

A Merger of Equals?

An Analysis of the Ticketmaster – Live Nation Merger

Philip Prorok
Chicago-Kent College of Law
Entertainment Law Seminar
Professor Perritt
Fall 2009

Introduction

On February 10, 2009, Live Nation, Inc. and Ticketmaster Entertainment, Inc. made known their agreement to enter into a “merger of equals” and create a new entity named Live Nation Entertainment.¹ The proposed merger appears likely to have adverse effects on competition in almost every market within the live performance industry. As currently arranged, the merger probably violates Section 7 of the Clayton Act and should be legally challenged by the United States Department of Justice (DOJ).

Despite the fact that the boards of both companies have come to an agreement, the respective shareholders of both companies and the government have yet to approve the deal. Before the merger can be completed, the parties must submit information to the DOJ Antitrust Division², which may challenge the merger in court.³ This paper considers many of the potential antitrust issues caused by the proposed merger, especially issues involving the impact of the horizontal merger on the market for primary ticket sales and concerns due to the vertical integration of the companies. The paper concludes that if the merger is allowed it will effectively eliminate any competition in the primary ticket market. It further concludes that any potential future competition in related markets will be severely inhibited, and vertical integration of the new entity will create significant barriers to entry for any current or future competitors. The merger will likely not create any efficiencies considered by the DOJ when

¹Daniel Kreps, *Live Nation and Ticketmaster Announce Merger*, Rolling Stone, February 10, 2009, available at, <http://www.rollingstone.com/rockdaily/index.php/2009/02/10/live-nation-and-ticketmaster-announce-merger-agreement/> (last visited Nov. 24, 2009); United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster, Inc., February 13, 2009, p. 9, available at <http://investors.ticketmaster.com/sec.cfm>

² 15 U.S.C §18a

³ The Antitrust Division is authorized to challenge acquisitions and mergers under § 15 of the Clayton Act, 15 U.S.C. § 25, and §4 of the Sherman Act, 15 U.S.C. § 4

determining whether to prohibit a merger. The absence of any feasible structural or conduct related remedies leads to the conclusion that the DOJ should prohibit the merger.

This paper begins by considering the nature of the industry, the merging parties, and the proposed transaction. The paper then examines the antitrust law underlying potential mergers. Finally, specific antitrust concerns are addressed.

Industry

The live performance entertainment industry consists mainly of concerts and sporting events.⁴ In 2007, the overall market generated around \$21 billion, with \$6.7 billion coming from concerts and \$14.3 billion from sporting events.⁵ Forbes however, reports that the live concert industry primary concert ticket sales market earned only \$3.9 billion.⁶ The industry also received an additional \$2.6 billion in secondary ticket sales.⁷ The live performance entertainment industry is a superstar market.⁸ The top 5% of revenue generating artists took in 84% of concert revenues in 2003.⁹ The number of shows performed by these artists decreased by 18% yet the revenue per show increased by 60%.¹⁰

⁴ 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, available at <http://judiciary.house.gov/hearings/pdf/Doyle090226.pdf>; The industry includes both large and small concerts, as well as stage plays, but the main source of revenue comes from concerts and sporting events.

⁵ *Id.* at 7-8. Ticketmaster sells tickets for concerts as well as tickets for professional sports events.

⁶ Louis Hau, *Another Record Year for the Concert Industry*, Forbes, January 4, 2008, available at http://www.forbes.com/2008/01/04/concert-revenues-2007-biz-media-cx_lh_0104bizconcert.html (last visited Nov. 19, 2009)

⁷ Testimony of Robert W. Doyle, Jr. at 8

⁸ Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 *Journal of Labor Economics* 1, 15 (2005), available at <http://www.irs.princeton.edu/pubs/pdfs/484.pdf>.

⁹ *Id.*

¹⁰ *Id.* at 16

Artists and bands have managers who represent them and take a share of their earnings in exchange for their managerial services.¹¹ On behalf of the artist, managers make contracts with promoters to promote live concerts.¹² Front Line Management, Ticketmaster's subsidiary, is the most dominant provider of artist management services.

The artist contracts with a promoter. The promoter secures a venue, advertises the event, and takes care of other arrangements, such as transportation, equipment, lodging, and security.¹³ Promoters contract with a ticket distributor to distribute tickets, the largest distributor by far being Ticketmaster.¹⁴ Some promoters have exclusive, long term contractual relationships with companies to sell tickets for events. Live Nation is the world's largest promoter.¹⁵ Until last year, Live Nation used Ticketmaster to supply tickets for its events.¹⁶

From primary ticket sales revenue, the artist receives a guaranteed advance.¹⁷ After this advance, the promoter recovers its expenses and a guaranteed profit.¹⁸ The promoter and the artist then split the remaining ticket revenues (85% usually goes to the band).¹⁹

Many of the large venues are owned or managed by companies such as SMG, Live Nation, or AEG, of which SMG is the leader in this market.²⁰ Most major venues have exclusive

¹¹ Alan B. Krueger, *Rockonomics: The Economics of Popular Music*, NBER Working Paper No. 11282 (2005), p. 5, available at <http://irs.princeton.edu/pubs/pdfs/499.pdf>

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 7

¹⁵ *About Us*, Live Nation Website, at <http://www.livenation.com/company/getCompanyInfo> (last visited Nov. 18, 2009)

¹⁶ Ray Waddell, *Ticketmaster, Live Nation Deal Unlikely To Be Renewed*, *Billboard*, August 22, 2007, available at http://www.billboard.biz/bbbiz/content_display/industry/e3i30e53e28d8226c065af0ecffa91325be

¹⁷ Krueger, *Rockonomics: The Economics of Popular Music*, at 6.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *AEG Worldwide*, "About Us," at www.aegworldwide.com/08_corporate/about_us.html (last visited Nov. 29, 2009); *SMG World – About SMG*, at http://www.smgworld.com/company_history.aspx?un=1 (last visited Nov. 29, 2009)

long term agreements to offer tickets for sale through companies such as Ticketmaster, the largest ticket distributor.²¹

Ticketmaster, and other providers of ticket distribution services, market and sell tickets on behalf of promoters, teams, bands, and venues.²² Tickets to entertainment events are revocable licenses issued by the event sponsor.²³ Ticketmaster gets its revenue from its share of the service and convenience fees, essentially a commission. Ticketmaster's fees are usually around 10 percent of the list price.²⁴ In some cases the venue, promoter, or performers receive a portion of this fee, depending on the contract.²⁵

Those who have purchased tickets at face value may then attempt to resell those tickets in the secondary ticket market. These tickets are typically resold through online services. The leading online secondary ticket sellers are Stubhub, TicketCity, TicketsNow, and TicketLiquidator, with Stubhub leading the market.²⁶ Although these tickets sold in the secondary ticket market are typically sold for an increased price over the face value of the ticket, the performers, promoters, venues, and primary ticket distributors don't see an increase in profits because the venues, performers, etc. do not have a contractual relationship with the secondary ticket seller as they do with the primary ticket seller.²⁷

²¹ Krueger, *Rockonomics: The Economics of Popular Music*, at 7.

²² "Ticketmaster – Legal Guide," Ticketmaster Website, at <http://www.ticketmaster.co.uk/legal/purchase.html> (last visited Nov. 23, 2009)

²³ See for example *People v. Waisvisz*, 582 N.E.2d 1383, 1386, (Ill.App. 4 Dist., 1991)

²⁴ Krueger, *Rockonomics: The Economics of Popular Music*, at 7

²⁵ *Id.*

²⁶ *Ticket Industry Rankings*, Ticket News, at http://www.ticketnews.com/index.php?q=ticket_industry_rankings (last accessed Dec. 5, 2009)

²⁷ Testimony of Michael Rapino Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, p. 3-4, February 24, 2009, available at <http://judiciary.senate.gov/pdf/09-02-24RapinoTestimony.pdf>

In sum, after considering how live performance events are structured, there are five discrete markets within the live entertainment performance industry: talent management, venue management, event promotion, primary ticket sales, and secondary ticket sales. Each of these markets within the industry must be considered when considering the impact of the proposed merger.

Both parties to the merger are vertically integrated. Ticketmaster ranks first in artist management, first in primary ticket sales, and second in secondary ticket sales. Live Nation ranks first in event promotion, second in venue management, and second in primary ticket sales. Live Nation only recently entered the market for primary ticket sales in 2008.²⁸

Parties

Ticketmaster

Description of the Company

Ticketmaster Entertainment Inc. (TM) is the world's leading live entertainment ticketing and marketing company.²⁹ Ticketmaster operates in 20 global markets, providing ticket sales, ticket resale services, marketing and distribution through www.ticketmaster.com, one of the largest e-commerce sites on the Internet.³⁰ In 2007, the Company sold more than 141 million tickets valued at over \$8.9 billion on behalf of its clients.³¹

Ticketmaster was acquired by conglomerate InterActiveCorp (IAC) in 1997.³² In 2008, IAC split into five smaller companies.³³ TM was one of these five companies and was

²⁸ Jane Cohen, *Live Nation to Team with CTS Eventim for Ticketing*, Ticket News, December 21, 2007, at <http://www.ticketnews.com/Live-Nation-Teams-CTS-Eventim0127219> (last accessed Nov. 19, 2009)

²⁹ *About Ticketmaster*, Ticketmaster Website, at http://www.ticketmaster.com/h/about_us.html?tm_link=tm_homeA_i_abouttm (last accessed Nov. 18, 2009)

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

subsequently publicly traded on the New York Stock Exchange.³⁴ TM's commission on sales is derived from its portion of the revenue generated by convenience charges and service fees for each ticket sold.³⁵ Ticketmaster has focused on developing integrated, full service ticket distribution services, using three methods: (a) retail sales outlets, (b) online sales, and (c) telephone sales.³⁶ According to TM reports, in 2008, 73% of sales were made online, 16% of sales were made through retail sales offices, and 11% of sales were made over the phone.³⁷ Ticketmaster generally serves as the exclusive ticket sales agent for many venues due to its contractual relationships.³⁸ TM has also developed several innovations making ticket sales easier, such as the advent of paperless tickets.³⁹

Ticketmaster has also acquired a secondary ticket sales subsidiary in TicketsNow.com.⁴⁰ TicketsNow is a resale marketplace for tickets to various events.⁴¹ In addition to TicketsNow, TM also operates TicketExchange, also in the secondary ticket sales market, which enables fans

³³ Geraldine Fabrikant, *IAC/InterActive to Split Into 5 Companies*, New York Times, November 6, 2007, available at <http://www.nytimes.com/2007/11/06/technology/06diller.html>

³⁴ *Id.*

³⁵ 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, available at <http://judiciary.house.gov/hearings/pdf/Doyle090226.pdf>.

³⁶ United States Securities and Exchange Commission, SEC Form 10-K, Filed by Ticketmaster, March 31, 2009, available at <http://investors.ticketmaster.com/sec.cfm>

³⁷ *Id.*

³⁸ Testimony of Robert W. Doyle, Jr. before the U.S. House of Representatives, at 7

³⁹ Allison Reitz, *AC/DC tour latest to employ Ticketmaster's paperless ticket technology*, Ticketnews.com, September 17, 2008, at <http://www.ticketnews.com/AC-DC-tour-latest-to-employ-Ticketmasters-paperless-technology09817462> (last accessed Nov. 25, 2009)

⁴⁰ *Ticketmaster Company History*, Ticketmaster Website, at <http://www.ticketmaster.com/history/index.html> (last accessed Nov. 18, 2009)

⁴¹ *About Us*, TicketsNow Website, at http://www.ticketsnow.com/info/about_us.html (last accessed Nov. 18, 2009); the secondary ticket sales market involves the resale of tickets purchased on the primary sales market, often at increased prices.

to enter into transactions with other fans to purchase tickets to various events.⁴² TicketExchange allows the seller to determine the price desired for tickets and allows buyers to purchase those tickets at the set price without the bidding process common with secondary ticket markets.⁴³

Prior Acquisitions

Ticketmaster has continued to grow in the industry by acquiring rivals and other companies in vertically related markets.⁴⁴ Ticketmaster wasn't always the leader in ticket sales. Before Ticketmaster became the most dominant firm in the industry, that distinction belonged to Ticketron.⁴⁵ By providing better service, TM eventually completed an asset acquisition of the onetime market leader in 1991.⁴⁶

Ticketmaster also has a technological advantage over competitors with the software and hardware it uses to make its sales. TM bolstered this advantage in 2008 by acquiring Paciolan, a leading software supplier, especially to universities and colleges.⁴⁷ Before Ticketmaster's acquisition, Paciolan's software allowed venues to sell tickets to their events without having to go through TM.⁴⁸ Many smaller venues, as well as some professional sports teams, used

⁴² *Frequently Asked Questions*, Ticketmaster Website, at <http://www.ticketmaster.com/h/te/about.html#Q1> (last accessed Nov. 18, 2009)

⁴³ *Id.*

⁴⁴ Vertically related markets are markets for businesses engaged in successive stages of production or marketing. See *Black's Law Dictionary*, (8th ed. 2004), integration, vertical trust; Vertical competition is competition between participants at different levels of distribution, such as manufacturer and distributor. *Black's Law Dictionary*, (8th ed. 2004), competition

⁴⁵ Susan C. Schena, *Ticketmaster Bows Out of SD*, San Diego Business Journal, June 4, 1990, available at <http://www.encyclopedia.com/doc/1G1-9266617.html>.

⁴⁶ *Ticketmaster Company History*, Ticketmaster Website, at <http://www.ticketmaster.com/history/index.html> (last accessed Nov. 18, 2009)

⁴⁷ *Id.*; Michelle Gershberg, *Ticketmaster to buy ticketing service Paciolan*, Reuters, July 2, 2007, available at <http://www.reuters.com/article/technology-media-telco-SP/idUSWEN913420070703>

⁴⁸ Kristina Dell, *Going After Ticketmaster*, Time Magazine, May 24, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1625205,00.html>

Paciolan technology, effectively adding them to the fold of venues Ticketmaster owns or has exclusive contracts with.⁴⁹ Paciolan ticketing software was installed in five of the six new arenas that opened in North America in 2005, including the Charlotte Bobcats Arena, home of the NBA's Charlotte Bobcats.⁵⁰ Collectively, Paciolan clients sold over 100 million tickets annually representing approximately 25% of all live event tickets sold in the US in 2005.⁵¹

Ticketmaster also expanded its business by acquiring the previously mentioned Ticketsnow.com in 2008.⁵² This gave TM ownership of the number two ranked secondary ticket reseller, thrusting Ticketmaster into the secondary ticket sales market.⁵³ Also in 2008, Ticketmaster acquired British secondary ticket reseller Getmein.com, giving TM a large stake in the UK secondary ticket market and further enabling Ticketmaster to sell tickets globally.⁵⁴

In 2008, TM acquired Front Line Management, one of the world's leading artist management companies.⁵⁵ This transaction further vertically integrated TM (as it was already dominant in primary ticket sales, expanded into the secondary market, and had control over venues through its exclusive contracts) and immediately placed the company as a leader in the talent management market.⁵⁶ Front Line represents a wide range of major artists, including the

⁴⁹ Gershberg, *Ticketmaster to buy ticketing service Paciolan*

⁵⁰ Marketwire, *Paciolan Ticketing Software to Sell Tickets for 5 of 6 New North American Arenas*, Marketwire, January 4, 2006, at <http://www.marketwire.com/press-release/Paciolan-676242.html> (last accessed Nov. 26, 2009)

⁵¹ *Id.*

⁵² Alfred Branch Jr., *Ticketmaster Completes Acquisition of Ticketsnow*, TicketNews.com, February 27, 2008, at <http://www.ticketnews.com/Ticketmaster-completes-acquisition-TicketsNow0282661> (last accessed Nov. 20, 2009)

⁵³ *Id.*

⁵⁴ Alfred Branch Jr., *Ticketmaster Buys UK Ticketer Get Me In*, TicketNews.com, February 14, 2008, at <http://www.ticketnews.com/Ticketmaster-Buys-UK-Ticketer-Get-Me-In018297> (last accessed Nov. 20, 2009)

⁵⁵ Ticketmaster Press Release, *Ticketmaster Announces Agreement to Acquire Controlling Interest in Front Line Management*, October 23, 2008, available at <http://investors.ticketmaster.com/releasedetail.cfm?releaseid=342687>

⁵⁶ *Id.*

Eagles, Jimmy Buffett, Neil Diamond, Van Halen, Fleetwood Mac, Christina Aguilera, Stevie Nicks, Aerosmith, Steely Dan, Chicago, Journey, and Guns N' Roses.⁵⁷

Prior Conflicts

Ticketmaster is no stranger to controversy. In 1994, the band Pearl Jam challenged Ticketmaster's alleged monopoly in the ticketing industry by filing a complaint against TM with the DOJ.⁵⁸ Pearl Jam wanted to keep ticket prices low for their concerts and requested that TM lower its service charge as well.⁵⁹ TM refused to lower the service charge per ticket and Pearl Jam filed a memorandum with the DOJ claiming that TM was unlawfully interfering with Pearl Jam's freedom to determine the price and other terms on which their tickets would be sold.⁶⁰ Pearl Jam attempted to go on tour without the use of Ticketmaster and found it extremely difficult selling tickets and finding appropriate venues not under contract with TM, eventually leading to cancellation of the tour.⁶¹ The DOJ decided not to proceed with further investigation into Ticketmaster's contracting practices at the time, but stated it would "continue to monitor competitive developments in the ticketing industry."⁶² That Pearl Jam eventually returned to using Ticketmaster for its concerts is evidence of the power TM holds on the market.

In 2003, jam band String Cheese Incident brought suit against Ticketmaster for alleged antitrust violations.⁶³ String Cheese Incident were upset with the service charges TM was

⁵⁷ *Id.*

⁵⁸ Pearl Jam's Testimony Before Congress (prepared statement), June 30, 1994, available at <http://www.fivehorizons.com/archive/articles/testimon.shtml>

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Fred Moody, *Pearl Jam's Lonely Crusade Against Ticketmaster to Bring Down Prices*, Seattle Weekly, November 11, 1994, available at <http://www.fivehorizons.com/archive/articles/sw110294.shtml>.

⁶² US DOJ Press Release, *Closing of Ticketmaster Investigation*, July 5, 1995, available at http://www.justice.gov/atr/public/press_releases/1995/0264.htm

⁶³ Steve Knopper, *Incident Fight Ticketmaster*, Rolling Stone, August 28, 2003, available at http://www.rollingstone.com/news/story/5936870/incident_fight_ticketmaster

charging (\$10.10 for a \$32.50 ticket, compared with \$4 for the same ticket on SCI's website) and challenged whether the band could sell tickets through their website even though TM had exclusive contracts with many of the venues.⁶⁴ The band commonly received 50% of tickets allotted for a show from the concert promoter to sell on their website, but TM was altering this practice and refusing to give the band the same amount of tickets to sell on its website.⁶⁵ SCI Ticketing, the band's ticketing service, said in its lawsuit that Ticketmaster was foreclosing it from competing in the relevant market.⁶⁶ The case was eventually settled out of court.⁶⁷ The terms of the settlement were not disclosed, but it can be assumed that the terms were favorable enough for SCI Ticketing to stay in business.⁶⁸

The Cleveland Cavaliers of the National Basketball Association along with Flash Seats, LLC filed a lawsuit against Ticketmaster in 2007, accusing TM of blocking out competition.⁶⁹ This suit was filed after TM filed suit against the team and Flash Seats for breach of contract (the Cavaliers were using Flash Seats to resell tickets while under contract to use Ticketmaster).⁷⁰ As far back as 1993, the Cavaliers licensed and used ticketing software and hardware from TM but began using Flash Seats software in 2006 for secondary ticket selling.⁷¹ This litigation was eventually settled in May 2009, the settlement allowing the Cavaliers to use Flash Seats online

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Tamara Conniff, *Ticketmaster Rebuts String Cheese Lawsuit*, Billboard, August 12, 2003, available at <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4621673-1.html>

⁶⁷ Matt Sebastian, *Boulder, Colo., Firm, Ticketmaster Settle Ticketing Dispute*, Daily Camera (Boulder, CO), May 25, 2004, available at <http://www.highbeam.com/doc/1G1-118361301.html>

⁶⁸ The company still sells String Cheese Incident tickets (as well as tickets for other bands) at <http://sci.baselineticketing.com/>.

⁶⁹ Sara Stefanini, *NBA Team Accuses Ticketmaster of Monopoly Abuse*, Law360, July 31, 2007, at http://www.law360.com/print_article/31054 (last accessed Nov. 18, 2009)

⁷⁰ *Id.*

⁷¹ *Id.*

ticket-reselling software.⁷² Flash Seats, LLC also filed a lawsuit against Paciolan, which was purchased by Ticketmaster in 2008, for patent infringement, which is still pending in the District Court of Delaware.⁷³

Ticketmaster has also faced recent criticism and legal problems due to an incident in which fans attempting to purchase tickets for a Bruce Springsteen were redirected to Ticketmaster's secondary ticket site, TicketsNow, even though tickets were still available through Ticketmaster.⁷⁴ This prevented customers from obtaining tickets at face value while netting Ticketmaster a fee for the original sale as well as a fee for the secondary sale.⁷⁵ This brought an investigation by the New Jersey Attorney General which resulted in TM agreeing to pay \$350,000 to cover the cost of the investigation and to alter its business practices.⁷⁶

Live Nation

Live Nation's (LN) core business is producing, marketing, and selling live concerts for artists and bills itself as "the largest live event company in the world."⁷⁷ On the company's website, Live Nation explains:

⁷² Erin Fuchs, *Cavaliers, Ticketmaster Settle Antitrust Feud*, Law360, May 26, 2009, at <http://www.law360.com/articles/103147> (last accessed Nov. 18, 2009)

⁷³ Alfred Branch, Jr., *Flash Seats Sues Ticketmaster's Paciolan for Patent Infringement*, TicketNews.com, September 25, 2007, at <http://www.ticketnews.com/Flash-Seats-Sues-Paciolan-for-Patent-Infringement0092507> (last accessed Nov. 22, 2009)

⁷⁴ Daniel Kreps, *Bruce Springsteen "Furious" At Ticketmaster, Rails Against Live Nation Merger*, Rolling Stone, February 4, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/04/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger/>

⁷⁵ *Id.*

⁷⁶ Daniel Kreps, *Ticketmaster Reaches Settlement With NJ Attorney General After Springsteen Ticketing Fiasco*, Rolling Stone, February 24, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/24/ticketmaster-reaches-settlement-with-nj-attorney-general-after-springsteen-ticketing-fiasco/>

⁷⁷ "About Us," Live Nation's Website, at <http://www.livenation.com/company/getCompanyInfo> (last accessed Nov. 16, 2009)

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.⁷⁸

Live Nation was formed through acquisitions of various entertainment businesses and assets by the company's predecessors.⁷⁹ LN was acquired by Clear Channel in 1997. In 2005, Live Nation was incorporated as its own company to hold all of the live entertainment business conducted by Clear Channel and was spun-off from Clear Channel, becoming a separate publically traded company.⁸⁰

LN owns, operates, has booking rights to and/or has an equity interest in 159 venues located across six countries as of the end of 2008, making Live Nation the second largest operator of music venues in the world.⁸¹ Live Nation also produces one of the largest networks of music festivals in the world, with over thirty festivals globally.⁸²

Live Nation has also entered into what have been termed "360 Deals" with several of the nation's largest music performing artists.⁸³ These major artists include: Shakira, U2,

⁷⁸ *Id.*

⁷⁹ United States Securities and Exchange Commission, Form 10-K, filed by Live Nation, Inc., March 5, 2009, p. 3, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec>

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Daniel Kreps, *Nickelback Sign 360 Deal With Live Nation*, Rolling Stone, July 8, 2008, available at <http://www.rollingstone.com/rockdaily/index.php/2008/07/08/nickelback-sign-360-deal-with-live-nation/>

Nickelback, Jay-Z, and Madonna.⁸⁴ Under these “360 Deals”, in addition to handling touring and recording, Live Nation also handles the band’s merchandising, website, licensing, sponsorship, fan club, DVDs, endorsements, secondary ticketing and broadcasting rights.⁸⁵

Prior Acquisitions

Live Nation has grown by consolidating the promoter industry by acquiring at least twenty different companies.⁸⁶ In 2006, Live Nation bought a controlling stake in Musictoday, the operator of fan clubs and websites for more than 500 clients, including the Rolling Stones, the Bonnaroo Music and Arts Festival, Christina Aguilera, and Eminem.⁸⁷ As part of Live Nation, Musictoday is the official online store for over 500 artists and athletes, including Dave Matthews Band, Elvis Presley, and the Rolling Stones.⁸⁸

Also in 2006, Live Nation acquired House of Blues.⁸⁹ This gave Live Nation ten additional venues, all in major cities including Chicago, Las Vegas, New Orleans, and Los Angeles.⁹⁰ This deal also included eight small amphitheaters in addition to the House of Blues venues.⁹¹

Live Nation let its 10-year agreement with Ticketmaster, under which TM was the primary ticket seller for many of Live Nation’s events, expire at the end of 2008.⁹² While the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Joe Cohen, *Live Nation – Ticketmaster*, All Access, February 9, 2009, at <http://all-access.com/2009/02/live-nation-ticketmaster> (last accessed Nov. 21, 2009)

⁸⁷ *Concert Promoter Taps Fan Club Link*, Cnnmoney.com, July 31, 2006, at <http://money.cnn.com/2006/07/31/news/companies/livenation/index.htm> (last accessed Nov. 22, 2009)

⁸⁸ Live Nation Press Release, *Live Nation’s Artist Nation Division Redefines the Music Industry With Unified Rights Model*, PR Newswire, October 16, 2007, available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/10-16-2007/0004683291>

⁸⁹ Live Nation Press Release, *Live Nation Completes Acquisition of House of Blues*, November 6, 2006, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-newsArticle&ID=926913&highlight=>

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Alfred Branch, Jr., *End of the Line for Ticketmaster and Live Nation*, TicketNews.com, August 23, 2007, at <http://www.ticketnews.com/End-of-the-Line-for-Ticketmaster-and-Live-Nation27832> (last accessed Nov. 28, 2009)

agreement was in effect, Live Nation was the source for a large amount of Ticketmaster's ticket sales (20% in 2006, 17% in 2007, and 13% in 2008).⁹³ Analyst estimates place Live Nation's contribution to Ticketmaster's annual revenue at almost 20 percent.⁹⁴ At the end of 2007, Live Nation entered into a 10-year agreement with German company CTS Eventim, the largest ticketing company in Europe, "enabling Live Nation to launch its own ticketing business utilizing one of the most technologically advanced ticketing platforms in the world."⁹⁵ CTS Eventim and Live Nation have both confirmed that the potential merger between Live Nation and Ticketmaster will not affect the agreement between CTS and Live Nation.⁹⁶

Like Ticketmaster's trouble during ticket sales for Bruce Springsteen however, Live Nation has had trouble with its ticketing service. In the first major test for Live Nation's new ticketing service, Live Nation "failed to deliver."⁹⁷ Fans attempting to purchase tickets for the reunion show of the band Phish encountered a site that froze up during purchases, causing fans to lose the tickets they were in the process of buying.⁹⁸ All tickets to all shows were eventually sold.⁹⁹

On September 11, 2008, Live Nation increased its presence in the ticketing market as well as the market for venue management. Live Nation entered into a 7-year deal to exclusively

⁹³ United States Securities and Exchange Commission, Form 10-K, filed by Ticketmaster, Inc., Mar. 31, 2009, p. 8, available at <http://investors.ticketmaster.com/sec.cfm>

⁹⁴ Branch, *End of the Line for Ticketmaster and Live Nation*

⁹⁵ Jane Cohen, *Live Nation to Team with CTS Eventim for Ticketing*, TicketNews.com, December 21, 2007, at <http://www.ticketnews.com/Live-Nation-Teams-CTS-Eventim0127219> (last accessed Nov. 27, 2009)

⁹⁶ Press Release, *CTS EVENTIM and Live Nation confirm partnership*, June 3, 2009, available at <http://www.webdisclosure.com/actualite.html?id=52759>

⁹⁷ Daniel Kreps, *Phish Fans Furious As Live Nation Fails First Major Ticketing Test*, Rolling Stone, February 2, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/02/phish-fans-furious-as-live-nation-fails-first-major-ticketing-test/>

⁹⁸ *Id.*

⁹⁹ *Id.*

sell tickets for the North American arenas, stadiums, and theatres managed by SMG.¹⁰⁰ The deal with SMG represents an estimated 25 percent annual increase in the 13 million tickets Live Nation already expected to sell over the next seven years.¹⁰¹ This deal was damaging to Ticketmaster because SMG was Ticketmaster's second-largest customer, accounting for about 6% of revenues, or about \$74.4 million, in 2007.¹⁰²

Proposed Merger

The proposed merger between Live Nation, Inc., and Ticketmaster, Inc. will create an entity to be called Live Nation Entertainment, with an aggregate enterprise value of \$2.5 billion.¹⁰³ Under the agreement, Ticketmaster shareholders will receive 1.384 shares of Live Nation common stock for each share of Ticketmaster they own, subject to certain adjustments defined within the agreement.¹⁰⁴ The deal will be a tax-free, all stock transaction in which TM's shareholders will own 50.01% of the new company's stock while Live Nation's shareholders will own 49.99%.¹⁰⁵

The new company will have a board consisting of fourteen directors, seven directors coming from each party.¹⁰⁶ The merger agreement provides that the Chairman of Ticketmaster, Barry Diller, will serve as the Chairman of the Board of Directors of the new company, the CEO

¹⁰⁰ Yinka Adegoke, *Live Nation signs ticketing deal with SMG*, Reuters, September 11, 2008, available at <http://www.reuters.com/article/domesticNews/idUSN1132844820080911>

¹⁰¹ *Id.*

¹⁰² Eric Savitz, *Ticketmaster Loses Its No. 2 Customer to Competitor Live Nation*, Seeking Alpha.com, September 11, 2008, at <http://seekingalpha.com/article/95051-ticketmaster-loses-its-no-2-customer-to-competitor-live-nation> (last accessed Nov. 29, 2009)

¹⁰³ Daniel Kreps, *Live Nation and Ticketmaster Announce Merger Agreement*, Rolling Stone, February 10, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/10/live-nation-and-ticketmaster-announce-merger-agreement/>

¹⁰⁴ *Id.*

¹⁰⁵ United States Securities and Exchange Commission, Form 8-K, filed by Ticketmaster, Inc., Feb. 13, 2009, p. 2, available at <http://investors.ticketmaster.com/sec.cfm>

¹⁰⁶ *Id.*

of Live Nation, Michael Rapino, will serve as CEO of the new company, and the CEO of Ticketmaster, Irving Azoff, will serve as Executive Chairman of the new company.¹⁰⁷ TM and LN claim that the combination will result in about \$40 million in operating savings.¹⁰⁸ The companies hope to complete the merger by the second half of 2009.¹⁰⁹

The merger has met much resistance in Congress.¹¹⁰ While the previous administration might have approved the merger, President Obama's antitrust head is much tougher.¹¹¹ A Senate Judiciary Committee subcommittee held a hearing on February 24, 2009, while a subcommittee of the House held hearings on February 26, 2009.¹¹² Rep. Bill Pascrell (D-NJ) wrote a letter to fellow U.S. Representatives urging them to join him in opposition to the merger and asking them to sign onto a letter written to Assistant Attorney General Christine Varney explaining why the merger should not be allowed to go through.¹¹³ This letter was signed by 50 members of the house.¹¹⁴

Some shareholders of the companies have opposed the merger as well. Shapiro Capital, Live Nation's largest shareholder (owning about 15% of the company) is opposed to the

¹⁰⁷ *Id.*

¹⁰⁸ David Lieberman, *Live Nation, Ticketmaster agree to merge*, USA Today, February 10, 2009, available at http://www.usatoday.com/money/media/2009-02-10-live-nation-merge-ticketmaster_N.htm

¹⁰⁹ Kreps, *Live Nation and Ticketmaster Announce Merger Agreement*

¹¹⁰ Ben Meyerson, *Ticketmaster-Live Nation merger panned at Senate hearing*, Los Angeles Times, February 25, 2009, available at <http://articles.latimes.com/2009/feb/25/business/fi-ticketmaster25>

¹¹¹ Eliot Van Buskirk, *Congressman Asks Justice Department to Block Live Nation/Ticketmaster Merger*, Wired.com, July 9, 2009, at <http://www.wired.com/epicenter/2009/07/congressman-asks-justice-department-to-block-live-nationticketmaster-merger/> (last accessed Dec. 10, 2009)

¹¹² 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, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3674>

¹¹³ Alfred Branch, Jr., *Ticketmaster/Live Nation merger: 50 members of the House oppose the deal*, TicketNews.com, July 27, 2009, at <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-fifty-members-of-the-House-oppose-the-deal709279> (last accessed Nov. 28, 2009); A copy of letter can be found at <http://www.house.gov/frank/letters/official/2009/07-29-09-ticketmaster-letter.pdf>

¹¹⁴ *Id.*

merger.¹¹⁵ Some of Ticketmaster's shareholders have filed a lawsuit claiming that Ticketmaster was undervalued in the merger.¹¹⁶

Underlying Antitrust Law

United States antitrust law is a body of laws that prohibits anti-competitive behavior and unfair business practices. U.S. antitrust law contains a basic distinction between concerted and independent action. Multi-firm conduct is more likely to have a negative effect and is "judged more sternly."¹¹⁷ Congress first attempted to regulate anti-competitive behavior with the passage of the Sherman Antitrust Act of 1890.¹¹⁸ The act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," and also prohibits monopolization.¹¹⁹ Antitrust law however, does not attack monopoly power obtained through "superior skill, foresight and industry."¹²⁰ The scope of prohibition is limited to those agreements where the restraint of trade is unreasonable, the Supreme Court stating "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy trade."¹²¹

¹¹⁵ Peter Lauria, *Live Wire Imperils Live Nation Deal*, New York Post, February 13, 2009, available at http://www.nypost.com/p/news/business/item_8xvhX3RucVhuqc5fmG4mCM

¹¹⁶ Alfred Branch, Jr., *Ticketmaster/Live Nation merger: Shareholder lawsuit details deal's undervaluation*, TicketNews.com, February 20, 2009, at <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Shareholder-lawsuit-details-undervaluation209203>(last accessed Nov. 28, 2009)

¹¹⁷ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)

¹¹⁸ 15 U.S.C. §1

¹¹⁹ *Id.*

¹²⁰ *United States v. Aluminum Corp. of America*, 148 F.2d 416, 430 (1945)

¹²¹ *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 244 (1918)

The antitrust law most implicated by this merger is the Clayton Antitrust Act of 1914.¹²²

The Clayton Act seeks to prevent anti-competitive behaviors at their start. There are four sections of the Act that supplement the Sherman Act's basic prohibitions.¹²³ The Act prohibits:

1. Price discrimination among different classes of purchasers if such discrimination substantially lessens competition or tends to create a monopoly in any line of commerce.¹²⁴
2. Sales on the condition that (A) the buyer or lessee not deal with the competitors of the seller or lessor ("exclusive dealings") or (B) the buyer also purchase another different product ("tying") but only when these acts substantially lessen competition.¹²⁵
3. Mergers and acquisitions where the effect may substantially lessen competition or create a monopoly.¹²⁶
4. Any person from acting as a director of two or more competing corporations.¹²⁷

In 1950, Congress passed the Celler-Kefauver Act, making the Clayton Act applicable to certain acquisitions and acquisitions by firms that were not direct competitors.¹²⁸ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 provides that before certain mergers, tender offers or other acquisitions transactions can close, both parties must file a "Notification and

¹²² 15 U.S.C. §12-27, 29 U.S.C. §52-53

¹²³ *Id.*

¹²⁴ 15 U.S.C. §13

¹²⁵ 15 U.S.C. §14

¹²⁶ 15 U.S.C. §18 (Clayton Act Section 7)

¹²⁷ 15 U.S.C. §19

¹²⁸ 15 U.S.C. §18

Report Form” with the Federal Trade Commission (FTC) and the DOJ.¹²⁹ Certain requirements must be met in order to trigger the notification requirement, and the Live Nation-Ticketmaster merger meets such requirements.

FTC & DOJ Guidelines

The FTC and the DOJ have created a set of guidelines to be considered when evaluating a potential merger.¹³⁰ The law that will be the focus of the DOJ’s inquiry into the Ticketmaster – Live Nation merger will be Section 7 of the Clayton act, pertaining to mergers and acquisitions.¹³¹ “The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”¹³² Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.¹³³ Market power also encompasses the ability of a single buyer (“monopsonist”) to depress the price paid for a product to a level below the competitive price and thereby depress the output.¹³⁴ The analytical process used by the DOJ has five steps. First, the DOJ assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the DOJ assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the DOJ assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the DOJ assesses any efficiency gains that reasonably cannot be achieved by the parties through

¹²⁹ 15 U.S.C. §18a

¹³⁰ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines*, p. 1, available at <http://www.ftc.gov/bc/docs/hmg080617.pdf>

¹³¹ *Id.* at 1

¹³² *Id.* at 2

¹³³ *Id.*

¹³⁴ *Id.*

other means. Finally the DOJ assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.¹³⁵

Antitrust Analysis

The potential merger between Ticketmaster and Live Nation raises several antitrust concerns. The merger will be analyzed under the DOJ process discussed above. The DOJ has reviewed the parties' initial filings and issued an expected Request for Additional Information, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, on March 20, 2009.¹³⁶ This merger is most likely to be evaluated as both a horizontal merger and a vertical merger. The companies are the top two firms in the primary ticket sales market, making this a horizontal merger. As discussed above, both Ticketmaster and Live Nation are each, in themselves, vertically integrated and are participants in several other related markets, which warrants consideration as a vertical merger as well. If the merger is permitted, Live Nation Entertainment will have a dominant position in five discrete markets within the industry. Each of the subsequent steps under the DOJ's analysis will be evaluated as they pertain to the potential Live Nation – Ticketmaster merger.

“Monopoly is a protean threat to fair pricing.”¹³⁷ The social cost of monopoly is equal to the loss produced by monopoly pricing and monopoly behavior, minus any social gains that monopoly produces.¹³⁸ Whichever considerations are used in determining the social costs of a

¹³⁵ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 3

¹³⁶ Ticketmaster Press Release, *Live Nation and Ticketmaster Entertainment Receive Second Request From the U.S. Department of Justice Regarding Proposed Merger*, March 20, 2009, available at <http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8168&fragment=0&Sea>

¹³⁷ *United States v. Line Material Co.*, 333 U.S. 287, 309 (1948)

¹³⁸ Herbert Hovenkamp, *Antitrust Policy and the Social Cost of Monopoly*, 78 IALR 371 (1993)

monopoly tell something about what intervention in the market is appropriate.¹³⁹ If the social cost of a monopoly is small, little or no intervention may be necessary.¹⁴⁰ An efficient antitrust policy will minimize the total social losses caused by monopoly seeking firms.¹⁴¹ Antitrust would do this by “minimizing the sum of (a) the costs to the consumer imposed by monopoly pricing and output reduction; (b) the costs to the monopolist of inefficient exclusionary practices; (c) the costs that inefficient exclusionary practices impose on third parties; and (d) the costs of operating the system that detects these things, adjudicates them, and punishes violators.”¹⁴²

The hypothetical monopolist test has been used to define antitrust markets for over 20 years.¹⁴³ Under the DOJ’s analytical process, the markets that first could be subject to the exercise of market power must first be identified.¹⁴⁴ Market definition focuses solely on possible consumer responses.¹⁴⁵ The outer boundaries of a product market are determined by the reasonable interchangeability of use and the cross-elasticity of demand between the product itself and substitutes for it.¹⁴⁶ The market affected must be substantial, and the Government must prove a likelihood that competition may be “foreclosed in a substantial share of that market.”¹⁴⁷ If a firm can raise prices or cut production (defined by the DOJ as “small but significant and transitory”) without causing a quick influx of supply to the area from outside sources, that firm is operating in a distinct geographic market.¹⁴⁸ The relevant geographic

¹³⁹ Herbert Hovenkamp, *Antitrust’s Protective Classes*, 88 Michigan Law Review 1, 15 (1989)

¹⁴⁰ *Id.*

¹⁴¹ Hovenkamp, *Antitrust Policy and the Social Cost of Monopoly*, 78 Iowa Law Review 371, 374 (1993).

¹⁴² *Id.*

¹⁴³ Malcolm B. Coate & Jeffrey H. Fisher, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 Journal of Competition Law and Economics 1031 (2008)

¹⁴⁴ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 4

¹⁴⁵ *Id.*

¹⁴⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, (1962)

¹⁴⁷ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 595, (1957)

¹⁴⁸ *Black’s Law Dictionary* (8th ed. 2004), market

market consists of the area from which the sellers of a particular product derive their customers, and the area within which the purchasers of the product can practically seek the product.¹⁴⁹

“The relevant market is defined as all products ‘reasonably interchangeable by consumers for the same purposes,’ because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level.”¹⁵⁰ Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, but also on the cost of substitution, which depends most sensitively on the price of the products.¹⁵¹

Once defined, a relevant market must be measured in terms of its participants and concentration.¹⁵² Participants include firms currently producing or selling in the market and other firms who would likely enter the market without incurring significant sunk costs of entry and exit.¹⁵³ Sunk costs are unrecoverable past costs, so if a firm would incur large sunk costs to attempt to enter a market, that company may be hesitant to do so because if the entry did not work out, that company would lose the money already invested.¹⁵⁴

After establishing the relevant market and participants, the DOJ then considers potential adverse competitive effects of the merger.¹⁵⁵ These adverse effects include: (1) lessening of competition through coordinated interaction and (2) lessening of competition

¹⁴⁹ *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 932 (6th Cir. 2005)

¹⁵⁰ *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 496 (2d Cir. 2004)

¹⁵¹ *FTC v. Whole Food Markets, Inc.*, 548 F.3d 1028, 1037 (DC Cir. 2008)

¹⁵² Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 5

¹⁵³ *Id.*

¹⁵⁴ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 469 (2002)

¹⁵⁵ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 17

through unilateral conduct.¹⁵⁶ Because an individual merger may threaten to harm competition through more than one of these effects, mergers will be analyzed in terms of as many potential adverse competitive effects as are appropriate.¹⁵⁷

Because a merger is not likely to create or enhance market power or to facilitate its exercise if entry into the market is so easy that current market participants could not profitably maintain a price increase above premerger levels, the DOJ does an entry analysis.¹⁵⁸ If entry is easy and sufficient in magnitude, the immediate anti-competitive effects of a merger may be blunted.¹⁵⁹ In such markets, the merger raises no antitrust concerns and ordinarily requires no further analysis.¹⁶⁰

Although as a matter of theory, a large market share, in and of itself, is not a barrier to entry, it is evidence that a barrier to entry exists.¹⁶¹ Implicit in the DOJ's approach is "a recognition that there is some relationship between market concentration and market performance."¹⁶² Some studies indicate that there is an inverse relationship between market concentration and the number of market entrants, indicating that highly concentrated markets have fewer entrants into such markets.¹⁶³ This lack of market entrants can likely be attributed to increased barriers to entry in many highly concentrated markets.

¹⁵⁶ *Id.* at 17-21

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 24

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *United States v. Philipsburg Nat. Bank & Trust*, 399 U.S. 350, 377 (1970) (J. Harlan, concurring in part and dissenting in part)

¹⁶² Robert D. Joffe, *Proposed Revisions to the Justice Department's Merger Guidelines*, 81 *Columbia Law Review* 1543, 1562 (1981)

¹⁶³ Arthur A. Thompson, Jr., *Entry and Market Share Success of New Brands In concentrated Markets*, *Journal of Business Research*, Volume 10, Issue 3, pg. 371-83, September 1982

The DOJ then analyzes whether the merger generates significant efficiencies by permitting a better utilization of existing assets, “enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.”¹⁶⁴ The agency only considers those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.¹⁶⁵ “The merging firms must substantiate efficiency claims so that the agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency.”¹⁶⁶ If cognizable efficiencies are large enough that the merger is not likely to be anticompetitive the DOJ will not challenge the merger.¹⁶⁷

Finally, the agency determines if imminent failure of one of the merging firms would cause the assets of that firm to exit the relevant market, as such exit would itself damage competition.¹⁶⁸ A merger that prevents such exit would not create or enhance market power.¹⁶⁹ In order for the DOJ to make this determination, the following circumstances must be met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able reorganize under the bankruptcy law; (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition; and (4) absent the acquisition,

¹⁶⁴ *Id.* at 28

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 29

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 30

¹⁶⁹ *Id.*

the assets of the failing firm would exit the relevant market.¹⁷⁰ This provision of the guidelines does not apply to either of these firms and thus is not given further consideration.

Primary Ticket Sales

The most obvious horizontal antitrust concern presented by the merger is the elimination of Live Nation as a competitor in the business of distributing tickets.¹⁷¹ The DOJ will likely define four submarkets, differentiating between primary ticket sales and secondary ticket sales and even further differentiating between concerts and sporting events.¹⁷²

Market Definition. The first step in the analytical process is to define the product or group of products and the geographic market.¹⁷³ As discussed above, the undertaking requires the DOJ to determine, for some product produced, the smallest area in which a monopolist could raise prices by a “small, but significant and nontransitory” amount and not cause potential competitors to enter the market.¹⁷⁴

Geographic Market. The likely geographic market pertaining to the Live Nation – Ticketmaster merger is the entire United States. Both companies operate across the nation through their online services, as well as at ticket offices and over the phone. Competition to sell tickets extends nationwide, as evidenced by Ticketmaster selling tickets for venues virtually all over the United States. Any ticket sellers from outside the U.S. that may compete with American sellers

¹⁷⁰ *Id.*

¹⁷¹ Testimony of Robert W. Doyle, Jr. at 11

¹⁷² *Id.*

¹⁷³ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 4

¹⁷⁴ *Id.*

have not been identified. Ticket sales in foreign countries will be looked at by those countries, as evidenced by the United Kingdom's own evaluation of the merger.¹⁷⁵

Product Market. The product market definition is the narrowest definition of the product for which the merger would allow a sole producer to impose a "small but significant and nontransitory" price increase and not result in potential competitors entering the market.¹⁷⁶ In order to establish a product market one must determine where consumers might reasonably turn for another source of tickets if the potentially merged company were to raise ticket prices, such as smaller ticket distribution companies or perhaps a venue entering the market by selling tickets to events in-house. Some experts suggest that primary ticket sales should be further broken down.¹⁷⁷ These suggestions include treating the market for sporting event tickets separately, treating the market for large venues separately, and treating primary ticket sales and secondary ticket sales separately.¹⁷⁸ This paper assumes that treating the markets for sporting events and large venues separately will result in a similar analysis as if they were included under the broad market of "primary ticket sales" but will treat the market for secondary ticket sales as a separate market.

Primary and Secondary ticket sales should be treated as separate markets. Ticketmaster and Live Nation may argue that the relevant market is broader than primary distribution of tickets.¹⁷⁹ A broad market would likely yield a more favorable analysis for the proposed merger as it would allow the DOJ to consider more potential market responses and market entrants

¹⁷⁵ Graeme Wearden, *Competition Committee Opposes Ticketmaster and Live Nation Merger*, The Guardian, October 8, 2009, available at <http://www.guardian.co.uk/business/2009/oct/08/competition-ticketmaster-live-nation-merger>

¹⁷⁶ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 5

¹⁷⁷ Testimony of Robert W. Doyle, Jr. at 7

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

when determining what may happen if a monopolist increased prices.¹⁸⁰ The markets for primary ticket sales and secondary ticket sales function in different ways. Secondary ticket sales are distinct from primary ticket sales, as the performers, promoters, and venues don't see an increase in revenue when a ticket is sold in the secondary market.¹⁸¹

Primary ticket sales are sold for the face value of the ticket (set by the event presenter), with the primary ticket seller or distributor adding a per ticket convenience charge, per order processing fee, and optional premium delivery fees.¹⁸² Secondary ticket sellers sell their tickets for whatever price a consumer is willing to pay, usually much more than the face value of the ticket.¹⁸³ Tickets for high demand events on the secondary ticket market are more expensive than if purchased on the primary ticket market and thus consumers will not want to purchase tickets on the secondary market unless tickets are unavailable on the primary market.¹⁸⁴ A ticket purchased on the secondary market is an imperfect substitute for a ticket bought on the primary market because of the often large increase in price. Secondary ticket sellers rely on both primary ticket sellers and their customers to acquire the tickets that they sell, while primary ticket sellers depend on the venue (or artist or promoter, etc.) to obtain the tickets they sell.

¹⁸⁰ See generally Malcolm B. Coate & Jeffrey H. Fisher, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 *Journal of Competition Law and Economics* 1031 (2008)

¹⁸¹ Testimony of Michael Rapino at 4

¹⁸² Testimony of Robert W. Doyle, Jr. at 8

¹⁸³ Chris Nicolayson, *Guest Commentary: Why the secondary ticket market exists*, TicketNews.com, September 15, 2009, at <http://www.ticketnews.com/Guest-Commentary-Why-the-secondary-ticket-market-exists9091567> (last accessed Nov. 24, 2009)

¹⁸⁴ See conflict resulting from Bruce Springsteen concert mentioned previously at <http://www.rollingstone.com/rockdaily/index.php/2009/02/04/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger/>

Even if the two markets are viewed together, Ticketmaster is the market leader by a large margin. TicketNews, an online company, provides analysis of the ticketing industry, describing itself as a “comprehensive resource for news, market analysis, event announcements, and information relating to the ticket industry.”¹⁸⁵ This company ranks ticket sellers by computing a “power score,” which is calculated based on web traffic received by a seller’s website.¹⁸⁶ Although this does not measure the entire breadth of the ticketing industry, as most sales are made through the internet, it is a good indicator of market strength.¹⁸⁷ The rankings by power score for the combined primary and secondary ticket market, for the month of November were as follows¹⁸⁸:

1. Ticketmaster.com 35.07
2. Stubhub.com 19.14
3. Ticketcity.com 3.85
4. TicketLiquidator.com 3.67
5. Ticketsnow.com 3.66 (owned by Ticketmaster)
6. Livenation.com 3.51

Ticketmaster’s ownership of TicketsNow strengthens TM’s market presence. By virtue of the merger, adding Live Nation’s share would place the potential company’s power score at 42.25, more than double the next highest score and more than double the score of the remaining companies in the top twenty combined.¹⁸⁹

¹⁸⁵ *About TicketNews*, TicketNews.com, at <http://www.ticketnews.com/aboutUs> (last accessed Nov. 21, 2009)

¹⁸⁶ *Ticket Industry Rankings*, TicketNews.com, at http://www.ticketnews.com/ticket_industry_rankings (last accessed Dec. 11, 2009)

¹⁸⁷ See SEC Form 10-K, Filed by Ticketmaster, March 31, 2009, (73% of sales made online)

¹⁸⁸ *Top Combined Ticket Sellers*, TicketNews.com, at <http://www.ticketnews.com/view/TopCombinedSellers> (last accessed Nov. 28, 2009)

¹⁸⁹ *Id.*

Ticketmaster's market dominance is even more evident by comparing the power score rankings for the primary ticket sellers alone.¹⁹⁰ The power score rankings of the primary ticket sales market for the month of November were as follows¹⁹¹:

1. Ticketmaster.com	67.92
2. LiveNation.com	6.86
3. Telecharge.com	5.28
4. TicketWeb.com	3.84
5. Etix.com	3.43
6. BrownPaperTickets.com	1.76

These rankings indicate that Ticketmaster is ten times stronger than its closest competitor, which happens to be Live Nation. If Live Nation and Ticketmaster merge, their combined power score will be more than more than fourteen times the next highest competitor's power score. The potential merged company would have a power score more than 5 times the power scores of the next four competitors combined.¹⁹²

After considering the similarities and differences between the primary ticket sales market and the secondary ticket sales market it has been determined that it is likely that the DOJ will treat primary and secondary sales as two distinct and separate markets. Thus, some additional analysis is done regarding the secondary market following the analysis of the primary market.

These power scores show that the primary ticket sales market is highly concentrated.¹⁹³ Although twenty different companies are listed as competitors by TicketNews.com's rankings,

¹⁹⁰ *Top Primary Ticket Sellers*, TicketNews.com, at <http://www.ticketnews.com/view/TopPrimarySellers> (last accessed Dec. 11, 2009)

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ According to the power scores, Ticketmaster controls almost twice as much of market when the primary ticket market is considered separately from the ticket market including both primary and secondary sales.

most command a very small portion of the market.¹⁹⁴ This signifies that consumers have very few options when it comes to purchasing tickets. Since Live Nation is the second most dominant company in the market, combining with Ticketmaster would make the market even more concentrated and bolster TM's dominance. Even though Live Nation only entered the market a short period of time ago¹⁹⁵, it has already emerged as the second ranked firm, indicating that it is Ticketmaster's greatest competition. One of the higher ranked competitors¹⁹⁶, Tickets.com, has been in operation since 1995¹⁹⁷ and has a power score that is one-sixth that of Live Nation.¹⁹⁸ This is evidence that competing with TM in the primary ticket market is difficult and that Live Nation was the best hope for competition.

Under a DOJ analysis, the potential entry into the market by other firms must also be considered.¹⁹⁹ Looking at Live Nation's foray into the primary market indicates that entry is not an easy task.²⁰⁰ Live Nation was in a unique position relative to other competitors in that it was established as a leader in several related markets. Even so, Live Nation partnered with the large European ticket seller, Eventim, in order to obtain the software and other necessities required to enter the ticket market.²⁰¹ The deterrent to entry that Ticketmaster's superior technology may impose on potential market entrants was not a factor to Live Nation because it was able to

¹⁹⁴ *Top Primary Ticket Sellers*, Ticketnews.com, at <http://www.ticketnews.com/view/TopPrimarySellers> (last accessed Dec. 11, 2009)

¹⁹⁵ Jane Cohen, *Live Nation to Team with CTS Eventim for Ticketing*, TicketNews.com, December 21, 2007, at <http://www.ticketnews.com/Live-Nation-Teams-CTS-Eventim0127219> (last accessed Nov. 25, 2009)

¹⁹⁶ 3rd ranked Telecharge.com sells primarily in NY, mostly Broadway productions, see <http://www.telecharge.com/aboutUs.aspx>

¹⁹⁷ *Tickets.com Corporate Overview*, Tickets.com, at http://provenue.tickets.com/US/about_us/corporate_overview.shtml (last accessed Nov. 18, 2009)

¹⁹⁸ *Top Primary Ticket Sellers*, TicketNews.com, at <http://www.ticketnews.com/view/TopPrimarySellers> (last accessed Dec. 11, 2009)

¹⁹⁹ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 24

²⁰⁰ Cohen, *Live Nation to Team with CTS Eventim for Ticketing*

²⁰¹ *Id.*

use its large presence in related markets to negotiate the use of similar technology produced abroad. Future potential market entrants would be at a further disadvantage because not only would they not have the same level of technology that Ticketmaster has, the best alternative would also be foreclosed. If the merger goes through, Live Nation Entertainment would control eighty percent of the concert ticket sales market, making entry even more difficult for any potential competitor.²⁰² As discussed previously, the large market share in an already concentrated market is not, without other indicia of a monopoly, does not represent a barrier to entry, but such a large share is certainly evidence that a barrier may exist.

Secondary Ticket Sales

Ticketmaster does not dominate the secondary ticket sales market as it does the primary market. This is one indicator that this market should be treated separately from the primary ticket sales market. Although it is common for tickets for popular shows to sell for much more than the face value of the ticket, some performers, such as Phish, have attempted to prevent any reselling of tickets to their concerts, even going so far as to turn people away at the gate for showing up with a scalped ticket.²⁰³ Despite Ticketmaster's presence in the secondary market through its subsidiary TicketsNow.com, TM has made purchasing tickets on the secondary market more difficult when it unveiled "paperless" ticketing, which requires the original purchaser to present his credit card and ID at the event in order to gain access.²⁰⁴ "Paperless tickets" have been taken up by several big name performers such as Miley Cyrus,

²⁰² James Rowley, *Ticketmaster-Live Nation Probe to Focus on Ticketing*, Bloomberg, February 12, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601109&sid=adl113CwyATc>

²⁰³ Swati Pandey, *Ticketmaster digs deeper into the secondary market*, LA Times Blog, October 2, 2008, at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2008/10/ticketmaster-di.html> (last accessed Nov. 21, 2009)

²⁰⁴ Associate Press, *Ticketmaster Develops New Way to Resell Tickets*, Fox News, September 18, 2009, available at <http://www.foxnews.com/story/0,2933,552001,00.html>

Bruce Springsteen, and Nine Inch Nails.²⁰⁵ Purchasers of “paperless tickets” can only resell their tickets through Ticketmaster, giving TM a stake in the secondary market that is not available to competitors such as StubHub.²⁰⁶ The power score rankings of the secondary ticket sales market for the month of November were as follows²⁰⁷:

- | | |
|-------------------------|-------|
| 1. StubHub.com | 36.49 |
| 2. TicketCity.com | 7.35 |
| 3. TicketsNow.com | 7.08 |
| 4. TicketLiquidator.com | 7.07 |
| 5. VividSeats.com | 2.34 |
| 6. GoTickets.com | 2.11 |

This market also is highly concentrated; StubHub (owned by eBay) has a power score over five times that of the second most dominant competitor. Ticketmaster has a recognizable presence in the market, being the third highest ranked in the month of November. Reviewing the rankings over a longer period of time often shows TicketsNow.com as the second ranked service.²⁰⁸

Ticketmaster’s presence in the secondary ticket market has created trouble, as evidenced by the controversy stemming from ticket sales for Bruce Springsteen’s concert discussed previously.²⁰⁹ While Ticketmaster issued an apology for this occurrence²¹⁰, the New Jersey Attorney launched an investigation that eventually resulted in a settlement requiring TM

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Top Secondary Ticket Sellers*, TicketNews.com, at <http://www.ticketnews.com/view/TopSecondarySellers> (last accessed Dec. 11, 2009)

²⁰⁸ See for example rankings for the week ending November 7, 2009, at http://www.ticketnews.com/secondary_ticket_sellers_rankings_2009_11_07

²⁰⁹ See Kreps, *Bruce Springsteen “Furious” At Ticketmaster, Rails Against Live Nation Merger*

²¹⁰ Rolling Stone, *Ticketmaster Apologizes to Bruce Springsteen After Onsale Blunder*, Rolling Stone, February 4, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/04/ticketmaster-apologies-to-bruce-springsteen-after-onsale-blunder/>

to pay a large amount of money, and significantly, requiring TM to “place a wall” between itself and TicketsNow for at least a year, meaning a sold out show won’t automatically route consumers to the secondary site.²¹¹

The potential merger will not inhibit entry into the secondary ticket market, evidenced by the fact that the market is dominated by another firm, StubHub. Additionally, Live Nation has no presence in the market so the merger will not cause the market to be any more concentrated than it already is. It is possible the Live Nation could enter the market barring the merger, but there is no evidence to suggest this was likely. Divestiture of Ticketmaster’s subsidiary TicketsNow has been indicated as a possibility by Ticketmaster CEO Irving Azoff, but this will be addressed further as a remedy.²¹²

Management Services

Ticketmaster purchased Warner Music Group’s 30% minority equity stake in Front Line Management for \$123 million in October 2008, giving TM a controlling equity interest.²¹³ Front Line grew to be a leader in talent management by acquiring the operations of competitors, in the process amassing over 200 clients and more than 80 executive managers, with its roster of clients including Tim McGraw, the Dixie Chicks, Brooks & Dunn, Van Halen, The Eagles, Jimmy

²¹¹ Daniel Kreps, *Ticketmaster Reaches Settlement With NJ Attorney General After Springsteen Ticketing Fiasco*, Rolling Stone, February 24, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/24/ticketmaster-reaches-settlement-with-nj-attorney-general-after-springsteen-ticketing-fiasco/>

²¹² Jeffrey Benkoe, *Ticketmaster CEO amenable to sale of TicketsNow*, Reuters, February 26, 2009, available at <http://www.reuters.com/article/idUSN2619813920090226>

²¹³ Ticketmaster Press Release, *Ticketmaster Announces Agreement to Acquire Controlling Interest in Front Line Management*, October 23, 2008, available at <http://investors.ticketmaster.com/releasedetail.cfm?releaseid=342687>

Buffett, Neil Diamond and Christina Aguilera.²¹⁴ At the time, Ticketmaster and Live Nation were competing to acquire Warner's stake in Front Line, with TM eventually winning out.²¹⁵ The Wall Street Journal specifically characterized the purchase as Ticketmaster trying to "trump" Live Nation.²¹⁶

Live Nation doesn't compete in the traditional artist management market. LN is still a player in the management market through its Artist Nation branch.²¹⁷ Artist Nation "was formed to partner with artists to manage their diverse rights, grow their fan bases and provide a direct connection to fans."²¹⁸ Live Nation's "360 Deals" with artists such as Madonna, Jay-Z, and Nickelback in which LN handles the bands' touring and recording angles, merchandising, website, licensing, sponsorship, fan club, DVDs, endorsements, secondary ticketing and broadcasting rights, many of the things handled by a talent manager.²¹⁹

The proposed merger has the potential to lessen competition. Although exact statistics are not available, the market for talent management appears to be a concentrated one, as Front Line Management manages many of the top musical acts, has acquired more than sixty other management companies, and is frequently referred to as the "world's biggest talent

²¹⁴ Alfred Branch, Jr., *With layoffs looming, Ticketmaster buys artist rep giant Front Line Management*, TicketNews.com, October 23, 2008, at <http://www.ticketnews.com/With-layoffs-looming-Ticketmaster-buys-artist-management-giant-Front-Line1082312> (last accessed Nov. 24, 2009)

²¹⁵ *Id.*

²¹⁶ Ethan Smith, *Ticketmaster to Acquire Star Power in Azoff Deal*, The Wall Street Journal, October 23, 2008, available at <http://online.wsj.com/article/SB122473027565161583.html>

²¹⁷ PRNewswire, *Live Nation's Artist Nation Division Redefines the Music Industry With Unified Rights Model*, October 16, 2007, available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/10-16-2007/0004683291>

²¹⁸ *Id.*

²¹⁹ Daniel Kreps, *Nickelback Sign 360 Deal With Live Nation*, Rolling Stone, July 8, 2008, available at <http://www.rollingstone.com/rockdaily/index.php/2008/07/08/nickelback-sign-360-deal-with-live-nation/>

management-company.”²²⁰ As with the analysis of the ticket sales market, the mere fact that Ticketmaster has a large market share in this market does not alone show that competition will be lessened. But coupled with Ticketmaster and Live Nation’s presence in related markets, the overall effect of the merger will likely lessen competition. After the merger, any artist affiliated with Live Nation would likely end up managed by Front Line. Competition may also be harmed because if the merger proceeds, the prospect of Live Nation entering the market goes out the window. Although Live Nation does not operate in the traditional artist management market, its attempt at purchasing Front Line shows that LN’s entry into that market was a definite possibility.²²¹ Live Nation’s dominance in the promotion market may be able to entice artist into signing with a potential Live Nation management venture.

The prospective merger between Live Nation and Ticketmaster may also create additional barriers to entry for potential competitors in the artist management market. Although Live Nation does not operate as a talent manager in the traditional sense, the merger is still likely to further concentrate a market that is already concentrated before the merger. Additionally, the aspects of vertical integration addressed later in this paper also likely create barriers to entry. Live Nation Entertainment’s prospective hold on primary ticket sales, artist management, and control of venues makes entry at the level of talent management difficult.

Venue Control

Live Nation has a large stake in the venue control/management market, due in large part due to its predecessor, Clear Channel’s, acquisition of SFX Entertainment, which at the

²²⁰ Ethan Smith, *Can He Save Rock and Roll?*, The Wall Street Journal, February 21, 2009, available at <http://online.wsj.com/article/SB123517105948436743.html>

²²¹ See Andrew Sorkin, *Merger Expected of Ticketmaster and Live Nation*, The New York Times, February 8, 2009, available at <http://www.nytimes.com/2009/02/09/business/media/09ticket.html>

time operated 120 entertainment venues in more than sixty percent of the top fifty U.S. markets.²²² Currently, Live Nation owns or manages 159 venues worldwide, of which 140 are located in the United States.²²³ Live Nation owns, leases, operates, or has booking rights to 52 amphitheaters, 10 arenas, 43 music theaters, 19 clubs, as well as owning 11 House of Blues and handling many festival sites.²²⁴

In 2008, Live Nation signed a deal with SMG, who was Ticketmaster's second largest set of venues on its roster.²²⁵ This deal will take effect when SMG and Ticketmaster's current contracts expire starting in late 2009.²²⁶ SMG controls 216 venues, including 75 arenas, nine stadiums, 66 convention centers, 52 performing arts centers and 14 other recreational facilities.²²⁷ This exclusive ticketing deal is expected to increase Live Nation's ticketing inventory by twenty-five percent.²²⁸

On the other hand, Ticketmaster does not own or manage any facilities. However, Ticketmaster has long term contracts with many venues to sell tickets to events.²²⁹ Critics claim that this amounts to over eighty percent of concert venues.²³⁰ This shows that TM has a significant presence in the venue control market despite not owning or managing any facilities.

²²² CNNfn, *Clear Channel Buys SFX*, CNN Money, February 29, 2000, at <http://money.cnn.com/2000/02/29/bizbuzz/sfx/> (last accessed Nov. 24, 2009)

²²³ United States Securities and Exchange Commission, SEC Form 10-K, Filed by Live Nation, March 5, 2009, p. 1, available at http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-sec&secCat01.1_rs=51&secCat01.1_rc=10

²²⁴ *Id.* at 8

²²⁵ Eliot Van Buskirk, *Live Nation Poaches SMG Venues from Ticketmaster*, Wired.com, September 11, 2008, at http://www.wired.com/listening_post/2008/09/live-nation-poa/ (last accessed Dec. 4, 2009)

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ David Balto, *Monopoly Building: Why the Justice Department Must Block the Ticketmaster/LiveNation Deal*, Center For American Progress, April 20, 2009, at http://www.americanprogress.org/issues/2009/04/monopoly_building.html (last accessed Nov. 27, 2009)

²³⁰ David Balto, Testimony before the United States Senate, Committee on the Judiciary, Subcommittee on

It is likely that the proposed merger between Ticketmaster and Live Nation will have anticompetitive effects. The market for venue control is concentrated. Live Nation controls a large number of venues as well as having contractual rights to sell tickets for SMG, and when combined with the venues controlled by Ticketmaster their market share is significant. The plight of Pearl Jam is illustrative. When Pearl Jam attempted to tour by playing at venues not controlled by Ticketmaster, they were extremely unsuccessful and had to cancel their tour.²³¹ If Pearl Jam struggled to find a viable alternative to playing at venues controlled by TM, one can only imagine how difficult it would be to find alternative venues after the proposed merger.

Entry into the venue control market likely will not be stifled any more by the pending merger. The number of venues under the control of Live Nation and Ticketmaster would not increase if the firms were combined. Other firms such as AEG and SMG control large quantities of venues. Vertical integration of the firms poses a larger problem, as controllers of venues have contracts with Live Nation or Ticketmaster to distribute their tickets.²³² These relationships seem to create significant barriers to entry. However, AEG has threatened to cancel its contract with Ticketmaster if the merger goes through, so this leaves open the possibility of competitors.²³³

Event Promotion

Antitrust, Competition Policy and Consumer Rights, Feb. 24, 2009, p.3, *available at*

http://www.americanprogressaction.org/issues/2009/02/pdf/ticketmaster_merger.pdf

²³¹ Pearl Jam's Testimony Before Congress (prepared statement), June 30, 1994, *available at*

<http://www.fivehorizons.com/archive/articles/testimon.shtml>

²³² Van Buskirk, *Live Nation Poaches SMG Venues from Ticketmaster*

²³³ Associated Press, *Ticketmaster: AEG May Cancel If Merger Succeeds*, Billboard.biz, February 26, 2009, *available at* http://www.billboard.biz/bbbiz/content_display/industry/e3i0e4b3f51d8b5e2333bf128cdc4f8f49b

Live Nation is the world leader in event promotion, annually producing more than 22,000 events in 33 countries.²³⁴ On January 8, 2009, Live Nation gave a presentation at a conference, ranking the leading event promoters by number of tickets sold worldwide²³⁵:

1. Live Nation	14,449,773
2. AEG Live	5,991,067
3. CIE	1,297,394
4. Marek Lieberberg (Germany)	919,261
5. 3A Entertainment (U.K.)	818,000

Comparing these statistics shows that Live Nation sold more than twice as many tickets as AEG, the next closest competitor. Clearly, Live Nation dominates this market.

Live Nation continues to expand and supplement its promotion business, as evidenced by the “360 Deals” signed with Madonna, Jay-Z, Nickelback, and Shakira discussed previously.²³⁶ In these deals, LN pays a large amount of money to the artist up front in return for a share of revenue from touring and recording angles, merchandising, websites, licensing, sponsorship, fan clubs, DVDs, endorsements, secondary ticketing and broadcasting rights.²³⁷

The market for event promotion is one in which Ticketmaster does not directly compete. No information available to the public suggests that Ticketmaster has any immediate plans to enter this market. However, Ticketmaster’s positions in related markets leave open the possibility that TM could acquire a company with a stake in the promotion market as it did

²³⁴ United States Securities and Exchange Commission Form 10-K, filed by Live Nation, Inc., March 5, 2009, p. 1

²³⁵ Live Nation Presentation, Citi Global Entertainment, Media and Telecommunications Conference, January 8, 2009, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-eventDetails&EventId=2058882>

²³⁶ Kreps, *Nickelback Sign 360 Deal With Live Nation*

²³⁷ *Id.*

when it acquired Front Line Management and entered the artist management market. It seems to be a logical step for Ticketmaster to be able to promote events for its artists that are managed by Front Line and are performing at a venue that uses Ticketmaster to distribute tickets.

The proposed merger may have anticompetitive effects by completely foreclosing any possibility of Ticketmaster entering into the market for event promotion. If TM had any plans to enter the market, that option is no longer available after the merger. Even if Ticketmaster had no immediate plans to enter the event promotion market, it can be reasonably argued that Ticketmaster was at least in a position to potentially enter that market. Otherwise, the merger does not appear likely to present any additional barriers to entry, other than problems posed by vertical integration discussed later.

Another potential concern brought on by the merger is how it might expose sales data from rival promoters.²³⁸ Independent promoters are concerned the merger could have a detrimental impact on companies that would compete with the new Live Nation Entertainment.²³⁹ Competitors are concerned about the possibility that Ticketmaster will divulge independent promoters' proprietary information to their rival in the promotion market, Live Nation.²⁴⁰ One independent promoter expressed his concern, stating that if the merger is allowed to happen, his biggest competitor will "have access to all of my sales records, customer

²³⁸ Mitchell Peters, *Live Nation-Ticketmaster Merger Grilled on Capitol Hill*, Billboard.biz, February 24, 2009, available at http://www.billboard.biz/bbbiz/content_display/industry/e3i03e9df1ef7d2112b3b2f77e94fc1df4a

²³⁹ *Id.*

²⁴⁰ *Id.*

information, on sale dates for tentative shows, my ticket counts and they can control which shows are promoted and much more.”²⁴¹

Due to this concern, the merger has the potential to inhibit competition. Independent promoters will have nobody to turn to in terms of ticket distribution if they are in fear that their proprietary information will not be safe. Live Nation Entertainment would have an advantage over competitors because they potentially would be privy to information on competitors that the competitors would not have about Live Nation. This could also potentially create a barrier to entry, making it more difficult for potential competitors to enter the market due to the vast competitive advantage Live Nation Entertainment would enjoy.

Vertical Integration

When the DOJ analyzes a potential merger, the agency must also consider whether vertical integration of the merging firms will pose a problem. The Supreme Court has stated, “the primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a ‘clog on competition,’ which ‘deprive[s] rivals of a fair opportunity to compete.’”²⁴² The degree of market share foreclosed by the vertical merger is an “important consideration” in determining whether the challenged vertical merger would produce any anticompetitive effects.²⁴³

There can be no disputing that both Ticketmaster and Live Nation are vertically integrated companies. Those opposed to the merger have classified the merger as “vertical

²⁴¹ *Id.*

²⁴² *Brown Shoe Co.*, 370 U.S. at 323-24

²⁴³ *Id.* at 328

integration on steroids.”²⁴⁴ As discussed previously, each company is powerful in several markets in the live entertainment industry. The proposed merger would create a vertically integrated entity whose power would extend across five of the industry’s markets.²⁴⁵ The concern about the merger is that “the combined entity will have the ability to suppress or eliminate competition in many segments of the music industry, including rival concert promoters, primary and secondary ticketing companies, artist management firms, talent agencies, venue management companies, record companies, artist merchandise, music apparel and licensing companies, and sponsorship companies.”²⁴⁶

Many analysts believe that vertical integration could be a greater concern posed by the merger, concluding that a single entity controlling every aspect of the industry would stifle competition and work against fans in the long term.²⁴⁷ Two specific risks are present with a potential vertical merger.²⁴⁸ First, a vertical merger may give the vertically integrated firm the incentive and ability to discriminate against suppliers or customers that compete with the firm in upstream or downstream markets.²⁴⁹ Second, a vertical merger could serve as a means for the vertically integrated firm to pass on to its division or subsidiary competitively sensitive information that it obtains from competitors of that business unit by virtue of its other business

²⁴⁴ *Id.*

²⁴⁵ Buskirk, *Congressman Asks Justice Department to Block Live Nation/Ticketmaster Merger*

²⁴⁶ Peters, *Live Nation-Ticketmaster Merger Grilled on Capitol Hill*

²⁴⁷ Financial Times, *Best In Show*, FT.com, March 1, 2009, at <http://www.ft.com/cms/s/0/5f7eefe-06a0-11de-ab0f-000077b07658.html> (last accessed Dec. 10, 2009)

²⁴⁸ Scott A. Stempel, *Moving Beyond the '84 Guidelines: Government Shows Increasing Concern With Vertical Mergers*, 9-Fall Antitrust 17, 21 (1994)

²⁴⁹ *Id.*

dealings.²⁵⁰ This concern was expressed by independent promoters as discussed under the event promotion analysis.

One reason that Live Nation's newly launched ticketing business was able to potentially compete with Ticketmaster was that by signing big name artists, LN was able to attract venues to use its ticketing service by effectively forcing the venue to use Live Nation ticketing if the venue wanted to book the big name artist.²⁵¹ This is an example of how a firm can use vertical integration to its advantage and to the possible disadvantage to others in the market.

Ticketmaster also uses its vertical integration to its benefit; by using the big name artists signed under Front Line Management as leverage when negotiating with concert promoters.²⁵² Ticketmaster CEO, Irving Azoff, subtly acknowledged that TM uses its dominant market position, stating "It's all done with a wink," elaborating that it is never explicitly stated that if a venue won't extend a rent deal to Journey, for example, then TM won't let Jimmy Buffet play the building.²⁵³ If both companies currently use their vertical integration to leverage companies during contracting, it can be assumed that this leveraging will occur more if the merger is finalized.

If the merger is consummated vertical integration may create a barrier to entry as potential entrants into any of the affected markets would likely need to enter the industry on

²⁵⁰ *Id.*

²⁵¹ Eric Savitz, *Ticketmaster Loses #2 Customer SMG to Live Nation*, Barron's Tech Trader Daily, September 11, 2008, at <http://blogs.barrons.com/techtraderdaily/2008/09/11/ticketmaster-loses-2-customer-smg-to-live-nation/> (last accessed Nov. 24, 2009)

²⁵² Smith, *Can He Save Rock and Roll?*

²⁵³ *Id.*

several levels at one time in order to have a realistic chance at viability.²⁵⁴ This obviously comes at an increased cost for the potential entrant. As an example:

A new promoter, for example, needs artists willing to perform and venues appropriate for staging the event. A new venue needs artists and promoters willing to book the facility. The vertically integrated firm can withhold these critical inputs, and its rival will suffer. To avoid such problems, an entrant would need to enter the industry on several levels at once, a burden that makes entry far more daunting and costly.²⁵⁵

If the merger is approved, Live Nation's promoters and venues are likely to give preference to Front Line's managers or vice versa. This poses a potential problem for any prospective competitor, as they may be excluded or forced into unfavorable deals because better deals were reached by the related parties of Live Nation Entertainment. In order to avoid this problem, a potential entrant would likely need to enter at several levels at once.

Monopsony

The DOJ has indicated that market power is not limited to sellers, but also encompasses the "ability of a single buyer...to depress the price paid for a product to a level that is below the competitive price and thereby depress output."²⁵⁶ The adverse effects of monopsony power are comparable to those of monopoly power.²⁵⁷ In vertical integration analysis, monopsony is notably important because the seller in one market is the buyer in a related market.²⁵⁸ In

²⁵⁴ Letter from Rep. Bill Pascrell to Assistant Attorney General for Antitrust Christine Varney, July 27, 2009 (signed by 50 bipartisan members of Congress), *available at* http://www.pascrell.house.gov/list/press/nj08_pascrell/pr7272009.shtml

²⁵⁵ *Id.*

²⁵⁶ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 2

²⁵⁷ *Id.* at 3

²⁵⁸ Catherine C. de Fontenay, *Can Vertical Integration by a Monopsonist Harm Consumer Welfare?*, Melbourne Business School, February 6, 2004, *available at* <http://www.mbs.edu/home/jgans/papers/VI-Monopsony.pdf>

assessing monopsony power, the DOJ employs an analogous analytical framework as monopoly analysis.²⁵⁹

If the proposed merger goes through, Live Nation Entertainment would have a great amount of power as a buyer as well as a seller. The merger may raise monopsony concerns if it will decrease market output. The combination of the two companies' dominance in several related markets within the industry may raise such concerns. The potential company's control over artists (through Front Line), venues, and ticketing may allow the company to dictate prices while negotiating contracts for any service the company does not provide itself. As the company would be so vertically integrated, it is imaginable that Live Nation Entertainment could give favorable contracts to its own artists, venues, or promoters, while making contracting more difficult for any entity not affiliated with the new company. If the merger takes place, sellers unaffiliated with the new company may have no other place to turn to sell their services in many circumstances if Live Nation Entertainment attempts to impose unfavorable contractual terms.

A monopsony situation could adversely affect many independent artists, leaving them with few, if any, options if the artist finds Live Nation Entertainment's terms for renting a venue or distributing tickets unfavorable. Additionally, if the potential entity has monopsony power, this may stifle market competition by discouraging entry into markets in the live entertainment industry. It is easy to imagine a potential entrant into any of the relevant markets deciding not to enter that market for fear that it only has one option as a buyer and thus will be at that company's mercy.

²⁵⁹Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 3

Efficiencies

Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.²⁶⁰ However, even when efficiencies generated through merger enhance a firm's ability to compete, a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive.²⁶¹ Only efficiencies that are accomplished through the merger and are not likely to be accomplished absent the merger are considered.²⁶² Efficiency claims will not be considered if they are "vague or speculative or otherwise cannot be verified by reasonable means."²⁶³ The DOJ defines "cognizable efficiencies" as efficiencies that are merger-specific and that have been verified and do not arise from anticompetitive reductions in output or service.²⁶⁴

An examination of publicly available information shows no indication that Live Nation and Ticketmaster will be able to prove "cognizable efficiencies" as defined by the DOJ. The parties have claimed that the new entity is expected to enjoy about \$40 million in annual cost savings and have greater bargaining power to woo artists and sell out concert halls more efficiently.²⁶⁵ The Center for American Progress²⁶⁶, a public policy think tank, calls the \$40 million in savings a "a truly paltry amount for a merger combining two companies with billions

²⁶⁰ *Id.* at 28

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 29

²⁶⁴ *Id.*

²⁶⁵ Janet Morrissey, *Ticketmaster & Live Nation: Obama's Antitrust Test*, Time Magazine, June 10, 2009, available at <http://www.time.com/time/business/article/0,8599,1903447,00.html>

²⁶⁶ *About Us*, Center for American Progress, at <http://www.americanprogress.org/aboutus> (last accessed Dec. 10, 2009)

in revenues.”²⁶⁷ These claims fall short of the DOJ’s requirement that the efficiencies be of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.²⁶⁸ These claimed efficiencies are speculative and not verifiable and will not lessen the anticompetitive effect of the merger and therefore should not be considered by the DOJ when determining whether to block the proposed transaction. Furthermore, the parties have not demonstrated that the benefits are merger specific and cannot be accomplished outside of the merger, and thus fail the requirement that efficiencies be merger-specific.

The parties also claim several other benefits that will arise from the transaction, namely: (1) Reduce costs associated with today's inefficiencies; (2) Relieve pressure on ticket pricing in the primary and secondary markets; (3) Give artists and fans new services and products; (4) Spur innovation and competition from all quarters; and (5) Increase concert attendance and improve the entire experience, from ticketing to the actual performance.²⁶⁹ These alleged benefits suffer from the same insufficiencies of the parties’ other claims in that the claims are speculative and not verifiable. Neither do the parties establish that these benefits are specific to the merger.

In sum, the parties have failed to establish any efficiencies that are likely to be considered by the DOJ during its evaluation of the merger. The benefits claimed do not rise to the requirements set out the by Antitrust Division. These unverified speculations as to benefits

²⁶⁷ David Balto, *Monopoly Building: Why the Justice Department Must Block the Ticketmaster/LiveNation Deal*, Center For American Progress, April 20, 2009, at http://www.americanprogress.org/issues/2009/04/monopoly_building.html (last accessed Dec. 4, 2009)

²⁶⁸ Federal Trade Commission & U.S. Department of Justice, *Horizontal Merger Guidelines* at 29

²⁶⁹ Ticketmaster Press Release, *Live Nation and Ticketmaster CEOs Outline Benefits of Merger*, February 24, 2009, available at <http://press.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8104>

that may be received are inadequate to overcome any harm the merger may cause to the live entertainment industry.

Remedies

If the DOJ concludes that a merger may substantially lessen competition the Antitrust Division may seek a full-stop injunction that would prevent the consummation of the transaction or the Division may negotiate a consent decree that allows the merger to proceed with modifications that restore or preserve competition.²⁷⁰ The DOJ lays out guiding principles that are to be considered when fashioning a remedy.²⁷¹ There are two forms of merger remedies, one addressing the structure of the market and the other addressing the conduct of the merged firms, with the DOJ preferring structural remedies due to fact that conduct remedies are more costly and difficult to craft.²⁷² When considering a divestiture, that divestiture must include all assets that are necessary for the purchaser to be an effective, long-term competitor in that market, with the DOJ preferring divestiture or an existing business entity.²⁷³

The Division provides that conduct relief is only appropriate in limited circumstances.²⁷⁴ Conduct relief may be used in order to help perfect structural relief but is rarely used by itself to fix a merger, and then still is almost exclusively used by itself in an industry that is already heavily regulated by the government.²⁷⁵

²⁷⁰ U.S. Department of Justice, Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies*, October 2004, available at <http://www.justice.gov/atr/public/guidelines/205108.htm>

²⁷¹ *Id.* at 2-7

²⁷² *Id.* at 7-8

²⁷³ *Id.* at 9

²⁷⁴ *Id.* at 17

²⁷⁵ *Id.* at 20

There do not appear to be any structural remedies available if the DOJ determines that this merger is likely to less competition. One possibility, although not likely feasible, is for Live Nation to divest itself of its ticketing operation.²⁷⁶ As stated previously, Live Nation contracted with CTS Eventim to lease its ticketing software for ten years.²⁷⁷ So a sale would be more difficult as it would require Eventim's cooperation and any purchaser still must be approved by the DOJ.²⁷⁸ It is unlikely that Live Nation could find a purchaser that would be able to be an effective, long-term competitor. Moreover, as Live Nation's primary ticket business power score is only one-tenth that of Ticketmaster's, a divestiture of LN's primary ticketing assets still won't likely restore competition, as required by the policy guide.²⁷⁹ The guiding principles also require that a remedy promote competition, not just competitors.²⁸⁰

This type of divestiture would not alleviate any of the concerns raised by the vertical integration. All of the venues owned and operated by Live Nation would go back to using Ticketmaster to distribute tickets, thus curbing any competition that may be increased by a purchase of Live Nation's ticketing assets. Furthermore, the increase in competition that occurred when Live Nation signed away SMG from Ticketmaster would be eliminated as that contract would essentially return to TM as it would belong to Live Nation Entertainment.²⁸¹ So unless this contract, along with others, is included in the divestiture it is unlikely that the divestiture would restore competition.

²⁷⁶ Alfred Branch, Jr., *Ticketmaster/Live Nation merger: DOJ may seek major concessions for approval*, TicketNews.com, October 16, 2009, at <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-DOJ-may-see-major-concessions-for-approval10091678> (last accessed Dec. 10, 2009)

²⁷⁷ Cohen, *Live Nation to Team with CTS Eventim for Ticketing*

²⁷⁸ U.S. Department of Justice, Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies* at 30

²⁷⁹ *Id.* at 4

²⁸⁰ *Id.* at 5

²⁸¹ Adegoke, *Live Nation signs ticketing deal with SMG*

Ticketmaster CEO has stated that he would be willing to divest TM of its secondary ticket market subsidiary, TicketsNow.²⁸² Because Ticketmaster does not have a dominant position in the secondary ticket market and Live Nation has no presence at all this sale would not be likely to remedy any problems the DOJ finds with the proposed merger. While divesting itself of TicketsNow may help with any problems Ticketmaster has faced regarding any impropriety²⁸³, it is not likely help if the DOJ finds that the proposed merger will lessen competition.

Another concession that may be included is the sale of Ticketmaster's artist management service, Front Line Management.²⁸⁴ However, it appears that if forced to divest itself of Front Line, Ticketmaster will be able to back out of the merger pursuant to a clause in the agreement.²⁸⁵ This being the case, a sale of Front Line Management is not a viable remedy.

If a sale of any subsidiary or branch of either Live Nation or Ticketmaster becomes a realistic option, the parties likely will not have trouble finding a buyer. Cable television giant Comcast has discussed the possibility of helping Ticketmaster and Live Nation consummate their proposed merger.²⁸⁶ Comcast hopes to benefit by possible cutting deals for any ticketing

²⁸² Jeffrey Benkoe, *Ticketmaster CEO amenable to sale of TicketsNow*, Reuters, February 26, 2009, available at <http://www.reuters.com/article/idUSN2619813920090226>

²⁸³ Daniel Kreps, *Bruce Springsteen "Furious" At Ticketmaster, Rails Against Live Nation Merger*, Rolling Stone, February 4, 2009, available at <http://www.rollingstone.com/rockdaily/index.php/2009/02/04/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger/>

²⁸⁴ Alfred Branch, Jr., *Ticketmaster/Live Nation merger: DOJ may seek major concessions for approval*, TicketNews.com, October 16, 2009, at <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-DOJ-may-see-major-concessions-for-approval10091678> (last accessed Dec. 8, 2009)

²⁸⁵ Ethan Smith, *Justice Agency Resists Music Merger*, Wall Street Journal, October 16, 2009, available at <http://online.wsj.com/article/SB10001424052748704112904574475563303463526.html>

²⁸⁶ Alfred Branch, Jr., *Ticketmaster/Live Nation merger: Comcast reportedly joins the two forces*, TicketNews.com, November 17, 2009, at <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Comcast-reportedly-joins-the-two-forces110917811> (last accessed Dec. 5, 2009)

assets either party may be forced to spin off in order to gain approval for the merger.²⁸⁷ Not enough information is available to determine the exact implications of Comcast’s involvement, but merely having a potential buyer is not enough to satisfy the DOJ’s requirements for a remedy.²⁸⁸

If no structural remedy can be found to enable the merger to proceed, it is unlikely that any mix of conduct remedies will be sufficient to gain the DOJ’s approval. Conduct remedies are only appropriate in limited circumstances and the complex live music entertainment industry (encompassing several markets) is unlikely to be fit into the “limited circumstances” categories of either: (1) when the merged firm needs to modify its conduct for structural relief to be effective, or (2) when completely stopping the merger would sacrifice significant efficiencies and structural remedies would also sacrifice these efficiencies.²⁸⁹ As discussed above, no significant efficiencies have been identified. The companies are vertically integrated in a complex industry and would “entangle the Division and the courts in the operation of a market on an ongoing basis” resulting in unnecessary expense.²⁹⁰ Thus, conduct remedies are not a viable option.

Conclusion

The proposed merger between Live Nation, Inc. and Ticketmaster Entertainment, Inc. creating Live Nation Entertainment would combine the parties’ powerful positions in five markets of the live entertainment industry; primary ticket sales, secondary ticket sales, talent management, venue control, and event promotion. The horizontal merger between

²⁸⁷ *Id.*

²⁸⁸ See generally U.S. Department of Justice, Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies*

²⁸⁹ U.S. Department of Justice, Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies* at 18

²⁹⁰ *Id.* at 17

Ticketmaster's long dominant primary ticket sale business and Live Nation's emerging competing business would join the top two competitors in an already concentrated market, creating a market with a single supplier that dwarfs the output of the next largest competitor by more than fourteen times. The merger is also anticompetitive in several related markets. The parties to the proposed merger may have been the most likely entrants into some of the industry markets, but with the merger those entrances are no longer possible. The largest concern the merger creates may be the problem caused by the vertical integration of the new entity. Both firms were vertically integrated before the merger so in combination Live Nation Entertainment's hold on the industry will be used as leverage when contracting with other parties as both a seller and as a buyer. This market control stifles competition as well as creates significant barriers to entry into any of the related markets, most likely necessitating entry into several market levels at once. Although the parties claim the merger will result in benefits and efficiencies, these claimed benefits do not outweigh the mergers anticompetitive consequences as the parties fail to point to any cognizable efficiencies likely to be considered by the DOJ. Any potential remedy sought by the DOJ, such as divestiture of certain of the new entity's business, will not alleviate the anticompetitive effects of the merger, leaving the Antitrust Division with no other choice other than to prohibit the proposed merger completely.