

Testimony of
David Balto

February 24, 2009

Testimony of David A. Balto, Senior Fellow, Center for American Progress Action Fund

To the Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights United States Senate Regarding "The Ticketmaster/LiveNation Merger: What does it mean for Consumers and the Future of the Concert Business?"

Tuesday, February 24, 2009

Introduction

Mr. Chairman, Ranking Member Hatch, and other distinguished members of the Senate Judiciary Committee, I want to thank you for giving me the opportunity today to speak about the severe competitive problems that may arise from Ticketmaster's proposed acquisition of LiveNation. As detailed in my testimony, this merger of dominant firms raises serious competitive concerns and could potentially lead to significantly higher prices for the hundreds of thousands of consumers who purchase tickets every day. Moreover, by creating a monopolist in the promotion and ticket purchase markets, rivals in the concert promotion market and competition from secondary ticket services will be severely diminished. The Antitrust Division of the Justice Department should thoroughly investigate this merger and challenge it if it raises a significant threat to reduced competition.

I make the following points in my testimony:

? Ticketmaster holds a monopoly in the ticket sales market. It has faced no significant competition in that market until LiveNation's recent entry. Ticketmaster's control of the primary market alone warrants enjoining the merger; ? The proposed merger raises serious vertical concerns. By combining a ticketing monopolist with a dominant firm in marquee concert promotion the merged firm will be able to foreclose competition in both markets, leading to less choice and higher prices;

? The proposed merger poses a significant threat to independent concert promotion;

? The proposed merger will diminish competition from secondary ticket services which offer the potential for greater rivalry in the ticketing market; and

? The DOJ should go beyond this merger and investigate anticompetitive conduct in the ticketing market. Similarly, the FTC should investigate deceptive conduct by Ticketmaster. Ticketmaster's monopoly power is preserved through a series of exclusionary arrangements that diminish the potential for rivals to arise and challenge the monopoly. In the 1990s those charged with antitrust enforcement failed to challenge Ticketmaster's conduct based on theoretical arguments that

consumers were protected by ease of entry into the market or that exclusive arrangement were procompetitive. Because of that inaction, consumers have paid dearly in excessive prices for ticketing services. History has demonstrated that those theoretical arguments that the market would prevent consumer harm have been proven wrong and consumers have paid dearly in excessive prices for ticketing services. Further competition and consumer protection enforcement action is necessary to prevent the substantial ongoing harm in this market and this Committee should call on both the DOJ and Federal Trade Commission to act.

My testimony today is based on my experience of over a quarter century as an antitrust practitioner, the majority of which was spent as a trial attorney in the Antitrust Division of the Department of Justice, and in several senior management positions, including Policy Director at the Federal Trade Commission ("FTC"). I have litigated numerous merger cases both for the government and for private parties. I regularly practice before both the agencies, and frequently represent consumer groups raising concerns about mergers under investigation by the Antitrust Division or the FTC.

I am here with a simple message for this Committee. Although the parties may assert various efficiencies for this merger, this proposal raises very serious competitive concerns. Ticketmaster has perfected and preserved its monopoly power, not by creating better products and services for consumers, but through exclusionary arrangements to exclude its rivals. Now, faced with a significant rival - LiveNation- with the potential to undermine its monopoly that it cannot drive from the market through exclusionary tactics, it is trying to buy it out of the market. It is a cornerstone principle of the antitrust laws that a dominant firm cannot use acquisitions, such as this one, to preserve its monopoly power.

Background

Ticketmaster Entertainment consists of Ticketmaster and Front Line Management Group. 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; approximately 6,700 retail outlets; and 19 worldwide call centers. In 2007, the company sold more than 141 million tickets valued at over \$8.3 billion on behalf of its clients. Ticketmaster controls the sales of tickets for over 80% of the venues in the United States. In 2008, Ticketmaster strengthened its hold on the ticket distribution market by acquiring Paciolan, a ticketing solutions service for over 190 North American clients from college athletics to arenas and museums. Ticketmaster also offers resale ticket services through its online subsidiary, TicketExchange, as well as through its acquisition of TicketsNow in 2008. Moreover, last year Ticketmaster entered into the entertainment promotion business by acquiring a controlling interest in the Front Line Management Group ("Front Line"). Front Line is the world's leading artist management company, with nearly 200 clients and more than 80 executive managers. Front Line represents a wide range of major artists, including the Eagles, Jimmy Buffett, Neil Diamond, Van Halen, Fleetwood Mac, Christina Aguilera, Stevie Nicks, Aerosmith, Steely Dan, Chicago, Journey, and Guns N' Roses.

Live Nation is the world's largest live music company: it is the world's No. 1 concert promoter. In 2007, over 64 million fans, including over 45 million live music fans, attended approximately 28,000 events in 18 countries managed by LiveNation around the world. Globally, it owns,

operates, has booking rights for and/or has an equity interest in more than 155 venues, including House of Blues music venues and prestigious locations such as The Fillmore in San Francisco, Nikon at Jones Beach Theater in New York and London's Wembley Arena. In addition, LiveNation owns multiyear comprehensive rights deals covering the tours of Madonna, Jay-Z, U2, Nickelback and Shakira. In 2007, LiveNation acquired or secured an ownership interest in three artist merchandising companies, two concert promotion companies, two companies that own and run a number of venues, and a company that connects fans to artists via fan-clubs and fan-club ticketing. In 2008, Live Nation ended a long-term contract to sell its concert tickets through Ticketmaster, and launched its own ticketing service for its venues in January 2009. At this time, LiveNation entered into an agreement with SMG, one of the world's largest venue management companies and Ticketmaster's largest client, to provide exclusive ticketing services for SMG's venues. This deal threatened to siphon off at least 15% of Ticketmaster's revenue and set the two companies up for a head-to-head fight to win ticketing contracts.

If Ticketmaster is permitted to merge with LiveNation a single firm will: (1) sell most of the concert tickets in this country through its contracts with venues (11,000 venue clients across 20 countries); (2) manage a significant number of the marquee performers in the world or control their tours (e.g., Madonna, U2, Jay Z, Shakira, Nickelback, Eagles, Christina Aguilera, Aerosmith, Jimmy Buffett, Guns 'n Roses, Steely Dan and more than 200 others); (3) own most of the amphitheatres in the US and own more 'club' venues (including 11 House of Blues) as well as controlling, through owning/leasing, a large amount of other clubs and theatres; (4) own two of the major resellers of tickets: and (5) own various sources of competitively sensitive data. As described below, this will give the merged firm the incentive and ability to raise rivals costs and foreclose competition, in many segments of the concert promotion and ticket marketplace.

Competitive Effects - Horizontal Effects in Ticket Sales

Distribution

The most straightforward competitive effects are in the market for initial ticket distribution for large venues. This market has been dominated by Ticketmaster ever since its acquisition of Ticketron in the early 1990s. Up until the recent entry of LiveNation there were only two competitors in this market, Ticketmaster and Tickets.com. Some industry observers estimate that Ticketmaster holds 80% of the market for concerts in large major venues. The only significant rival, Tickets.com focuses on sports events and provides ticketing services for 14 baseball teams and two hockey teams; Ticketmaster provides the ticketing service for nearly all of the rest of the major professional sports teams.

Let's be straightforward about one transparent fact: Ticketmaster is a monopolist and exercises that power to exploit consumers. It has a substantial market share by any meaningful measure. Moreover, it has regularly increased prices. This is not a situation where a monopolist is accused of reducing prices in a predatory fashion. Nor is this a market where price increases are justified by cost increases. Millions of consumers pay what seem like fairly astronomical surcharges to receive the very simple task of having a ticket dispensed. Although Ticketmaster labels their fees "convenience" and "service" fees, consumers pay a very high price for a basic level of convenience and service. As the Boston Globe observed in a recent editorial "Ticket to Gouge," due to Ticketmaster's charges the price of a "\$50 seat can rise by 20 percent and that does not

include the extra \$2.50 per order if the customers want to print out tickets on their home computer."

Today consumers can purchase almost anything electronically. When consumers purchase an airline ticket, railroad ticket, movie ticket, or other goods there are few if any surcharges. Only in the market for entertainment tickets where Ticketmaster controls the bottleneck are there surcharges. Often these surcharges can exceed 20 percent of the value of the ticket, especially when Ticketmaster adds on additional charges for unused services.

The key to rivalry in the ticket service market is access to both venues and events. Concert promoters control access to the major concert events. Thus, to succeed in the ticket market, a rival needs access to both venues and concert promoters. Ticketmaster now controls the vast majority of entertainment venues through long term exclusivity arrangements (typically of duration of between 3-5 years). Ticketmaster also controls over 80% of the concert venues in these exclusivity arrangements.

The recent entry of LiveNation into ticketing posed a very substantial threat of unsettling Ticketmaster's monopoly hold on the market. Because it is the largest concert promoter and owns over 140 venues (including several marquee venues), it was in a unique position to succeed in attacking Ticketmaster's dominance. In 2008, LiveNation terminated its previous arrangement with Ticketmaster, under which Ticketmaster sold tickets for LiveNation concerts. LiveNation's entry threatened to siphon off a significant portion of Ticketmaster's revenue. Industry analysts suggested that LiveNation would control the ticketing of over 22 million tickets this year. With the beachhead established with its venue and artist base, LiveNation would have been able to engage in substantial head to head competition with Ticketmaster leading to lower prices and better services.

Eliminating a nascent competitor by acquisition raises the most serious antitrust concerns. As Justice Potter Stewart observed over a quarter of a century ago:

The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion -- that is, by competing successfully rather than by arranging treaties with its competitors. 2

One can assume that Ticketmaster will contend that it is no monopolist. It will suggest the market consists of all sources of tickets including the venues themselves (or the sports teams) and dozens of firms that resell tickets. It will suggest that in this market of "all ticket sales" it has a paltry market share, certainly nothing that would make it a dominant firm. This Committee, the Courts and the antitrust enforcers should be highly skeptical of such arguments, because they are a diversion from the ultimate question of whether Ticketmaster is a monopolist. Market definition is not the ultimate inquiry; rather, it is a tool for determining competitive effect. In essence the purpose of defining a market is an indirect process of determining whether a firm has market power. Where there is "direct evidence" of a firm's ability to exercise market power, e.g., by raising prices, without losing business to make the price increase unprofitable, a complex determination of the relevant market is unnecessary.³ In this case, Ticketmaster's ability to consistently raise prices demonstrates that it possesses market power.

In the market definition inquiry the critical question is whether alternative products or services constrain the ability of the merged firm to raise prices. The fact that venues may sell tickets directly at the box office or tickets are sold through resellers does not necessarily mean these other sources of tickets are in the relevant product market. The key question is whether the alternatives can constrain price increases or reductions in service. Neither of these alternatives is likely to constrain prices. Ticketmaster limits the ability of many venues to sell tickets directly to consumers. And ticket resellers have a limited ability to constrain Ticketmaster's fees because resellers only have the ability to sell tickets obtained from Ticketmaster at the value which Ticketmaster retails them for. Not surprisingly neither sales by venues or resellers have constrained Ticketmaster's ability to raise prices in the past. As explained infra, they will be even less likely to offer a restraint on Ticketmaster's prices if Ticketmaster acquires LiveNation.

Moreover, what Ticketmaster offers is different from other sources of tickets. Ticketmaster offers primary ticket sales through its website, call centers and throughout thousands of retail locations, as well as offering secondary resale services. Ticketmaster is the only U.S. company to have implemented a paperless ticketing system, in which consumers can simply print a receipt containing a bar code scanned for access into the venue. Ticketmaster, further, has an unmatched capability to handle a significant amount of sales volumes and ticket trafficking at one time, allowing them to sell more tickets at a much faster rate than any competitor.

The fact that there are other sources of ticket sales does not mean they are necessarily included in the relevant market. Let me compare this to the Staples/Office Depot merger, which the FTC successfully enjoined over a decade ago.⁴ The FTC focused on a market of office supplies sold in office supply superstores. When the FTC announced the challenge to the merger, the parties and most commentators objected; observing that everything that could be purchased in a Staples or Office Depot could be purchased in another type of store or by mail order. In fact, less than 6% of all office supplies were purchased at a Staples or Office Depot. Thus, the parties strenuously argued that an office supply superstore market was far too narrow. But they did not prevail.

In enjoining the merger the Court observed "that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products." But the court explained that "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." The Court then observed that the sale of consumable office supplies by office superstores was a relevant antitrust market, based on several factors including industry recognition of an office superstore category, evidence that pricing was far different at these office superstores, and that the stores had distinct formats and customers.

In this case there are numerous practical indicia that demonstrate a market for primary ticket sales for large venues. Ticketmaster offers distribution through a variety of services including online, retail sales outlets, call centers, and box offices. Venues demand this wide variety of services and are unwilling to sacrifice primary ticket distribution for other services.

Competitive Effects - Foreclosure in Concert Promotion and

Ticket Sales Distribution

Mergers are not only anticompetitive because they eliminate competition between direct competitors. They may also be anticompetitive when they combine firms that are not direct competitors but are aligned in the distribution system or vertical mergers. A vertical merger involves firms that operate at different but complementary levels in the chain of production and/or distribution. The defining characteristic of a vertical merger is that the product or service produced by one firm can be used as an input to the product or service produced by the other firm. Common examples include a merger between a manufacturer and a distributor, or a merger between two manufacturers, one of which produces an end product and the other a component of that end product. In this case the two vertical segments are concert promotion and ticketing services.

It may be easy to forget that vertical mergers can be illegal - during the Bush II Administration the federal antitrust enforcers challenged only a single merger because of vertical anticompetitive effects, which placed vertical mergers into a world of per se legality. This approach to potentially anticompetitive acquisitions was unlike prior Administrations which took a prudent balanced approach to vertical merger enforcement. The Ticketmaster/LiveNation merger is the time to reverse this laissez-faire approach to vertical mergers.

Vertical merger policy is set out in the 1984 Merger Guidelines which describe several theories of possible competitive harm from a vertical merger. Broadly, there are three areas of concern identified in the 1984 Guidelines, the case law, and academic commentary. First, vertical integration will raise entry barriers or foreclose non-integrated firms from a market in which the merged firm would operate. Second, vertical integration may raise competitors' costs in an anticompetitive manner or reduce the incentives of either the merged firm or its rivals to compete. Finally, a monopolist in one market may acquire a rival in a complementary good market to raise entry barriers in the primary market (a "monopoly maintenance" theory).

The barrier-to-entry and foreclosure concerns are essentially two sides of the same coin. If the newly integrated firm forecloses unintegrated rivals from raw materials on the upstream side or a market on the downstream side, the rivals will have to integrate themselves or perish, and new entrants will have to enter at both market levels in order to succeed. As former FTC Chairman Bob Pitofsky has explained "[i]f . . . 'two level' entry is more risky, more difficult, or more time-consuming than entry into the entrant's primary market alone, a merger that increases vertical integration could create more barriers to entry."⁵

The potential reduction of incentives can also arise from access to competitively sensitive information. Because of its position at two levels of the market, the newly vertically integrated firm may relate to a rival both as a horizontal competitor and as a customer or supplier. In its position as customer or supplier, the merged firm may gain access to competitively sensitive information concerning its horizontal competitors. When a firm gains competitively sensitive information by participating in vertically related markets, it may be able to compete less aggressively. If, for example, through its participation in an upstream market the merged firm gains access to competitively sensitive information, thus enabling it to reduce its uncertainty about a competitor's bids in a downstream market, the merged firm may be able to bid less aggressively in the downstream market. This concern extends to situations in which the

competitor gains access to information about costs or technology with which it could estimate its rival's likely bid and adjust its own bid accordingly.

Furthermore, integration may dampen the ability and incentives of the non-integrated firm to compete. If the integrated competitor gets access to a non-integrated competitor's costs or technical information, that competitor's incentives to innovate or engage in research and development may be reduced. Commentators have observed that where a firm knows that its competitors can "free-ride" on its innovations, the incentive to innovate may be seriously dampened. Similarly, if the non-integrated firm believes that it faces exclusion or discrimination from the integrated firm, it may choose to withdraw from the market or compete less aggressively.

An informative precedent from a decade ago was the FTC's challenge to the Time Warner/Turner merger. One of the most important aspects of the transaction was the degree to which it increased vertical integration in the cable television market. Prior to the acquisition, Time Warner and TCI, the two largest cable systems in the U.S., had some relatively significant cable programming holdings. But this acquisition dramatically increased those holdings, by putting several significant cable networks under Time Warner's control. Thus, the FTC challenged the merger because the merged firm would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing cable distribution systems, by denying programming, or providing programming only at discriminatory (i.e., disadvantageous) prices. For example, post-merger Time Warner would have had the incentive and ability to foreclose alternative cable networks from its distribution systems in order to give its own programming a competitive advantage.

The Time Warner/Turner merger offers an interesting analogy to the Ticketmaster/LiveNation merger. Producers in the upstream market (cable programming in the case of Time Warner and concert promotion in the case of Ticketmaster) faced an increasing threat of foreclosure because of the merger. Prior to the merger, Time Warner lacked the incentive and ability to engage in such foreclosure - the merger would have facilitated this strategy. The same is true for Ticketmaster, with an even greater potential for harm because Ticketmaster's downstream market power (an 80% market share) is far higher than Time Warner's (about 44%).

The proposed Ticketmaster/LiveNation merger raises significant vertical concerns, each one of which will lead to higher prices and less service for consumers:

? Diminish competition in primary ticket distribution. By acquiring LiveNation, Ticketmaster will cut off the air supply for any future rival to challenge its monopoly in the ticket distribution market. The merged firm will control hundreds of venues, including the key venues and many of the crucial marquee artists that produce the most lucrative tours. Without access to these venues or artists, potential entry will become even less likely. With entry barriers strengthened, Ticketmaster will further exploit its monopoly power and raise prices;

? Diminish competition in independent concert promotion. Although LiveNation is the largest concert promoter there are numerous smaller rivals in the market. Many of these firms are particularly innovative in sponsoring a wide variety of entertainment, offering consumers greater

choice and enabling artistic creativity. By controlling the dominant form of ticketing, Ticketmaster will be able to dampen rivalry in concert promotion. Ticketmaster will be able to force venues and artists to use LiveNation as a condition of using its ticketing services. Since Ticketmaster is the only game in town, it will be increasingly difficult for independent producers to provide rivalry in the market. These are very similar to the concerns of independent programmers that led to the FTC challenge of the Time Warner/Turner merger.

? Reduce competition among ticket resellers. Ticket resellers, sometimes known as the secondary market, provide a valuable service to consumers by providing convenient access to a significant number of tickets. By controlling LiveNation, Ticketmaster will further diminish the access of ticket resellers to alternative sources of tickets, limiting the ability of consumers to secure tickets to the most highly sought concerts and events.

Let me focus on the last issue - the impact on ticket resellers. Everyone is familiar with the incident involving the Bruce Springsteen concert - that tickets almost instantaneously appeared to have been diverted from Ticketmaster to their higher priced ticket reselling site - TicketsNow. Ticketmaster claims this was an inadvertent mistake. However, both consumers and Bruce Springsteen, who believed that tickets were available at face value, may have been defrauded by Ticketmaster's actions. Before its acquisition of TicketsNow, Ticketmaster lacked the incentive or ability to artificially inflate ticket prices by diverting tickets to the resale market. If it acquires LiveNation it will have an even greater ability to manipulate the market in this fashion and harm both resellers and consumers. If this merger is permitted, the "Springsteen scheme" may become a regular part of Ticketmaster's anticompetitive playbook.

That leaves us with the question of whether the merger is procompetitive and the efficiencies from that consolidation exceed any potential anticompetitive effects. The legal standard for the efficiencies defense is straightforward. Ticketmaster must demonstrate that efficiencies are: (1) merger-specific; (2) cognizable and verifiable; and (3) sufficient in magnitude to reverse the anticompetitive effects of the merger. Merger specific means they must be "likely to be accomplished with the proposed merger and unlikely to be accomplished in absence of either the proposed merger or another means having comparable anticompetitive effect." Merger Guidelines § 4. The claimed efficiencies cannot be efficiencies that could "be achieved by either company alone." *FTC v. Heinz*, 246 F.3d 708, 722 (D.C. Cir 2001). Moreover, because "information relating to the efficiencies is uniquely in the possession of the merging firms, the merging firms carry the burden of proof on efficiencies. Merger Guidelines § 4.

It is important to note that "efficiency" under the antitrust laws has a particular meaning: only efficiencies that lead to lower prices or improved services - that benefit consumers - count as efficiencies under the antitrust laws. The mere fact that a merger will lead to a more profitable company is not a reason to approve a potentially anticompetitive merger.

Ticketmaster has proclaimed that the LiveNation acquisition will benefit consumers by creating a new entity positioned to address the challenges of serving fans better at the point of the initial ticket sale with more options and better access.

Ticketmaster claims the merger will enable more innovative and dynamic promotion arrangements that provide more choice and a more fan-friendly purchasing experience. Economic theory suggests that vertical integration can be procompetitive by uniting

complementary products and services. It is Ticketmaster's burden to demonstrate these benefits will overcome any potential anticompetitive effects.

But economic theory is inadequate as a basis to recognize these efficiencies. One must look at the past history of Ticketmaster's acquisitions. There is little evidence that those acquisitions benefitted consumers through lower prices. The claims of improved services in this merger are similar to the claims Ticketmaster made when it acquired TicketsNow. Have consumers benefited from lower prices or better service? The jury is still out, but there is evidence of market manipulation, such as the alleged Springsteen incident. The lesson is simple - vertical integration in the hands of Ticketmaster can be a tool to stifle competition and deceive consumers.⁶ The promises of a benevolent monopolist are a poor substitute for competition.

Further Antitrust and Consumer Protection Enforcement Action is Necessary to Protect Consumers

This Committee should make it clear that investigating this merger is only the start of the enforcers' job in making sure competition works in the ticket market. For too long consumers have paid excessive charges for basic services, enabled by Ticketmaster's exclusionary and deceptive conduct. Blocking this merger will only prevent a competitively unhealthy market from becoming terminally ill. Further enforcement is necessary to restore competition. Here are three important suggestions:

? The FTC's Bureau of Consumer Protection should investigate the Springsteen incident to determine whether Ticketmaster has violated Section 5 of the FTC Act. Section 5 gives the FTC broad powers to attack unfair or deceptive practices that may harm consumers. Ticketmaster's actions, whether intentional or inadvertent, that resulted in the mass diversion of Springsteen tickets to the higher priced TicketsNow site deceived consumers (or Mr. Springsteen) or were simply unfair acts perpetrated on a vulnerable set of consumers;

? The Antitrust Division should review past acquisitions of Ticketmaster to determine if they were anticompetitive. The Springsteen incident suggests that some of the past vertical acquisitions, such as the TicketsNow acquisition, may not be as benign as Ticketmaster may have suggested. Where there is evidence that these acquisitions have diminished competition or facilitated deceptive conduct, the DOJ should seek a remedy, including divestiture to stop the competitive harm

? The Antitrust Division should review Ticketmaster's exclusionary conduct including long term contracts with venues to determine whether they are anticompetitive. A decade ago the DOJ chose not to challenge a wide variety of exclusionary conduct by Ticketmaster based on theoretical arguments that entry was easy or that consumers benefitted from exclusivity arrangements. History has proven that was a mistake. Moreover, both the case law and economic theory have matured sufficiently to recognize in a far more sophisticated fashion how these practices can harm competition. The DOJ should reopen its investigation of these practices to determine how to restore competition to the ticket marketplace.