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AT TICKETMASTER, SCALPERS SCORE AND FANS COME LAST

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## AT TICKETMASTER, SCALPERS SCORE AND FANS COME LAST

*Debra Parma\**

### I. AN INTRODUCTION TO TICKETMASTER'S ILLEGAL SCHEME

For years, consumers and ticket scalpers engaged in battles to secure tickets to popular events like *Hamilton* through Ticketmaster. Unbeknownst to consumers, Ticketmaster has been working against them the entire time. Through the assistance of software, frequently referred to as “bots,” scalpers can obtain massive amounts of tickets that they then resell on the secondary ticket market for tremendous markups.<sup>1</sup> For instance, if one wanted to attend a Broadway performance of *Hamilton* on January 2, 2019, the only available tickets are Ticketmaster's verified resale tickets, priced from \$475 to \$1,024, plus fees.<sup>2</sup>

According to Ticketmaster, a single scalper managed to buy 30,000 tickets to *Hamilton* using bots.<sup>3</sup> In a statement from the company, it said “Ticketmaster has zero tolerance for bots and will continue to employ all available methods to stop their usage.”<sup>4</sup> An investigation by the New York attorney general's office revealed that a broker could buy over 1,000 tickets in just one minute, then reselling the tickets with an average mark up of roughly 50%.<sup>5</sup> Needless to say, this is far faster than a human's ability to purchase tickets, putting consumers at a significant disadvantage. Ultimately, these bots acquired between 30-40% of Ticketmaster's *Hamilton* ticket inventory, but bots were easily able to acquire the majority of tickets for

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<sup>1</sup> Avi Loewenstein, Note, *Ticket Sniping*, 8 J. ON TELECOMM. & HIGH TECH. L. 243, 244 (2010).

<sup>2</sup> TICKETMASTER, <https://www.ticketmaster.com> (last visited Dec. 28, 2018).

<sup>3</sup> Gene Maddaus, *Ticketmaster Says Bot Army Bought 30,000 'Hamilton' Tickets*, VARIETY (Oct. 2, 2017), <https://variety.com/2017/digital/news/ticketmaster-hamilton-prestige-entertainment-renaissance-ventures-1202578292/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

events occurring less frequently than *Hamilton*.<sup>6</sup> Because of the massive amounts of inventory swept up by bots, consumers find themselves forced into the secondary market and paying huge mark ups.

Bots are a persistent problem for both Ticketmaster and consumers, but, as it turns out, Ticketmaster appears to have taken on the motto “if you can’t beat them, join them.” At a ticketing convention, a team of undercover journalists learned of Ticketmaster’s own bot that the company marketed to scalpers to resell tickets, in violation of Ticketmaster’s own terms.<sup>7</sup> While Ticketmaster denies the allegations, a Ticketmaster employee claims that 100 scalpers successfully used Ticketmaster’s own software to sell between thousands and several million tickets each year.<sup>8</sup>

First, this Note will explore Ticketmaster’s corporate and historical background. Second, it will review the statutory and jurisprudential history relevant to Ticketmaster, scalping bots, and antitrust law. Third, the Note will analyze these relevant provisions in light of Ticketmaster’s actions in marketing its own bot to scalpers and, finally, offer solutions that would be effective in preventing Ticketmaster’s actions.

This Note will prove that previous attempts to prevent scalpers and bots from buying up tickets to popular events have been unsuccessful because Ticketmaster is operating to monopolize both the primary and secondary ticketing markets through illegal, unfair, and deceptive acts and the most effective way to prevent Ticketmaster’s behavior is a joint response from both the Federal Trade Commission (“FTC”) and the Attorney General.

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<sup>6</sup> Annlee Ellingson, *Suit: Scalpers used bots for ‘Hamilton’ tickets*, BIZWOMEN (Oct. 4, 2017), <https://www.bizjournals.com/bizwomen/news/latest-news/2017/10/suit-scalpers-used-bots-for-hamilton-tickets.html>.

<sup>7</sup> Anastasia Tsioulcas, *Ticketmaster Has Its Own Secret ‘Scalping Program,’ Canadian Journalists Report*, NAT’L PUB. RADIO (Sept. 20, 2018), <https://www.npr.org/2018/09/20/649666928/ticketmaster-has-its-own-secret-scalping-program-canadian-journalists-report>.

<sup>8</sup> *Id.*

## II. A CORPORATE AND HISTORICAL BACKGROUND

### A. Ticketmaster's Corporate Background

“At Ticketmaster, we strive to put fans first,” Ticketmaster claims in its company description, citing its merger with Live Nation as one of the many ways it works to put fans first.<sup>9</sup>

Through the years, Ticketmaster expanded its network to become the ticketing giant it is today. In 2010, despite much contention, Ticketmaster merged with Live Nation.<sup>10</sup> This merger brought together Live Nation, Ticketmaster, and Ticketmaster's network of companies, which also includes TicketWeb, TicketNow, House of Blues, Universe, NFL Ticket Exchange, NBATickets.com, and NHL Ticket Exchange.<sup>11</sup>

Ticketmaster also introduced its own in-site secondary market, not to be outshined by Stubhub's secondary ticket market success. On the surface, Ticketmaster's Verified Resale Tickets offers consumers an opportunity to sell their tickets to events that they could no longer attend to other interested fans on their “fan-to-fan” resale market.<sup>12</sup> Ticketmaster guarantees that “every seat you sell—comes with peace of mind.”<sup>13</sup> Per the company, its resale market is “the easiest and safest way to sell your tickets.”<sup>14</sup> However, in many instances, this transaction does not involve one fan selling to another fan and instead is a consumer paying a huge markup to professional ticket scalpers.

Ticketmaster profits from ticket fees on both primary and resale ticket purchases. The total ticket price can consist of the face value price, determined by the client, a service fee, also called a “convenience charge,” an order processing fee, which “offsets the costs of ticket handling, shipping

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<sup>9</sup> *Who We Are*, TICKETMASTER, [https://www.ticketmaster.com/about/about-us.html?tm\\_link=abouttm\\_about](https://www.ticketmaster.com/about/about-us.html?tm_link=abouttm_about) (last visited Feb. 8, 2019).

<sup>10</sup> Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

<sup>11</sup> *Our Network*, TICKETMASTER, [https://www.ticketmaster.com/about/about-us.html?tm\\_link=abouttm\\_about](https://www.ticketmaster.com/about/about-us.html?tm_link=abouttm_about) (last visited Feb. 8, 2019).

<sup>12</sup> *Ticketmaster Verified Resale*, TICKETMASTER, [https://www.ticketmaster.com/verified?\\_ga=2.215469331.500223346.1546445884-100937779.1546445884](https://www.ticketmaster.com/verified?_ga=2.215469331.500223346.1546445884-100937779.1546445884) (last visited Feb. 8, 2019).

<sup>13</sup> TICKETMASTER, <https://my.ticketmaster.com/event/160054D299314852/sell> (last visited Dec. 28, 201).

<sup>14</sup> *Id.*

and support,” a delivery fee, a facility charge, and taxes.<sup>15</sup> Ticketmaster states that its “clients typically share in a portion of the fees” collected and the portion Ticketmaster itself keeps “helps . . . to provide [its] clients with software, equipment, services and support to manage their tickets and box office, and provide the sales network used by clients to distribute tickets to fans.”<sup>16</sup> Finally, the amount remaining after all of this contributes to its profits, per Ticketmaster.<sup>17</sup>

Interestingly, of its facility charges, Ticketmaster claims that it “does not share in facility charges,” but rather “simply [collects] them for venues,” but neglects to mention just how many venues Live Nation and Ticketmaster operate, discussed *infra*.<sup>18</sup> Additionally, in regards to the service fees added to resale tickets, Ticketmaster bases this fee amount on the resale listing price, whereas Ticketmaster bases the service fee for the primary market tickets on agreements with the client.<sup>19</sup> For instance, Ticketmaster attaches a service fee in the amount of \$82.40 to a resale ticket priced at \$515 for *Hamilton*, whereas an orchestra seat on the primary market priced at \$749 comes with only a \$25 service fee.<sup>20</sup>

By navigating Ticketmaster’s webpage, consumers agree to the site’s terms of use.<sup>21</sup> Within these terms, Ticketmaster establishes a code of conduct that a user agrees to follow, in addition to all applicable laws, which includes not using Ticketmaster for illegal or commercial purposes, and not impersonating a person or entity—all of which bot users violate.<sup>22</sup> In the next section of its terms, Ticketmaster expressly forbids the use of bots to “reserve, buy, or otherwise obtain tickets.”<sup>23</sup> Additionally, site users agree, merely by using the Ticketmaster website, to waive their right to a jury trial and to engage in class action suits against Ticketmaster.<sup>24</sup>

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<sup>15</sup> *How are ticket prices and fees determined?*, TICKETMASTER, [https://help.ticketmaster.com/s/article/How-are-ticket-prices-and-fees-determined?language=en\\_US](https://help.ticketmaster.com/s/article/How-are-ticket-prices-and-fees-determined?language=en_US) (last visited Feb. 8, 2019).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* See *infra* section III.B and notes 84–85.

<sup>19</sup> TICKETMASTER, *supra* note 15.

<sup>20</sup> TICKETMASTER, *supra* note 2.

<sup>21</sup> *Terms of Use*, TICKETMASTER, [https://www.ticketmaster.com/h/terms.html?tm\\_link=tm\\_i\\_terms](https://www.ticketmaster.com/h/terms.html?tm_link=tm_i_terms) (last visited Feb. 8, 2019).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

### *B. Scalping and Secondary Market Ticket Resales*

The secondary ticketing market is booming, raking in \$15 billion per year.<sup>25</sup> This market is far from a new phenomenon, with scalpers selling Charles Dickens tickets for ten times their face value in 1860.<sup>26</sup> However, part of the reason that this market reached this magnitude is courtesy of scalpers' use of bots inflating the market with massive amounts of tickets that they deprived from the primary market. These bots allow scalpers to flood Ticketmaster with requests and allow them to purchase massive ticket amounts before the average consumer.<sup>27</sup> Even if a consumer attempts to get tickets right as they become available, bots already "have packed the queue with automated requests at superhuman speed."<sup>28</sup> According to Ticketmaster, bots make 80% of its total ticket requests on some days.<sup>29</sup> One scalper admitted to making over 600,000 requests in one day using bots.<sup>30</sup>

These bots buy tickets, relist them on the secondary market, monitor pricing, and adjust it as necessary in order to sell the scalper's inventory.<sup>31</sup> Ticket retailers apply anti-bot technology measures to counter the bots, but bot advancements thwart these measures.<sup>32</sup> These bots have grown more sophisticated, with scalpers designing them to actually appear human to Ticketmaster, occasionally engaging in human error, like mis-clicking, to

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<sup>25</sup> Sharon Ebersson, *'Hamilton' Is Coming to Pittsburgh. And with It Comes the Cyber Scalpers*, PITT. POST-GAZETTE (Mar. 25, 2018), <https://www.post-gazette.com/ae/theater-dance/2018/03/25/Hamilton-Pittsburgh-Cultural-Trust-cyber-scalpers-BOTS-Bill-of-2016-CAPTCHA/stories/201803220196>.

<sup>26</sup> Kieran McLean, *Cultural Trust Defends Against 'Hamilton' Ticket Buying Bots*, 90.5 WESA (Nov. 6, 2018), <https://www.wesa.fm/post/cultural-trust-defends-against-hamilton-ticket-buying-bots>.

<sup>27</sup> Loewenstein, *supra* note 1, at 245.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 247.

<sup>30</sup> *Id.*

<sup>31</sup> Tiff Fehr, *To Learn About 'Hamilton' Ticket Bots, We Wrote Our Own Bot*, N.Y. TIMES (Jul. 29, 2016), <https://www.nytimes.com/2016/07/30/upshot/to-learn-about-hamilton-ticket-bots-we-wrote-our-own-bot.html>.

<sup>32</sup> The Editorial Board, *The 'Hamilton' Experiment: How to Fight the Bots for Tickets*, CHI. TRIB. (Jun. 9, 2016), <https://www.chicagotribune.com/news/opinion/editorials/ct-hamilton-tickets-bots-scalpers-edit-0610-md-20160609-story.html>.

throw Ticketmaster of their trail.<sup>33</sup> These bots are “screen scrapers,” or bots that mimic behaviors of human buyers using Ticketmaster.<sup>34</sup>

In 2016, then New York Attorney General Eric Schneiderman called ticketing a “fixed game,” one which consumers were losing.<sup>35</sup> Even where ticket purchasing limits were in place, these bots still managed to get around these measures, purchasing over 1,000 tickets per minute and reselling these tickets on average 49% more than the original price and sometimes up to ten times the original price.<sup>36</sup>

In 2018, the United States Government Accountability Office (“GAO”) investigated ticket sales and found that scalpers and consumers are on uneven playing field through their usage, resulting in tickets becoming only available to consumers in the resale market.<sup>37</sup> No federal regulation governs event ticketing, but the BOTS Act does forbid people using software or otherwise to circumvent security or other measures to protect ticketing limits or rules.<sup>38</sup>

### III. STATUTORY AND JURISPRUDENTIAL BACKGROUND

#### *A. Antitrust Statutes and Jurisprudence*

The Sherman Act, codified under 15 U.S.C. §§ 1–11, forbids “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . .”<sup>39</sup> It also forbids monopolies, “or attempt[s] to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . .”<sup>40</sup>

In *Standard Oil Co. v. United States*, the Supreme Court held that Rockefeller’s companies engaged in an attempt to monopolize the movement

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<sup>33</sup> Tiff Fehr, *How Scalpers Make Their Millions with ‘Hamilton,’* N.Y. TIMES (Jul. 29 2016), <https://www.nytimes.com/2016/07/30/upshot/how-scalpers-make-their-millions-with-hamilton.html>.

<sup>34</sup> McLean, *supra* note 26.

<sup>35</sup> Terry Carter, *New York AG Says Ticket Sales for Concerts, Sporting Events Is a ‘Fixed Game’ won by ‘Ticket Bots,’* ABA J. (Jan. 29, 2016), [http://www.abajournal.com/news/article/new\\_york\\_ag\\_says\\_ticket\\_sales\\_for\\_concerts\\_sporting\\_events\\_is\\_a\\_fixed\\_game](http://www.abajournal.com/news/article/new_york_ag_says_ticket_sales_for_concerts_sporting_events_is_a_fixed_game).

<sup>36</sup> *Id.*

<sup>37</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-347, EVENT TICKET SALES (2018).

<sup>38</sup> *Id.* at 48; *see supra* Section III.A and note 58.

<sup>39</sup> 15 U.S.C. § 1 (2018).

<sup>40</sup> 15 U.S.C. § 2 (2018).

of petroleum, violating the Sherman Act, and ordered for their dissolution.<sup>41</sup> The facts of the case show that Standard Oil “had obtained a complete mastery over the oil industry, controlling 90 per cent of the business. . . .”<sup>42</sup> Standard Oil effectively controlled all aspects of the oil business, including “producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of . . . petroleum and to restrain and monopolize all interstate commerce in those products.”<sup>43</sup> While the Standard Oil companies did not control 100% of the market, the companies retained “substantial power,” which “serve[s] to add additional cogency to the presumption of intent to monopolize. . . .”<sup>44</sup>

In *United States v. Socony-Vacuum Oil Co.*, the Supreme Court held that Socony-Vacuum Oil violated the Sherman Act by conspiring and actually artificially raising oil and gas prices in markets, thereby increasing prices for consumers.<sup>45</sup> The company controlled 83% of the mid-western area market and was “fully integrated—producing crude oil, having pipe lines for shipment of the crude to its refineries, refining crude oil, and marketing gasoline at retail and at wholesale.”<sup>46</sup> While there was no evidence of coercion, the company “had the power to raise prices and acted together for that purpose, the combination was illegal; and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination.”<sup>47</sup>

In *United States v. Paramount Pictures, Inc.*, the Supreme Court sustained an injunction against Paramount Pictures and its affiliates from granting licenses only to its own theaters, which was “exclusionary,” and “designed to strengthen their hold on the exhibition field.”<sup>48</sup> However, the Court remanded this issue back to the District Court to make a determination on whether a monopoly existed “[f]or when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine

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<sup>41</sup> Standard Oil Co. v. United States, 221 U.S. 1, 81–82 (1911).

<sup>42</sup> *Id.* at 33.

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

<sup>44</sup> *Id.* at 77.

<sup>45</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940).

<sup>46</sup> *Id.* at 191.

<sup>47</sup> *Id.* at 191, 210–11.

<sup>48</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 170 (1948).



what the results of the conspiracy were. . . .”<sup>49</sup> Per the Court, the relevant inquiry “is the relationship of the unreasonable restraints of trade to the position of the defendants in the . . . field.”<sup>50</sup>

The Court holds that to determine whether vertical integration is illegal under the Sherman Act, the Court considers “(1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent.”<sup>51</sup> As such, a monopoly exists under such circumstances when a vertically integrated enterprise has “a power to exclude competition . . . coupled with a purpose or intent to do so.”<sup>52</sup> Size is an indicator of this, “[f]or size carries with it an opportunity for abuse.”<sup>53</sup> In this, “the fact that the power created by size was utilized . . . to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power.”<sup>54</sup> The “nature of the market to be served” must also be considered in whether the vertical integration created a monopoly as well as “the leverage on the market within the particular vertical integration makes possible.”<sup>55</sup>

The Federal Trade Commission Act (“FTC Act”) forbids “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . .”<sup>56</sup> The act, which created the Federal Trade Commission, empowers it to prevent entities from engaging in such unfair methods of competition and deceptive practices.<sup>57</sup> Also within the FTC Act is the BOTS Act, which makes it illegal “to circumvent a security measure, access control system, or other technological control or measure on an Internet website . . . used by the ticket issuer to enforce posted event ticket purchasing limits . . . or to maintain . . . purchasing order rules” as well as “to sell or offer to sell any event ticket . . .” obtained through circumventing security measures or otherwise.<sup>58</sup>

In *FTC v. Sperry & Hutchinson Co.*, the Supreme Court construed a broad definition of “unfair conduct,” as described in 15 U.S.C. § 45 holding

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<sup>49</sup> *Id.* at 171.

<sup>50</sup> *Id.* at 172.

<sup>51</sup> *Id.* at 174.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 15 U.S.C. § 45(1) (2018).

<sup>57</sup> See 15 U.S.C. § 45(2) (2018).

<sup>58</sup> 15 U.S.C. § 45C (2018).

that Congress did not intend to limit this definition.<sup>59</sup> The Court turned to the legislative history of the FTC Act, which manifested Congress's intention to "leave it to the commission to determine what practices were unfair."<sup>60</sup> Per the Court, Congress granted this power to the FTC with a broad "sweep and flexibility. . . ."<sup>61</sup> In fact, this branches beyond antitrust laws, allowing the FTC, "like a court of equity, [to consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."<sup>62</sup> In doing so, the FTC must articulate a "'rational connection between the facts found and the choice made.'"<sup>63</sup>

### *B. Ticketmaster's Encounters with the Law*

In 2009, the FTC set forth a complaint against Ticketmaster, charging that the ticketing giant "used deceptive bait-and-switch tactics to sell event tickets" for Bruce Springsteen's summer tour.<sup>64</sup> In attempting to secure tickets through Ticketmaster, consumers received a notification stating "No Tickets Found," and the site then redirected them to TicketsNow, a ticket resale site owned by Ticketmaster, where tickets were available for sometimes quadruple the face value of the ticket.<sup>65</sup> Per the FTC, this also occurred for other events.<sup>66</sup> Ticketmaster settled with the FTC in 2010, resulting in no official finding or ruling that Ticketmaster violated the law.<sup>67</sup> As a result of the settlement, Ticketmaster refunded consumers that purchased resale tickets on TicketsNow for the Bruce Springsteen tour, but not consumers who suffered the same deception for the many other events for which this also occurred.<sup>68</sup>

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<sup>59</sup> See Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 241.

<sup>62</sup> *Id.* at 244.

<sup>63</sup> *Id.* at 249 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

<sup>64</sup> *Ticketmaster and TicketsNow Settle FTC Charges of Deceptive Sales Tactics, Refunds for Springsteen Concertgoers Provided; FTC Warns Other Ticket Resellers*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/press-releases/2010/02/ticketmaster-ticketsnow-settle-ftc-charges-deceptive-sales> (last visited Feb. 8, 2019).

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

In 2003, a class action was initiated against Ticketmaster, filed under *Schleisinger v. Ticketmaster*, and charged that “Ticketmaster’s fees were excessive and misleading.”<sup>69</sup> The lawsuit settled in 2013, with the parties agreeing that Ticketmaster would pay \$42 million over four years.<sup>70</sup> Ticketmaster decided to do this in the form of vouchers, one type of which consumers could only redeem for specific events at venues that Live Nation operates.<sup>71</sup> Ticketmaster releases eligible events once yearly to the roughly 57 million people that it issued vouchers to for a total of \$386 million in vouchers.<sup>72</sup> Ultimately, “the odds are a lot of people will never get the chance to claim their free tickets.”<sup>73</sup>

Recently, Ticketmaster brought suit against a company that uses bots to purchase large amounts of tickets to sell on StubHub and other resale sites.<sup>74</sup> Per Ticketmaster’s First Amended Complaint, the defendant company asserts an unfair advantage against consumers, as “these bots inundate Ticketmaster’s website and mobile app with page requests and ticket reserve requests at a far higher rate than would be possible for a human.”<sup>75</sup> Per Ticketmaster’s records, in a four month period, the defendant managed to make over 300,000 ticket orders through the use of over 9,000 different accounts, even purchasing the majority of tickets for the landmark Mayweather-Pacquiao fight.<sup>76</sup>

This is not the first time Ticketmaster brought suit against a company using bots, previously finding back-to-back success in court against such a company.<sup>77</sup> In the 2007 case, the court granted Ticketmaster’s motion for a preliminary injunction against the defendant company, considering the

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<sup>69</sup> Daniel Victor, *Why You Probably Won’t Get to Use Your Ticketmaster Vouchers*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/22/business/media/ticketmaster-lawsuit-vouchers.html>.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* Ticketmaster LLC v. Prestige Entm’t West, Inc., 315 F. Supp. 3d 1147, 1155 (Cal. C.D. Ct. 2018).

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

<sup>76</sup> Kenneth Lovett, *Ticketmaster claims scalper used illegal bots to buy thousands of high-demand tickets in new \$10M suit*, DAILY NEWS (Oct. 2, 2017), <https://www.nydailynews.com/news/national/ticketmaster-sues-big-time-scalper-10m-article-1.3536405>.

<sup>77</sup> *See* Ticketmaster LLC v. RMG Techs., Inc., 536 F. Supp. 2d 1191 (C.D. Cal. 2008); Ticketmaster LLC v. RMG Techs., Inc., 507 F. Supp. 2d 1096 (Cal. C.D. Ct. 2007).

public interest and finding that the company hurts both Ticketmaster and the public with its conduct, which “denies consumers the opportunity to purchase tickets at their face price.”<sup>78</sup> In the subsequent 2008 proceeding, the defendant company counterclaimed, asserting that Ticketmaster retains a monopoly over retail ticketing.<sup>79</sup> The defendant company also alleged that Ticketmaster “developed a scheme to obtain a monopoly in the ticket resale market,” but the court dismissed the counterclaim.<sup>80</sup>

#### IV. CURRENT ISSUE: TICKETMASTER’S MONOPOLISTIC PRACTICES AND BOT SCHEME

Ticketmaster and Live Nation’s 2010 merger deeply troubled many across the United States, who believed that this merger would create “an industry monolith, one capable of crippling competitors in the ticketing business.”<sup>81</sup> Officials in the federal government tried to ease the minds of critics, with Christine A. Varney, Assistant Attorney General, stating that “[t]here will be enough air and sunlight in this space for strong competitors to take root, grow and thrive.”<sup>82</sup> However, it has been almost a decade since the merger and Live Nation and Ticketmaster continue to dominate ticketing, with ticket prices reaching “record highs” and service fees being “far from reduced.”<sup>83</sup>

In 2017, the massive company promoted around 30,000 shows worldwide, for which it sold 500 million tickets, all while also operating over 200 venues globally.<sup>84</sup> Live Nation “manages 500 artists,” while Ticketmaster “tickets 80 of the top 100 arenas in the country.”<sup>85</sup> Collectively, Ticketmaster has its hand in “nearly every facet of the live-event business: recording, record sales, licensing, talent management, venue ownership,

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<sup>78</sup> Ticketmaster LLC v. RMG , 507 F. Supp. 2d 1096, 1116 (C.D. Cal. 2007).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Sisario & Bowley, *supra* note 10.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

ticketing services and even concessions.”<sup>86</sup> Ultimately, Ticketmaster controls 80% of the ticketing market.<sup>87</sup> Size is not automatically an indicator of a monopoly, but “carries with it an opportunity for abuse,” per the Supreme Court.<sup>88</sup> It appears that this rings true for Ticketmaster.

Because the secondary ticketing market is so lucrative, it is no wonder that Ticketmaster wanted to expand its reach in this market as well. To do so, Ticketmaster allegedly created its own bot called TradeDesk that enables scalpers to buy and resell tickets on Ticketmaster without fears of cancelled purchases or other consequences, even though this is in direct violation with Ticketmaster’s terms of use.<sup>89</sup> In early 2018, 100 scalpers used TradeDesk, with the largest of these scalpers obtaining an estimated five million tickets in one year.<sup>90</sup> Ticketmaster’s Professional Reseller Handbook incentivizes such massive dealings, stating that Ticketmaster will reduce its fees as scalpers reach certain growth milestones such as \$500,000 or \$1 million in yearly sales.<sup>91</sup> Such a program ensures that Ticketmaster is able to double dip, collecting not only the primary sale’s fees, but also the much more lucrative resale fee.

The scalping scheme is not the only unfair, anti-competitive allegation facing Ticketmaster either. For decades now, artists, venues, and other businesses accused Ticketmaster of using coercion.<sup>92</sup> Back in 1995, Pearl Jam decided not to use Ticketmaster for their tour and unveiled Ticketmaster’s extensive network of exclusive deals with concert venues, which forced fans and artists alike into Ticketmaster’s grasp.<sup>93</sup> Also, Ticketmaster allegedly told venues that tried to stray from its control that

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<sup>86</sup> Bill Pascrell Jr., *Everyone’s worst fears about the Live Nation-Ticketmaster merger have come true*, L.A. TIMES (May 17, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-pascrell-live-nation-concert-ticketing-20180517-story.html>.

<sup>87</sup> *Id.*

<sup>88</sup> *Paramount Pictures*, 332 U.S. at 174.

<sup>89</sup> Tsioulcas, *supra* note 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See Sisario & Bowley, *supra* note 10; Eric Boehlert, *Pearl Jam: Taking on Ticketmaster*, ROLLING STONE (Dec. 28, 1995), <https://www.rollingstone.com/music/music-news/pearl-jam-taking-on-ticketmaster-67440/>.

<sup>93</sup> Boehlert, *supra* note 92.

they would lose out on shows promoted and managed by Live Nation, putting them “in a literal boycott.”<sup>94</sup>

Ticketmaster enjoys massive control over the market, holding 80% of the market share,<sup>95</sup> which is also comparable to Standard Oil and Socony-Vacuum Oil Co.<sup>96</sup> With its merger with Live Nation, Ticketmaster has created a massive vertically integrated enterprise, comparable to Paramount Pictures and Standard Oil. Ticketmaster and its network control every aspect of the live event business, from recording down to even concessions at venues.<sup>97</sup> Ticketmaster creates the content, manages it, sells tickets for it, and promote the events, many of which take place at its own venues, similar to Paramount Pictures’ monopoly on the exhibition of its films.

Not every vertical integration is per se illegal, but applying the Supreme Court’s inquiry set forth in *Paramount Pictures*,<sup>98</sup> it is evident that Ticketmaster’s vertical integration constitutes an illegal monopoly. While no facts present themselves that Ticketmaster and Live Nation’s merger itself had any dubious intent or purposes underlying it, but the power created and the attendant purpose and intent weigh against Ticketmaster, considering the relevant factors of size and nature of the market served.<sup>99</sup>

Just because Ticketmaster is a massive enterprise does not make it fail this inquiry, but its size provides Ticketmaster “an opportunity for abuse,”<sup>100</sup> which Ticketmaster takes. As set forth in *Paramount Pictures*, Ticketmaster uses “the power created by size . . . to crush . . . competition,” which “is potent evidence that the requisite purpose or intent attends the presence of monopoly power.”<sup>101</sup> Ticketmaster, through Live Nation, controls major artists and venues, allowing it to deprive non-Ticketmaster venues of these artists and non-Ticketmaster artists of major venues unless they elect to use Ticketmaster’s portfolio of services.<sup>102</sup> Additionally, venues, competitors,

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<sup>94</sup> Sisario & Bowley, *supra* note 10.

<sup>95</sup> Pascrell, *supra* note 86.

<sup>96</sup> See *Paramount Pictures*, 334 U.S. at 174.

<sup>97</sup> Pascrell, *supra* note 86.

<sup>98</sup> To determine if a vertical integration is legal, the Supreme Court considers “(1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent.” *Paramount Pictures*, 334 U.S. at 174.

<sup>99</sup> *Id.*

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

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

<sup>102</sup> Sisario & Bowley, *supra* note 10.

and artists have come forward with allegations of coercion by Ticketmaster,<sup>103</sup> further supporting this notion that Ticketmaster uses its size to prevent competition.

The market served by Ticketmaster indicates the illegality of this vertically integrated enterprise, in regards to “the leverage on the market the particular vertical integration makes possible.”<sup>104</sup> Ticketmaster’s market leverage allows it to deprive artists and venues of crucial parts of the market.<sup>105</sup> It also allows for Ticketmaster to even deprive consumers of primary market tickets, forcing them to purchase higher priced secondary market tickets. Ultimately, Ticketmaster and its network of companies constitute an illegally vertically integrated enterprise.

Ticketmaster’s bot scheme, TradeDesk, is a symptom of Ticketmaster’s utilization of its massive size and market control to crush competitors, indicating the presence of a monopoly. Ticketmaster uses its standing, size, and market leverage to bring suits against other companies under legitimate guises,<sup>106</sup> but these suits merely serve to crush their competitors in the secondary market. While Ticketmaster has found success in such lawsuits, it has been in direct violation of the Sherman Act, the FTC Act, and the BOTS Act through its illegal dealings working directly with scalpers and against consumers. These actions are not only illegal, but cost consumers significant amounts of money when they are left with no other alternative besides the secondary market. In the interests of the public, the federal government must take action to protect consumers from Ticketmaster’s behavior.

## V. REMEDIES AND SOLUTIONS

In the past, Ticketmaster took advantage of its massive size to settle cases without actually altering its behavior.<sup>107</sup> Instead, the federal government, jointly through the Attorney General’s office and the Federal

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<sup>103</sup> See Sisario & Bowley, *supra* note 10; Boehlert, *supra* note 92.

<sup>104</sup> *Paramount Pictures*, 334 U.S. at 174.

<sup>105</sup> See Sisario & Bowley, *supra* note 10; Boehlert, *supra* note 92.

<sup>106</sup> See *Ticketmaster L.L.C. v. Prestige Entm’t West, Inc.*, 315 F. Supp. 3d 1147, 1155 (C.D. Cal. 2018); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191 (C.D. Cal. 2008); *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

<sup>107</sup> See FTC, *supra* note 64; Victor, *supra* note 69.

Trade Commission, must bring actions against Ticketmaster in order to finally put a stop to Ticketmaster's monopolistic behavior.

Recently, consumers brought a class action suit against Ticketmaster in response to the news of its ticket scalping scheme,<sup>108</sup> but this action will likely find little success when it comes to actually curtailing Ticketmaster's behavior. Ticketmaster previously paid out significant sums, but did so in a manner that does not actually repair the harms it caused to consumers and then continued with its anticompetitive, deceptive, and unfair practices.<sup>109</sup> Also, in using Ticketmaster's website, site users agree to Ticketmaster's terms of use, which includes a waiver of users' rights to bring or participate in a class action lawsuit,<sup>110</sup> although it is unclear whether a court would uphold such a term for consumers in these circumstances.

The Attorney General's Office should bring forth a claim against Ticketmaster under §§ 1 and 2 of the Sherman Act, for conspiring to and actually restraining and monopolizing trade and commerce.<sup>111</sup> With its bot scheme, Ticketmaster conspired with ticket scalpers to use Ticketmaster's bots and resale markets to raise ticket prices through the secondary market and actually achieved these means, as did *Socony-Vacuum Oil*, for which the Supreme Court held that the existence of proof of a conspiracy to elevate prices, which then caused or assisted in a raise in prices, serves as "proof of the actual consummation or execution of a conspiracy" for purposes of the Sherman Act.<sup>112</sup>

Per the Supreme Court, any enterprise that interferes "with price structures is engaged in an unlawful activity," regardless of whether this enterprise controls the market.<sup>113</sup> This is a uniform, bright line rule under the Sherman Act and the reasonableness of the prices is irrelevant.<sup>114</sup> While there may not have been any express agreement of what these prices should be, Ticketmaster, through TradeDesk, conspired with scalpers to purchase lower

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<sup>108</sup> Lake Schatz, *Ticketmaster, Live Nation hit with class action lawsuit for allegedly running secret scalping program*, CONSEQUENCE OF SOUND (Oct. 1, 2018), <https://consequenceofsound.net/2018/10/ticketmaster-lawsuit-scalping-program/>.

<sup>109</sup> See FTC, *supra* note 64; Victor, *supra* note 69.

<sup>110</sup> TICKETMASTER, *supra* note 21.

<sup>111</sup> 15 U.S.C. §§ 1–2 (2016).

<sup>112</sup> *Socony-Vacuum Oil Co.*, 310 U.S. at 219–20.

<sup>113</sup> *Id.* at 221.

<sup>114</sup> *Id.* at 222.



priced face value tickets on the primary market to then resell at a much higher price on the secondary market, therefore conspiring to raise prices of tickets. The statutes allow for fines up to \$100,000,000 for corporations and/or imprisonment for up to ten years,<sup>115</sup> but the Attorney General's office should also pursue an injunction to stop TradeDesk and dissolution of the ticketing giant's network.

The FTC must also pursue actions against Ticketmaster, under §§ 45 and 45C of the FTC Act. First, the FTC should use the broad powers granted by Congress to set forth a complaint against Ticketmaster to cease and desist its bot scheme, which is an unfair method of competition as well as a deceptive act.<sup>116</sup> This would be an action within FTC, unless appealed to the Court of Appeals, but otherwise the FTC would have the power to make an official ruling that Ticketmaster's practices are unfair and deceptive, resulting in an official report on the books declaring that such practices are unfair and deceptive.<sup>117</sup> Unlike the FTC's earlier run in with Ticketmaster that resulted in a settlement,<sup>118</sup> the FTC should strive to make an official ruling against Ticketmaster in order to curtail Ticketmaster's behavior.

Once the FTC has an order in place, Ticketmaster may be fined up to \$10,000 for each violation of that order and the federal government may then pursue mandatory injunctions as well as additional equitable relief as the court finds to be appropriate.<sup>119</sup> Such a ruling by the FTC would allow the FTC to keep Ticketmaster within an arm's length. In contrast, where Ticketmaster and the FTC settled, Ticketmaster paid out a lump sum without receiving any official declaration or ruling that its behavior was illegal,<sup>120</sup> allowing Ticketmaster to continue such behaviors. With an official ruling, the FTC can continually take Ticketmaster back to court for continuing to pursue its bot scheme, where courts may grant equitable relief without any prescribed maximum.

The FTC should also pursue Ticketmaster under the BOTS Act along with its action against Ticketmaster under § 45 of the FTC Act. Ticketmaster is in direct violation of this act,<sup>121</sup> as it created TradeDesk to circumvent

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<sup>115</sup> 15 U.S.C. §§ 1-2 (2016).

<sup>116</sup> 15 U.S.C. § 45 (2016).

<sup>117</sup> *Id.*

<sup>118</sup> FTC, *supra* note 64.

<sup>119</sup> 15 U.S.C. § 45(l) (2016).

<sup>120</sup> FTC, *supra* note 64.

<sup>121</sup> 15 U.S.C. § 45 (2016).

Ticketmaster's own security measures to allow scalpers to violate event purchasing limits and order purchasing rules and subsequently selling such tickets obtained in violation of this law, which Ticketmaster participated in directly.

Artists and venues have also come up with some very creative solutions to beat bots, taking the ball out of Ticketmaster's court as well. For instance, Taylor Swift used a ticketing system for her fan base, which rewards the fans that were the most active.<sup>122</sup> *Hamilton* allowed resellers to set their prices in the primary market in order to deprive scalpers of these profits, while then drastically reducing the prices to \$10 for other tickets that are non-transferable and available through a daily lottery system.<sup>123</sup> In Pittsburgh, the Cultural Trust required purchasers to make an account with the theater, providing information authenticating their humanity in doing so,<sup>124</sup> and staggered ticket releases "quietly," releasing additional tickets for purchase through its own ticketing service.<sup>125</sup> Additionally, limiting the ticket delivery method to will call and requiring the credit card used for purchase would also be troublesome for bots.<sup>126</sup> The GAO also offers several options, including delivery delays and face-value resale exchanges.<sup>127</sup> Bots are not unbeatable, but instead of taking bots to task, Ticketmaster decided to unfairly take advantage of them instead.

## VI. CONCLUSION

Scalpers, through bots, artificially inflate the price of tickets by buying up massive quantities of them and making them only available to consumers on the secondary resale market for far more than the face value. Instead of effectively counteracting these bots, Ticketmaster created its own bot that allows scalpers to amass significant amounts of tickets at a time to sell on Ticketmaster's resale site, providing the scalpers with ease of use and

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<sup>122</sup> Rebecca Beitsch, *Despite bans, 'Hamilton,' Springsteen tix still vacuumed up by bots*, PHILA. INQUIRER (Feb. 2, 2018), <https://www.philly.com/philly/business/despite-bans-hamilton-springsteen-tix-still-vacuumed-up-by-bots-20180202.html>.

<sup>123</sup> The Editorial Board, *supra* note 32.

<sup>124</sup> McLean, *supra* note 26.

<sup>125</sup> Natasha Lindstrom, *Pittsburgh Cultural Trust quietly releases more Hamilton tickets*, PITT. TRIB. REV. (Dec. 26, 2018), <https://archive.triblive.com/news/pittsburgh-allegheeny/pittsburgh-cultural-trust-quietly-releases-more-hamilton-tickets/>.

<sup>126</sup> Eberson, *supra* note 25.

<sup>127</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 50–51.

Ticketmaster with the profits from the fees from both the primary and secondary sales of the same tickets. In doing so, Ticketmaster uses its massive size and market reach to cripple would be competitors in the secondary market and conspires to raise ticket prices for actual consumers. Ticketmaster's actions prove the existence of monopoly power within its vertically integrated enterprise, which causes significant harm to the public. To protect consumers and the American public generally, the federal government must pursue Ticketmaster for its antitrust violations of the Sherman Act, the FTC Act, and the BOTS Act in order to enjoin Ticketmaster's behavior and break up its monopoly over the ticketing market.