicted-to-360-deals-signs-nickelback>, July 8, 2008.

<sup>74</sup> Adegoke, “Live Nation agrees to 12-year pact with U2,” Reuters, <http://www.reuters.com/articlesPrint?articleID=USN3040810420080331>, Mar. 31, 2008.

<sup>75</sup> *Id.*

market, it is in a position to do so if it chooses, and if the proposed merger does not proceed. Two factors suggest that this possibility is significant.

First, Ticketmaster and Live Nation have been expanding their competitive profiles in significant ways over the past 18 months. Live Nation set up its own ticketing system and entered into a strategic alliance to provide ticketing services for the leading venue management company. For its part, Ticketmaster purchased Front Line, the leading talent management company. Should Ticketmaster choose, it would be capable of trying to purchase one or more promotion companies, such as AEG. Several industry sources have noted that before it agreed to merge with Live Nation, Ticketmaster displayed interest in purchasing AEG.<sup>76</sup>

Second, Ticketmaster may want to be able to offer its Front Line artists the capacity to promote events. Even absent public indications that Ticketmaster is planning such a move, Ticketmaster should not be overlooked as a potential competitor to Live Nation in the promotion market. A Live Nation--Ticketmaster merger, however, would eliminate any chance that rivalry between these companies might develop in the live entertainment promotion market.

The merger threatens to have a particularly adverse impact on independent promoters and venue operators, because it risks exposing the sensitive business information of these independents to their rival, Live Nation. A supplier of ticket distribution services obtains highly detailed, sensitive, proprietary information about both

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<sup>76</sup> ProfessorPooch.com, <http://blogs.myspace.com/index.cfm?fuseaction=blog.view&friendId=1847333&blogId=468561651> ("The potential merger would leave the other players in the music business marginalized. While there is also talk that the second largest promoter, AEG Live, has been under the acquisitive eye of both Live Nation and Ticketmaster, independent promoters have to be worried that they will be on the outside looking in.") Feb. 4, 2009.

the promoter's and venue's activities, plans, performance, and clients. At present, independents have the option of using Ticketmaster's rather than Live Nation's primary ticket distribution services, because Ticketmaster has no reason to divulge the independents' proprietary information to their direct rival, Live Nation. If Ticketmaster and Live Nation were to merge, however, the safe option is removed and the sensitive proprietary information might become available to Live Nation's promotion or venue management arms. For this reason, Seth Hurwitz, an independent promoter, testified to the Senate subcommittee,

If this merger is allowed to happen, my biggest competitor will have access to all of my sales records, customer information, on sale dates for tentative shows, my ticket counts, they can control which shows are promoted and much more. This will put ALL independent promoters at an irreparable competitive disadvantage."<sup>77</sup>

Not surprisingly, therefore, the industry's second largest promoter, AEG, which now uses now uses Ticketmaster's primary ticket distribution services, has informed Ticketmaster that it retains the option to terminate their relationship if the merger is consummated.<sup>78</sup>

Current economic and legal analysis ratifies the practical concerns of these competitors. Scholars are recognizing that there may be a market in the collection and use of data, just as there may be markets for, and vigorous competition regarding the efficient use of any input for or byproduct of competitive activity.<sup>79</sup> To be sure, the

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<sup>77</sup> United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Testimony of Seth Hurwitz," (Emphasis original.) [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3674&wit\\_id=7625](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3674&wit_id=7625), Feb. 24, 2009. Seth Hurwitz is not related to the author of this paper.

<sup>78</sup> . United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster Entertainment, Inc, p. 2 (Feb. 26, 2009) ("8-K, Feb. 26, 2009") available at <http://apps.shareholder.com/sec/viewerContent.aspx?companyid=TICK&docid=6441158>. Ticketmaster estimates that AEG accounted for less than 10% of its 2008 revenues.

<sup>79</sup> See, e.g., speaker presentations and discussions, notably Comments of FTC Commissioner Pamela Jones Harbour regarding "Whose Data is it? Competition, Privacy and Consumer Protection Perspectives in

information that Ticketmaster and Live Nation mines from each of the performances for which they provide ticketing services is individual to that particular performance and venue, but looking at the data in aggregate, the companies are competing with regard to the selection, collection and use of this data. Thus, the competition is not just with regard to how much information the companies can gather and how efficiently they can use it, but also regarding how well they determine when mining for certain information might be repellant to some potential customers.

Although arguably there is no data *market* here in the sense that the companies do not compete in selling the mined information to a common body of customers, there nonetheless remains competition regarding the choices that each company makes regarding the collection of data and the skill with which it implements those choices. As the comments of independent promoters and venue operators indicate, the parties' respective decisions and skills in this regard give the independents a choice.

Merging the information collection activities of the two companies creates three problems, therefore. First, the independents no longer have a choice between competitors based on the use of collected information. Second, the combined company would have so much more data at its disposal and such increased analytical capacity that it would enjoy an increased advantage over existing rivals, not just in the ticket distribution services market, but also in the markets for promotion and venue management. Third, the horizontal joining of data collection efforts and resultant information would create another barrier to entry in these markets -- another advantage, among many -- that the merger would confer on Live Nation Entertainment.

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Electronic Data Markets," Conference Topic, ABA Antitrust Section, 56<sup>th</sup> Antitrust Law Spring Meeting, March 27, 2008.

### E. Secondary Ticket Sales

The secondary market involves the resale of tickets that have already been purchased. As an example of how much prices may be elevated in the secondary market, tickets for a return concert by Phish, a group that previously had disbanded, were initially sold through LiveNation.com for \$49.50 but were resold on the secondary market for \$1000.<sup>80</sup> Although public demand for the band's reunion concerts was huge, brokers captured a substantial amount of the available primary ticket sales by using, among other means, computer programs known as "web bots" that can make automated bulk purchases from the primary website. Efforts to curtail such bulk purchases have not been entirely successful. Brokers also sometimes engage in unlawful methods of obtaining tickets, including bribery of promoters, performers, representatives of venues, and employees of ticket sellers.<sup>81</sup> A 1999 Report by the NY Attorney General's Bureau of Investor Protection and Securities examines these corrupt and unfair practices in detail.<sup>82</sup> On April 6, 2009, Senator Schumer of New York introduced anti-scalping legislation that would require sellers to wait two days from the time tickets go on sale at an authorized sales outlet before a reseller can put those tickets on sale in the secondary market. The goal is to give the fans a good chance to purchase the most desirable tickets at face price. Ticketmaster supports this legislation.<sup>83</sup>

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<sup>80</sup> Pareles, "Phish's Breakup? That was Then. But Tough Times Call for a Reunion." The New York Times, March 5, 2009, p. C1.

<sup>81</sup> NY Bureau of Investor Protection and Securities, "Why Can't I Get Tickets? Report on Ticket Distribution Practices," May 27, 1999, [http://schumer.senage.gov/new\\_websits/record\\_print.cfm?id=311230](http://schumer.senage.gov/new_websits/record_print.cfm?id=311230).

<sup>82</sup> Id.

<sup>83</sup> Press Release, "Schumer unveils new legislation to crack down on ticket resellers and dramatically bring down prices for fans—new two-day waiting period will allow fans to get first crack at originally priced tickets," [http://encarta.msn.com/dictionary\\_1861609245/étagère.html](http://encarta.msn.com/dictionary_1861609245/étagère.html). Under the legislation, ticket

According to Ticket News, the leading secondary ticket sellers and their power scores for the week ending March 28, 2009 are:

StubHub.com (owned by Ebay)	28.88
TicketsNow.com (owned by Ticketmaster)	13.28
TicketLiquidator.com	6.37
TicketCity.com	5.90
CoasttoCoastTickets.com	3.50
RazorGator.com	2.73 <sup>84</sup>

Ticketmaster is the only leading primary ticket seller that also, through its subsidiary TicketsNow.com, enjoys a place among the top secondary ticket sellers.

Ticketmaster has received enormous criticism for shifting customers to its secondary ticket sales site within minutes after tickets go on sale on its primary site. Some have taken this conduct to be not merely an error or isolated instance of exploitation, but as an example of the power Ticketmaster derives from being so powerful in several vertically integrated markets.

The states of New Jersey and Connecticut recently commenced investigations of Ticketmaster for directing people seeking tickets for a Bruce Springsteen concert from its primary ticket sales website to TicketsNow.com just minutes after Ticketmaster had put the tickets on sale. At TicketsNow.com, the tickets sold for up to 50 times their face value.<sup>85</sup> Although the Connecticut matter remains active, New Jersey recently settled its

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resellers would also have to obtain from the FTC a federal registration number that they post on their website when making sales.

<sup>84</sup> Ticket News, Ticket Industry Rankings, [http://ticketnews.com/ticket\\_industry\\_rankings](http://ticketnews.com/ticket_industry_rankings). Rankings and power shares for prior weeks are comparable for most firms.

<sup>85</sup> Ticketmaster apologized for the conduct regarding the Springfield concert, characterizing it as an error. <http://press.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8082&fragment=0&SearchType=OR&terms=>

investigation against Ticketmaster for diversion of customers to TicketsNow.com.<sup>86</sup> This settlement requires, among other provisions, that the company refund to aggrieved purchasers the excess they paid by being directed to TicketsNow.com, and that Ticketmaster effectively wall itself off from TicketsNow for at least a year by not selling tickets on TicketsNow.com before they go on sale on Ticketmaster's primary ticket sales site, Ticketmaster.com.<sup>87</sup> Ticketmaster is facing two suits in Canada for similar diversions of customers seeking tickets for Leonard Cohen and Carrie Underwood concerts.<sup>88</sup>

Ticketmaster's CEO Azoff has stated that even before the problems with the Springsteen concert, he had been telling Ticketmaster personnel to separate the Ticketmaster and TicketsNow sites.<sup>89</sup> More recently, Mr. Azoff testified to Congress that, for the right price, he would be amenable to selling TicketsNow.<sup>90</sup> Although such a divestiture might eliminate a source of consumer deception,<sup>91</sup> it would have no impact on problems presented by the merger that involve the markets for management of artists,

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<sup>86</sup> The settlement of this investigation does not bear on the investigations that 8 states, including New Jersey and Connecticut, are cooperatively conducting regarding the merger. Note 1, *supra*.

<sup>87</sup> Branch, Jr., "Ticketmaster/Live Nation merger: New Jersey AG settles investigation with Ticketmaster over Bruce Springsteen tickets," <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-New-Jersey-settles-with-Ticketmaster-over-Bruce-Springsteen-tickets209231>, Feb. 23, 2009. As noted previously, eight states, including New Jersey, have open investigations of the merger. See note 1, *supra*.

<sup>88</sup> Branch, Jr., "Ticketmaster/Live Nation merger: Trouble with Leonard Cohen tickets on TicketsNow, and a third class action lawsuit," <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Trouble-with-Leonard-Cohen-tickets-TicketsNow-third-class-action-lawsuit209257>, Feb. 25, 2009. Notwithstanding Ticketmaster's promise to the New Jersey Attorney General not to sell tickets "on TicketsNow before the went on sale to the general public, ... according to a report published by CBC.com, the company was doing just that with Leonard Cohen tickets." *Id.*

<sup>89</sup> Smith, "Can He Save Rock 'n' Roll? Irving Azoff Wants to Concentrate Power in the Music World Like Never Before; Bruce Springsteen Objects," *Wall Street Journal* pg A-1, Feb. 21, 2009, <http://online.wsj.com/article/SB123517105948436743.html>

<sup>90</sup> Reuters, "Ticketmaster CEO amenable to sale of TicketsNow," Feb. 26, 2009, <http://www.reuters.com/articlePrint?articleID=USN2619813920090226?sp=true>. As noted previously, Ticketmaster agreed to separate its other operations from those of TicketsNow for at least a year as part of the settlement of the New Jersey investigation. Fn. 87, *supra*.

<sup>91</sup> In his testimony before the Senate Judiciary subcommittee, David Balto wisely suggests that the Federal Trade Commission examine deceptive practices such as those that apparently occurred in the Springsteen incident. Balto, *supra* note 70, p.4.

control of venues, and primary ticket sales. In each of these markets, the merger would replace actual or potential competition with market dominance shielded from new rivalry.

The possible sale of TicketsNow.com or its effective separation from Ticketmaster does muddy the picture somewhat regarding the merger's impact on the secondary ticket market. Similarly, speculation that eBay might sell Stubhub raises further questions.<sup>92</sup> Although some might reasonably consider Live Nation to be a potential entrant into the secondary market in the absence of the merger, the possibility that one or both of the market's two leading firms might be sold presents too many open questions to permit confident predictions. Some industry members have, however, expressed concern that, if Ticketmaster and Live Nation were to merge, they would engage in joint efforts to prevent secondary sellers from obtaining adequate quantities of tickets for resale.

#### F. Problems related to Vertical Integration.

Ticketmaster and Live Nation is each a vertically integrated company that is powerful in three or more individual markets within the live entertainment industry. For each, its vertical integration augments the pressure that it can apply to rivals, customers, and suppliers at any given level. If the merger is consummated, firms seeking to enter the market would, to an even greater extent than at present, need to enter on several levels at once, a business reality that would raise rivals' cost of entry and thereby shelter Live Nation Entertainment's operations from competition at every level. It is not surprising, therefore, that the Financial Times concluded in an editorial that the problems stemming

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<sup>92</sup> Branch, Jr., "StubHub sale speculation begins to gain ground," TicketNews, <http://ticketnews.com/StubHub-sale-speculation-begins-to-mount409151>, April, 15, 2009.

from vertical integration exceed even the ones associated with dominance of primary ticket sales. In the Financial Times' view, "[a] single entity running the entire process from signing up the talent to staffing of the concerts and selling the tickets would stifle competition. This would work against the fans in the longer term, no matter what innovations were on offer initially."<sup>93</sup>

Vertical mergers may be unlawful when they injure the competitive process in a market. As stated in Antitrust Law Developments (6<sup>th</sup> ed.)

Vertical mergers may negatively impact horizontal competition at one or more of the levels of production or service at which the merging firms operate by, for example, (1) foreclosing fair opportunities to compete, (2) facilitating collusion among market participants, or (3) permitting the merged firm to evade rate regulation. However, the principal concern with vertical transactions is the possibility that companies will be denied significant access to suppliers and customers.<sup>94</sup>

The Ticketmaster – Live Nation merger, if consummated, presents the very serious prospects of foreclosing fair opportunities to compete by raising barriers to new entry and denying incumbent firms vital access to customers and suppliers.

Industry insiders widely recognize the competitive impact of vertical integration in the live entertainment event industry. Stifel Nicolaus analyst Scott Devitt stated,

By signing big name artists, Live Nation is able to attract venues to the company's ticketing platform with a compelling value proposition. If venues wish to book the most prominent artists, who are under contract with Live Nation, then the venue will have to work with Live Nation's ticketing platform."<sup>95</sup>

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<sup>93</sup> Financial Times, FT.com, "Best Show in Town, March 1, 2009, [http://www.ft.com/cms/s/0/5f7ecef-06a0-11de-ab0f-000077b07658.html?nclick\\_check=1](http://www.ft.com/cms/s/0/5f7ecef-06a0-11de-ab0f-000077b07658.html?nclick_check=1).

<sup>94</sup> ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (6<sup>th</sup> ed. 2007) p.380 (footnote omitted), and ff. See also see ABA Section of Antitrust Law, MERGERS AND ACQUISITIONS, 3D Ed (2008) pp 439 ff; and Balto, Testimony before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Feb. 24, 2009, p.3, [http://judiciary.senate.gov/hearings/testimony.cfm?id=3674&wit\\_id=7624](http://judiciary.senate.gov/hearings/testimony.cfm?id=3674&wit_id=7624).

<sup>95</sup> Savitz, "Ticketmaster loses #2 Customer SMG to Live Nation," Barron's Tech Trader Daily, Wall Street Journal Digital Network, Sept. 11, 2008, <http://blogs.barrons.com/techtraderdaily/2008/09/11/ticketmaster-loses-2-customer-smg-to-live-nation/>.

Ticketmaster also uses denial of access, albeit quietly, to further its competitive interests. Venues that don't sign some Front Line artists to perform might find themselves unable to obtain concerts by other, more popular artists. Ticketmaster's CEO, Irving Azoff, effectively acknowledged this point in a recent interview with the Wall Street Journal.

Mr. Azoff isn't shy about using his gold-plated roster as leverage when negotiating with concert promoters. 'It's done with a wink,' he says. 'There's never a conversation that says, 'If you don't extend this rent deal to Journey and the Eagles, I'm not going ... to let Jimmy Buffet play your building.'<sup>96</sup>

Vertical integration in the live entertainment event industry can also act as a barrier to entry and competition. Several possibilities highlight this problem. First, firms that want to enter on the ticket-seller level would need to contract with venues that want their services, but Live Nation and Ticketmaster currently own, manage, or have ticket distribution contracts with most major venues. Second, firms that want to act as event promoters would need to be acceptable to the artists and their managers. If the merger is completed, however, Front Line managers might be impelled to give preference to Live Nation Entertainment's promoters and venues, wherever possible. Thus, outsiders might easily be excluded, and for reasons not necessarily based on the merits of the deal. Third, although an emerging or non-superstar artist currently managed by Front Line might be willing to sign a long-term, multi-faceted deal with a recording company, Front Line's talent managers, post-merger, might steer their artists away from the recording companies and toward their new sibling, Live Nation. Fourth, if an independent rival competes too

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<sup>96</sup> Smith, "Can he Save Rock 'n' Roll? Irving Azoff Wants to Concentrate Power in the Music World Like Never Before; Bruce Springsteen Objects," *Wall Street Journal* pg A-1, Feb. 21, 2009, <http://online.wsj.com/article/SB123517105948436743.html>, appended to Testimony of Robert W. Doyle, before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy, "Competition in the Ticketing and promotion Industry: The Potential Anticompetitive Effects of the Proposed Combination of Ticketmaster Entertainment Inc. and Live Nation, Inc."

vigorously, Live Nation Entertainment could discipline the insurgent by withholding needed artists, venues, or concert deals, as the case may be.

In each of these situations, and others, preference can be given for justifiable reasons, but also for anticompetitive ones. Rather than expose itself to such jeopardy, any potential rival would recognize the practical need to enter the market at several levels at once, a daunting, cost-raising prospect for any competitor. Although this situation already exists to some degree since Live Nation and Ticketmaster are both vertically integrated – even their main, but smaller, competitor, AEG is vertically integrated – the obstacles to entry due to vertical integration would be magnified if the merger were consummated.

Some might contend, however, that a vertical merger between powerhouses at different levels could be beneficial since, before the merger, each company adds its own mark-up to the ultimate price, whereas after the merger there might be only a single mark-up. This argument has limited force for the merger at issue here, for two reasons. First, both parties are already vertically integrated and probably have dispensed with any mark-ups within their current structures that they are inclined to eliminate. Second, the post-merger market simply would lack sufficient rivalry at any level to apply the competitive pressure necessary to force Live Nation Entertainment to further lower its prices and profits.

Additionally, the coupling of Ticketmaster's dominance in artist management with Live Nation's dominance in event promotion would effectively create a "walled garden" around artists. An artist's closest relationship is with its manager, and managers have a fiduciary duty to provide advice in the best interests of their clients. The merger,

however, raises the specter of creating a serious conflict of interest, because Front Line managers will also have a fiduciary duty to Live Nation Entertainment. Its managers, therefore, may be pressured, impelled, or just silently expected to advise their clients to let Live Nation Entertainment fulfill all their artists' their needs.

In combining Live Nation's "first artist-to-fan vertically integrated concert platform" with Ticketmaster's market dominance in primary ticket sales and talent management, among other strengths, the proposed merger would effectively create an all-encompassing live entertainment system. Unless the fragments of the industry that are left out of this alliance are somehow able to coalesce into a powerful system of their own, Live Nation Entertainment will be unrivaled in North America.<sup>97</sup> The available evidence provides no indication that a substantial competitor can or will be created within any reasonable time horizon. Consequently, Live Nation Entertainment would enjoy top-to-bottom market power, including the increased capacity to raise prices and fees and limit consumer choices. This dominance, spanning most of the industry's markets, would place Live Nation Entertainment in a position substantially to shape the kinds of live entertainment that will, or will not, reach large audiences and therefore to exert enormous influence over the cultural life of the country.

G. Problems stemming from Monopsony (problems stemming from power held buyers)

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<sup>97</sup> SMG owns or operates many venues, but has always had to rely on Ticketmaster or Live Nation to do its ticketing. Although AEG is vertically integrated -- it owns sports teams and venues and promotes events, especially for its venues -- it would be unable to compare with Live Nation Entertainment in either its size or the range of its vertical integration.

With the marriage of Live Nation and Ticketmaster, the combined entity would have enormous power not only as a seller, but also as a purchaser, of services. Such monopsony power may be the source of significant harm. Although it is not an antitrust problem if it merely confers bargaining benefits, it is to the extent that it may result in a decrease in output, such as a reduced number of concerts or decreased ticket sales.

The proposed merger raises the real possibility that the merger would create monopsony power that could cause antitrust harm in this industry. By combining Front Line's leading position regarding talent management with Live Nation's similar position in event promotion, Live Nation Entertainment will be well-set to "call the tune" when negotiating management contracts with all but the most significant artists. While there remain independent artist management companies and promoters, these cannot offer the combination of management and promotion leadership that the merger would give to Live Nation Entertainment.

Within its bailiwick, Live Nation Entertainment would also include Live Nation's large portfolio of venues, the second largest in the industry, plus Live Nation's strategic ticket distribution alliance with SMG, which holds the largest venue portfolio. By adding Front Line's artist management relationships and Ticketmaster's immense portfolio of exclusive ticket distribution contracts, the merger would confer on Live Nation Entertainment the capacity to give favorable deals to its own artists and venues and impose less favorable terms on independent managers, promoters, and venues. As is the case with monopolistic sellers, monopsonistic buyers leave the other party to the "bargain" no suitable place to turn. The outcome of this shift in bargaining power is a transfer of wealth from suppliers (the artists, for example) to the monopsonist.

Of course, as a vertically integrated powerhouse, Live Nation Entertainment might often find that it is bargaining with itself. While such internecine bargaining does not raise monopsony problems, negotiation with independents after the merger may be a lopsided affair because of Live Nation Entertainment's market power at most levels of the industry.

As discussed in the American Antitrust Institute's Transition Report, "The Next Antitrust Agenda," the standard concern regarding monopsony power is that its exercise tends to result in decreased output, which in turn may result in higher prices for consumers.<sup>98</sup> The shifts in bargaining power and transfers of wealth described above are likely to reduce artists' incentives to perform as many concerts and tours, or even stay in the market. Similarly, potential competitors may have less incentive to enter markets within the industry. The exercise of monopsony power, therefore, may ultimately reduce both the supply of talent and the number of competitors, whose rivalry would otherwise yield greater output, lower prices, and increased market innovation.

The preceding subsections examined various sources of anticompetitive injury that the proposed merger is likely to cause. The following two subsections address additional factors that are critical to any merger assessment: the first considers whether the merger is likely to yield sufficient, demonstrable efficiencies to warrant not challenging an otherwise harmful merger; and the second examines the possible remedies that the Department of Justice might seek, assuming it chooses to challenge the merger.

#### H. Lack of Demonstrable Efficiencies.

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<sup>98</sup> American Antitrust Institute, "The Next Antitrust Agenda," (Foer, ed.), Ch. 3, "The New Kid on the Block: Buyer Power," 2008, available at [www.antitrustinstitute.org](http://www.antitrustinstitute.org).

In determining whether to challenge mergers, the Department of Justice, like the Federal Trade Commission, follows the DOJ/FTC Horizontal Merger Guidelines, which permit assessment of whether the merger creates efficiencies that outweigh the competitive harm caused by the merger.

Preliminarily, it is important to note that the claims must be for true efficiencies, in the sense that, if attained, they will improve consumer welfare. It is not sufficient to claim benefits that simply improve the merging parties' competitive posture, since such "benefits" are not cognizable under the Horizontal Merger Guidelines. At present, however, it is impossible to determine which claimed benefits are for true efficiencies, so we will merely raise, but not further explore, this issue.

The Merger Guidelines specify three criteria that must be met in order for an efficiency claim to be considered.

1. First, the claimed efficiencies must be "merger-specific," that is, they must be "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of the proposed merger or another means having comparable anticompetitive effects."<sup>99</sup>

2. Second, "[e]fficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means."<sup>100</sup> The burden of proof is on the merging firms to "substantiate [their] efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would

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<sup>99</sup> DOJ/FTC Horizontal Merger Guidelines, *supra* note 46, § 4.

<sup>100</sup> *Id.*

enhance the merged firm's ability and incentive to compete, and why each would be merger specific."<sup>101</sup>

3. Third," [t]he Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market."<sup>102</sup>

Ticketmaster and Live Nation assert that the merger will offer several benefits. Although the parties undoubtedly will provide more details in the course of the Department of Justice's investigation, the information that they have provided to Congress or otherwise made public does not substantiate that these benefits are merger-specific, verifiable, and of sufficient magnitude to outweigh the transaction's anticompetitive effects. At present, the claims are no more than that -- claims.

Ticketmaster and Live Nation assert that, by merging, they will be better able to increase investment in ways that will reduce the costs stemming from prevailing inefficiencies; relieve pressures on ticket prices in both the primary and secondary markets; and innovate, inaugurate new services, and increase attendance. We are not told just how the investment would achieve these ends.

Second, the parties claim that, once joined, they will be better positioned to respond to competition, which the parties assert is "robust at every level." Live Nation and Ticketmaster also assert that they will be better able to use technology to spur innovation and better serve customers. In particular, they would do this by investing further in telephone sales and retail outlets.<sup>103</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Ticketmaster News Release, "Live Nation and Ticketmaster CEOs Outline Benefits of Merger," Feb. 24, <http://press.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8104&fragment=0&SearchTyp>

Claims of efficiencies must meet all three criteria specified in the Horizontal Merger Guidelines to warrant consideration. At present, the merging parties' claims satisfy none of them.

*The Claimed Benefits are not merger-specific.* Ticketmaster and Live Nation do not need to merge to achieve the claimed efficiencies; even separately, the companies appear capable of making investments, innovating, modifying pricing and other business practices, and working to provide a closer connection between its artists and their fans. Live Nation has entered the primary ticket selling market, invested approximately \$600 million to sign major superstars to long term contracts, and already asserts that it places artists and fans within one vertically integrated platform.

Similarly, Ticketmaster has been becoming more vertically integrated by extending its activities into talent management and secondary ticket sales. Technologically, Ticketmaster already is in the process of installing the necessary equipment in venues to permit customers to use paperless ticketing – just swipe a credit card at the door and show a photo ID – and it has announced it is developing the capacity to permit mobile ticket purchasing from Blackberries. Ticketmaster also is weighing whether consumers would prefer being charged an “all-in-one” price rather than a face price for the ticket plus additional convenience, service, and other fees.

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[e=OR&terms=](#). This release summarizes effectively the parties' testimony to Congress regarding the benefits they anticipate will arise from their proposed merger. In a prior release, Ticketmaster asserted that the transaction would enable the newly-minted Live Nation Entertainment to: improve access and transparency, improve ticket pricing options, invest in better ticketing options; and increase event attendance through reliance on the combination of Ticketmaster's and Live Nation's online resources, databases, and promotional resources. “Live Nation and Ticketmaster Entertainment to Combine in Merger of Equals to Create World's Premier Live Entertainment Company,” <http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8080&fragment=0&SearchType=OR&terms=>, Feb. 10, 2009

Finally, although the parties assert that consumers want a closer connection between fans and the artists, the parties have not yet revealed who in the process they would eliminate – independent managers, booking agents, venue owners, promoters, or others – nor how the merger would help them do it. Overall, if the parties independently can take the steps they have been taking – steps that appear to be stimulated by competition – then they can make others. The burden is on the parties to demonstrate that any claimed efficiency benefits are merger-specific. To date, they have not met it.

*Claimed Efficiencies are speculative, not verifiable.* For neither of the claimed sets of benefits have the companies yet made public any detailed information demonstrating, in a verifiable way, just what costs can be reduced, how much they can be reduced, what new services are likely to be developed, and how much these services are likely to increase consumer welfare.

The companies assert, for example, that many tickets go unsold and that the merger will enable them to invest to increase attendance. It is undeniable that some investments might yield cost saving technology, and it is conceivable that the parties might pass some of the savings on to consumers to stimulate demand. As noted above, however, there is at present no reason to believe that the parties are not already fully investing in new technology and incorporating any useful innovations they develop. Nor is it manifest that the merger will make possible some cost-saving technological developments in the future that would not otherwise be possible and that would redound to the benefit of consumers. As for now, the parties' claims are pure speculation. As such, they do not excuse an otherwise harmful merger.

*Claimed benefits will not plausibly overcome the merger's competitive harm at all levels.* The dynamic that provides the greatest stimulus for reduced prices and improved attendance is competition. As Professor Krueger notes, even now the market displays some trends toward monopolization. By further reducing the extant rivalry in the live performance industry, the merger would sacrifice the very competition that is necessary to return prices and ticket sales to competitive market levels. Unsupported predictions of efficiency gains and technological developments simply will not overcome the value of competition.<sup>104</sup>

I. Lack of Effective Remedies Other than Complete Prohibition of the Merger.

There appear to be no structural or conduct remedies that would prevent the serious harm likely to result from the transaction, other than prohibiting its consummation.

*Structural Remedies.* Although the Department of Justice prefers structural to conduct remedies,<sup>105</sup> adequate structural remedies in this matter appear to be elusive. In many cases where merging firms have modest overlaps in their competitive ventures, one of the firms can sell a plant, division, or subsidiary in that contested market, thereby eliminating the overlap. Sometimes this is sufficient to permit the merger to proceed as modified, especially if the divestiture will create a new, viable rival or strengthen an existing one. In the present case, however, a divestiture by Live Nation of its ticket

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<sup>104</sup> Although the parties have also alluded to the nation's current economic difficulties, a merger that yields monopoly power is no help, because even in a recession, monopolists have little reason to innovate or keep prices down. See Baker, "'Dynamic Competition' does not Excuse Monopolization," Vol. 4, No. 2 Competition Policy International 243 (2008). Moreover, judging by the companies' fourth quarter and full year 2008 financial reports, neither is suffering. See notes 39 and 40, and associated text.

<sup>105</sup> United States Department of Justice, Antitrust Division, "Antitrust Division Policy Guide to Merger Remedies," § IIIA, October, 2004.

selling operation would still leave Live Nation – and thus, Live Nation Entertainment – in possession of CTS Eventim’s software licenses. Without cooperation from CTS Eventim, which received for its software licenses the right to handle ticketing for Live Nation’s events in Europe, the divestiture is likely to fail. Second, even if the new company acquires CTS Eventim’s software it would need the appropriate hardware and technical assistance to establish a viable ticketing system. Finally, the ticketing operation, lodged in its new home, would have to provide a viable operation that could compete with Live Nation Entertainment. This is unlikely however; Live Nation’s ticketing operation – the one Live Nation Entertainment would be likely to divest – is much smaller and reputedly of lower quality than Ticketmaster’s. Competitive viability may be elusive, therefore. Even were Live Nation’s ticketing function to be offered to an existing company, such as AEG, or to some rival ticket seller, such as Tickets.com, their systems might not be compatible. Overall, the problems are just too profound.

In addition, structural (or conduct) remedies should be able to lower barriers to entry and expansion in other markets in the industry. As the Department of Justice notes in its Merger Remedy Guide, “restoring competition is the key to an antitrust remedy.”<sup>106</sup> Although vertical integration can sometimes be the source of competitive benefits, Live Nation Entertainment would cobble together dominant or powerful positions in most markets in the industry, a situation likely to elevate entry barriers by requiring firms to enter on several levels at once. We cannot envision a remedy that would ease this chilling impediment to competition.

*Conduct Remedies.* Conduct remedies comprise limitations or requirements imposed on a firm’s competitive conduct. For conduct remedies to work in the situation

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<sup>106</sup> *Id.* at §II.

under review, they would have to effectively forestall or resolve the problems that the merger would cause at each level of industry activity.

It is true that a patchwork of prohibitions might be created. The court might, for example, prohibit Live Nation Entertainment from giving information derived from selling tickets to events promoted by independent promoters to Live Nation Entertainment's promotion unit. It also might prohibit Live Nation Entertainment from giving information from selling tickets at independent venues to the new entity's venue management arm. The court might even prohibit Live Nation Entertainment from using its horizontal and vertical market power to discriminate, without a legitimate business reason, against independent talent managers, booking agents, promoters, and venues.

Even if all the necessary prohibitions could be foreseen and articulated in a manner that would permit competitive behavior and prevent only anti-competitive conduct, the task of monitoring compliance would be daunting. It would impose upon the court a regulatory burden that courts are ill equipped to handle. Such judicial micro-management would probably even inject additional inefficiencies into the market by creating uncertainties and slowing the ability of competitors to respond quickly to market or technological developments.

Overall, no structural remedies or conduct prohibitions appear capable of shielding the live performance industry from the competitive ills that the merger seems likely to cause or exacerbate. Absent other workable, effective remedies, the appropriate outcome of the DOJ investigation is a challenge to the merger that seeks its complete prohibition.

## CONCLUSION

Like the interlacing of fingers, the proposed merger between Live Nation and Ticketmaster Entertainment would join the parties' powerful positions in most of the markets within the live entertainment industry. The horizontal merging of the two leading positions in the primary ticket distribution market would create a virtually unshakable hold on that market. The merger would also shelter other markets from competition by bringing into the new entity's fold the firms most likely to enter and compete on their own. Moreover, the merging parties' two-handed grip would become stronger – and more exploitable – by Live Nation Entertainment's vertical integration. Not only would every finger, every market position, be individually powerful, but when flexed in unison, Live Nation Entertainment -- as a buyer or seller – could increase its hold on the industry. Markets subject to such control are not competitive; they are deprived of the lower prices, increased output, and enhanced innovation that vigorous rivalry promotes. These anticompetitive effects are not justified by the transaction's alleged benefits. At present those appear to be wishful speculation, not reliable forecasts of efficiencies that are merger-specific, verifiable, and of sufficient magnitude to outbalance the harm caused in each adversely affected market. In the absence of other effective, expeditious remedies, the proposed transaction should be prohibited.