EXHIBIT 3

15 U.S.C. 4301 *et seq.* ("the Act"), Network Centric Operations Industry Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, LFV, Norrkoping, SWEDEN has been added as a party to this venture. Also, SRA International, Fairfax, VA has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Network Centric Operations Industry Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 19, 2004, Network Centric Operations Industry Consortium, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on February 2, 2005 (70 FR 5486).

The last notification was filed with the Department on June 13, 2008. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on July 21, 2008 (73 FR 42367).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–24806 Filed 10–20–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open DeviceNet Vendor Association, Inc.

Notice is hereby given that, on September 5, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Open DeviceNet Vendor Association, Inc. ("ODVA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, LinkBASE, Seoul, REPUBLIC OF KOREA; Keyence Corporation, Tokyo, JAPAN; RocKontrol Industry Co., Ltd., Shanxi, PEOPLE'S REPUBLIC OF CHINA; Nichigoh Communication Electric Wire Co., Ltd., Osaka, JAPAN; CSE Servelec, Sheffield, UNITED KINGDOM; and Fluke Networks, Inc., Everett, WA have been added as parties to this venture.

Also, Spyder Controls Corp., Lacombe, Alberta, CANADA; APV Products Unna, Unna, DENMARK; and The Siemon Company, Watertown, CT have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODVA intends to file additional written notifications disclosing all changes in membership.

On June 21, 1995, ODVA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 15, 1996 (61 FR 6039).

The last notification was filed with the Department on June 4, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 16, 2008 (73 FR 40882)

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–24801 Filed 10–20–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Regal Cinemas, Incorporated; Response to Public Comments on the Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes the public comments received on the proposed Final Judgment in *United States* v. *Regal Cinemas, Incorporated,* Civil Action No. 1:08–cv–746, and the response to the comments. On April 29, 2008, the United States filed a Complaint alleging that Regal Cinema, Inc.'s acquisition of Consolidated Theatres Holdings, GP violated Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed on April 29, 2008, requires the combined company to divest four movie theaters in three North Carolina metropolitan areas. Public comment was invited within the statutory 60-day comment period. Copies of the Complaint, proposed Final Judgment, Competitive Impact Statement, Public Comments, the United States' Response to the Comments, and other papers are currently available for inspection in Suite 1010 of the Antitrust Division, Department of Justice, 450 5th Street, NW., Washington, DC 20530, telephone: (202) 514–2481, on the Department of Justice's Web site (*http://www.usdoj.gov/atr*), and the Office of the Clerk of the United States District Court for the District of the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

[Civil Action No: 1:08–cv–00746]

United States of America, Plaintiff, v. Regal Cinemas, Inc., and Consolidated Theatres Holdings, GP, Defendants; Response of the United States to Public Comments on the Proposed Final Judgment

Judge: Leon, Richard J.

Filed:

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("APPA" or "Tunney Act"), the United States hereby responds to two public comments received during the public comment period regarding the proposed Final Judgment in this case. One commenter argues for additional, more intrusive relief than the relief obtained by the United States. The other argues there was no harm from the transaction, and that the United States should not have filed its Complaint nor required any relief whatsoever. After careful consideration of the comments, the United States determined that the Proposed Final Judgment remains in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

I. Procedural History

On April 29, 2008, the United States filed the Complaint in this matter alleging that defendant Regal Cinema, Inc.'s ("Regal") acquisition of defendant Consolidated Theatres Holdings, GP ("Consolidated"), if permitted to proceed, would combine the two

leading, and in some cases only, operators of first-run, commercial movie theatres in parts of the metropolitan areas of Charlotte, Raleigh, and Asheville, North Carolina. The Complaint alleged that the likely effect of the acquisition would be to lessen competition substantially for first-run commercial movie exhibition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The United States filed a proposed Final Judgment and a Stipulation signed by the United States and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA. Pursuant to those requirements, a Competitive Impact Statement ("CIS") was filed in this court on April 30, 2008; the Proposed Final Judgment and CIS were published in the **Federal Register** on May 15, 2008; and a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published for seven days in the *Washington Post* on May 23, 2008 through May 29, 2008. The defendants filed the statements required by 15 U.S.C. 16(g) on May 19, 2008 and June 18, 2008, respectively.

The sixty-day comment period ended on July 28, 2008. Two comments, described below, were received.

II. The United States' Investigation and Proposed Resolution

After Regal and Consolidated announced their plans to merge, the United States Department of Justice (the "Department") conducted an extensive investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained documents and information from the merging parties, and conducted interviews with competitors and other individuals with knowledge of the industry. Among the third parties the Department interviewed during its investigation was one of the commenters, Mr. Bruner, who shared his concerns about the competitive impact of the proposed merger in the Charlotte area.

On the basis of its investigation and prior experience with markets for first-run commercial movie exhibition, the Department concluded that the proposed transaction would lessen competition for the theatrical exhibition of first-run, commercial movies in four North Carolina markets—Southern Charlotte, Northern and Southern Raleigh, and Asheville.[1] As more fully explained in the Complaint and CIS, the proposed transaction likely would lead to higher ticket prices for moviegoers and would reduce the newly merged entity's incentives to maintain, upgrade, and renovate its theatres in the relevant markets, to improve its theatres' amenities and services, and to license the highest revenue movies, thus reducing the quality of the viewing experience in those four areas. As alleged in the Complaint, these outcomes are likely because, in each of the relevant markets, Regal and Consolidated were each other's most important competitor, given the close proximity of their theatres to one another and to moviegoers.

The proposed Final Judgment is designed to preserve competition in the four markets. It requires divestitures as viable ongoing businesses of a total of four theatres in three metropolitan areas: the Crown Point 12 in Southern Charlotte; the Raleigh Grand 16 in Northern Raleigh; the Town Square 10 in Southern Raleigh; and the Hollywood 14 in Asheville. Sale of these theatres will preserve existing competition between the defendants' theatres that are or would have been each other's most significant competitor in the theatrical exhibition of first-run movies in Southern Charlotte, Northern and Southern Raleigh, and Asheville.

III. Standard of Review

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. 16(e), as amended. In making the "public interest" determination, the Court should review the proposed Final Judgment in light of the violations charged in the complaint, *see, e.g., Mass. Sch. of Law at Andover, Inc.* v. *United States,* 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995)), and be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft,* 56 F.3d at 1461.

The Tunney Act states that the Court shall consider in making its public interest determination:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e). *See generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the Tunney Act "effected minimal changes" to the court's scope of review under Tunney Act, and that review is "sharply proscribed by precedent and the nature of Tunney Act proceedings").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (*citing United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft,* 56 F.3d at 1460–62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. *The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest."* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

[1] The other locations where Consolidated owned a theatre that was acquired by Regal did not present competitive problems. The Complaint contains no allegations regarding these areas and no one has commented on them.

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf.* BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' "). In making its public interest determination, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant "due respect to the [United States'] prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' " *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the district court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what the Congress that enacted the Tunney Act in 1974 intended, as Senator Tunney then explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).

IV. Summary of Public Comments and the Response of the United States

During the sixty-day comment period, the United States received two comments: one from Robert B. Bruner, the owner of the Village Theatre in Charlotte, North Carolina, and the other from The Voluntary Trade Council, Inc., a Virginia non-profit corporation. Both comments are attached in the accompanying Appendix. After reviewing both comments, the United States continues to believe that the proposed Final Judgment is in the public interest. The two comments received by the Department are summarized below:

Public Comment From Mr. Bruner[3]

Robert B. Bruner is the owner of the Village Theatre in Charlotte, North Carolina, located approximately three miles west of Regal's Stonecrest 22. The Village Theatre is a five-plex, stadium-seating theatre located on the third floor of a mixed-use shopping center and offers reserved seating, beer and wine, and upscale concessions. The Village Theatre is one of the six theatres the Department alleged to compete in the Southern Charlotte market for first-run motion picture exhibition, and Mr. Bruner's comment is limited to this geographic market.

Mr. Bruner's comment contends that the United States should have sought additional relief in the Southern Charlotte market, and he proposes in particular that appropriate relief would have included freeing the Village Theatre from pre-existing limitations (referred to as "clearances" and discussed below) on the films that distributors were willing to license to that theatre.

Mr. Bruner first argues that divestiture of Regal's Crown Point 12 (as required by the proposed Final Judgment) will not prevent the merger from increasing concentration in the Southern Charlotte market, in part because the market should have been alleged to exclude his Village Theatre and to include an additional theatre operated by Consolidated.[4] He submits that, had the United States alleged the "proper" market, additional relief of the sort he proposes would be required to remedy sufficiently the increase in concentration from the merger.

As explained below, Mr. Bruner's comment should be given no weight in the context of this Tunney Act review of the remedy obtained by the United States. Mr. Bruner acknowledges that the required divestiture of the Crown Point 12 furthers the objective of remedying the harm to competition in Southern Charlotte alleged in the United States' complaint; indeed, Mr. Bruner would retain this component of the United States' remedy. Mr. Bruner does not allege that this remedy was

[3] Mr. Bruner made two written submissions during the comment period. His second comment, which he describes as a Supplement, makes largely the same points as the first comment, but provides additional information arising out of a lawsuit he filed against Consolidated and Regal in North Carolina state court. Mr. Bruner's lawsuit does not allege that Regal's acquisition of Consolidated violates the antitrust laws. Rather, Mr. Bruner's claims are based entirely on the effect of the transaction on his contract with Consolidated pursuant to which that company has managed certain aspects of the Village Theatre's operation. According to Mr. Bruner's complaint, upon acquiring Consolidated, Regal informed Mr. Bruner that it would assign the management contract to another theatre chain, which Mr. Bruner believes violates his agreement.

[4] For the Court's convenience, we have attached as Exhibit A a map showing the locations of theatres in the Southern Charlotte area.

insufficiently related to the allegations in the Complaint, or was unclear, or that enforcement mechanisms are insufficient, or that the relief will harm third parties. *See Microsoft,* 56 F.3d at 1457–58. Mr. Bruner's argument is that the United States should have obtained *additional* relief, but this assertion does not satisfy the standards set forth in cases such as *Bechtel,* 648 F.2d. at 666, *AT&T,* 552 F. Supp. at 151, and *Alcan,* 605 F. Supp. at 622, that the secured remedy is outside "the reaches of the public interest." Moreover, in criticizing the United States' allegations regarding market definition, Mr. Bruner is questioning the validity of the United States' Complaint, an exercise that is beyond the scope of the Tunney Act review. *See SBC Commc'ns,* 489 F. Supp. at 15; *Microsoft,* 56 F.3d at 1459.

When considered in light of the applicable legal standards, the United States' remedy more than satisfies the public interest requirements set forth in the Tunney Act.

A. Divestiture of the Crown Point 12 Adequately Restores Competition Lost as a Result of the Merger

Mr. Bruner asserts that divestiture of the Crown Point 12 is inadequate relief to remedy the merger's concentrating effect. Mr. Bruner claims that divestiture of this theatre does not sufficiently reduce the merger's concentrating effect in Southern Charlotte, and that, even after the divestiture of the Crown Point, the Southern Charlotte market would still be so highly concentrated that additional relief is required. Mr. Bruner also argues that the Crown Point will not be an effective competitor against Regal because it is located on the eastern edge of the Southern Charlotte market, five miles from its nearest competitor, the Arboretum 12, with no other competing theatres to the north, south or east.

Mr. Bruner is correct that divestiture of the Crown Point would not ensure that concentration levels in Southern Charlotte were no higher than their pre-merger level, but that fact does not mean that the relief obtained by the United States is inadequate. The Department determined that the anticompetitive effects of the transaction in Southern Charlotte would flow from the elimination of competition among three theatres that were most vigorously competing against each other pre-merger: Regal's Crown Point, Consolidated's Arboretum 12 (which, as Mr. Bruner correctly points out, is five miles from the Crown Point to the south), and Consolidated's Philips 10 (which is located approximately seven miles from the Crown Point to the west). The divestiture of the Crown Point to an independent viable competitor would restore the competition among those theatres that was lost due to the combination of Regal and Consolidated.

With respect to the sufficiency of the proposed remedy, a district court must accord due respect to the United States's views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *E.g., SBC Commc'ns,* 489 F. Supp. 2d at 17 (United States is entitled to "deference" as to "predictions about the efficacy of its remedies"). The United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *Id.*

Mr. Bruner places great emphasis on the concentration statistics in making his argument that the relief obtained is inadequate. While a merger's impact on concentration in a market is a useful indicator of the likely potential competitive effects of a merger, it is by no means the end of the analysis. The Department gathered and considered considerable other evidence, much of which is not publicly available, bearing on the likely effects of combining Regal and Consolidated theatres in Southern Charlotte, and the effect of preserving the independence of the Crown Point theatre via an appropriate divestiture. The United States concluded, and subsequently alleged in the Complaint, that the merger would cause harm by eliminating competition for moviegoers between particular Regal and the Consolidated theatres in Southern Charlotte, rather than by considering market-wide concentration levels. The United States explained in its Complaint the competitive dynamics that would be impaired by Regal's acquisition of Consolidated. Specifically, as noted above, the Department found that the principal competitor of both Consolidated theatres in Southern Charlotte—the Arboretum 12 and the Phillips 10—was Regal's Crown Point theatre, and that the Phillips 10 also competed to a lesser degree with Regal's Stonecrest theatre. The United States alleged that, without the merger, if these Regal or Consolidated theatres were to increase ticket prices, and the theatres of the other firm did not follow, the exhibitor that increased price would likely suffer financially as a substantial number of its patrons would patronize the other exhibitor's theatre. *See* Complaint, ¶ 34. That competition would be lost as a result of an unremedied merger, because the newly-combined entity could increase prices at all of its theatres, or be sure that its other theatres would capture sales lost to the theatre that raised prices, thus making profitable price increases that would have been unprofitable pre-merger. *Id.*

The United States also found that, for various reasons, the other theatres in Southern Charlotte would be unable to attract enough moviegoers that were served by the Regal and Consolidated theatres to make a post-merger price increase or reduction in quality unprofitable. For example, as alleged in the Complaint, those other theatres are located further away from those moviegoers, are smaller in size or have fewer screens, or offer a lower quality viewing experience than the Regal and Consolidated theatres. *See Id.* at ¶ 36. The relief obtained by the United States flowed directly from this analysis of the merger's likely effects, and that relief will prevent those effects from being realized. Not only is Regal's Crown Point 12 the principal competitor to Consolidated's two theaters in Southern Charlotte, it is one of the largest theatres in the market, with 12 screens and stadium seating, making it competitive in quality with the other theatres in the area.

B. Criticism of the United States' Allegation of the Proper Geographic Market for First-Run Commercial Movie Exhibition of Southern Charlotte Is Beyond the Scope of Tunney Act Review

Much of Mr. Bruner's comment is devoted to arguments that the allegations in the United States' complaint do not properly define the South Charlotte market. Mr. Bruner claims that the United States incorrectly excluded another Consolidated theatre from the market, and improperly included his Village Theatre in the market. Mr. Bruner asserts that these changes support a conclusion that the merger caused an even greater increase in concentration, and thus provide further support for his position that the relief obtained by the United States was inadequate.

Mr. Bruner's arguments should be rejected. In essence, Mr. Bruner is claiming that the United States should have brought a different case—founded upon different market allegations—than the one alleged in the Complaint. As explained by this Court, however, in a Tunney Act proceeding, the district court should not second-guess the prosecutorial decisions of the Department regarding the nature of the claims brought in the first instance; "[r]ather, the court is to compare the complaint filed by the [United States] with the proposed consent decree and determine whether the [proposed

decree] clearly and effectively addresses the anticompetitive harms initially identified." *United States* v. *Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996). Similarly, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft,* 56 F.3d at 1459 (stating that the district judge may not "reach beyond the complaint to evaluate claims that the government did not make")[5]. The reviewing court may look beyond the scope of the complaint only when the complaint has been "drafted so narrowly as to make a mockery of judicial power." *SBC Commmc'ns,* 489 F. Supp.2d at 14. That is not the case here. The United States' decision to allege a harm in a specific market is based on a case-by-case analysis that varies depending on the particular circumstances of each product and geographic market. The Complaint properly alleges the harm the transaction is likely to cause in the relevant product and geographic markets. Because Mr. Bruner is challenging the adequacy of the relief based on *his* definition of the relevant geographic market, rather than the geographic market alleged in the Complaint, his challenge should carry no weight.[6]

C. The Additional Relief Proposed by Mr. Bruner Would Be Inappropriate

Mr. Bruner argues that the United States should obtain additional relief in the form of an order requiring his competitor, Regal, to waive any opportunities it has for "clearances" of first-run movies against the Village Theatre, which Mr. Bruner asserts will enhance the Village Theatre's ability to compete against Regal's Stonecrest theatre post-merger. In the motion picture industry, "clearance" refers to a practice whereby a distributor (*i.e.,* movie studios) may elect to license only certain theatres in a geographical area to exhibit a first-run movie during some period of time. In such a case, the exhibitors that are licensed to show the movie are referred to as having "clearance" against exhibitors that do not have such rights. According to Mr. Bruner, several distributors have opted to license first-run movies only to Regal's Stonecrest Theatre in the portion (or "zone") of the Southern Charlotte market in which the Village Theatre is located, thus granting clearances against that theatre.

Mr. Bruner would have this Court order Regal not to avail itself of the exclusive rights to exhibit a movie at the Stonecrest that a distributor wishes to grant. In Mr. Bruner's view, this outcome would assure his theatre access to every first-run movie he desires and allow his five-plex theatre to compete better with Regal's 22-screen Stonecrest, to the benefit of consumers. Mr. Bruner's proposal is inappropriate for several reasons, and the United States' remedy—divestiture of the Crown Point—is more effective in addressing the merger's harm in Southern Charlotte.

First, it is important to recognize that the practice of distributors granting the Stonecrest clearance against the Village Theatre is not a result of the merger. Whatever effects those practices have on competition in the Southern Charlotte market, they are unrelated to this case and the United States' allegations of harm from the transaction at issue. Thus, factoring Mr. Bruner's concern regarding clearances into the public interest assessment here would inappropriately construct a "hypothetical case and then evaluate the decree against that case," something the Tunney Act does not authorize. *Microsoft,* 56 F.3d at 1459.

Second, Mr. Bruner's relief likely would be unworkable and inappropriately limit the licensing freedom of third parties, since its effectiveness would hinge on movie distributors choosing to license the Village Theater despite Mr. Bruner's assertion that they have not made such choices in the pre-merger world.

Finally, even if Mr. Bruner's requested relief would serve to enhance the Village Theatre's ability to compete in the market post-merger, such relief would inappropriately and unnecessarily involve the Court and the Department in supervising Regal's ongoing marketplace conduct. Mr. Bruner's proposal would limit Regal's ability to compete with the Village Theatre for the exclusive right to show a movie at the Stonecrest or the Arboretum by offering studios a better deal. The Department of Justice's Antitrust Division has previously made clear that it is unlikely to impose restrictions on a merged firm's right to compete as part of a merger remedy. Such restrictions, even as a transitional remedy, are strongly disfavored as they directly limit competition in the short term, and any long-term benefits are inherently speculative. *See* Antitrust Division Policy To Guide To Merger Remedies, dated October 21, 2004 at 19. Structural remedies such as the divestiture the Department has required in this case, are preferred in merger cases because they are relatively clean and certain, and generally avoid government entanglement in the market that conduct remedies require. A carefully crafted divestiture decree is "simple, relatively easy to administer, and sure" to preserve competition. *United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 331 (1961). Divestiture of an ongoing business to a new, independent, and economically viable competitor has proved to be the most successful remedy in maintaining competition that would have been lost due to the merger. *See California* v. *American Stores Co.,* 495 U.S. 271, 280–81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

Public Comment From the Voluntary Trade Council, Inc.

The Voluntary Trade Council ("VTC") describes itself as "a research center dedicated to antitrust and competition regulation * * * working in the tradition of the Austrian School of Economics * * * offer[ing] free-market criticism of the Department of Justice, the Federal Trade Commission and other agencies that intervene to prevent the voluntary exchange of goods, services and ideas." VTC argues that the Department should not have alleged a market for first-run movie distribution, contends that the Department should ignore any increase in price resulting from the transaction so long as consumers were willing to pay higher prices, and opposes any remedies to ameliorate the competitive harm that the United States alleges would otherwise occur as a result of Regal's acquisition of Consolidated. VTC urges the Court to reject the proposed Final

[5] Were a court to reject a proposed decree on the grounds that it failed to address harm not alleged in the complaint, it would offer the United States what the Court of Appeals for the D.C. Circuit referred to as a "difficult, perhaps Hobson's choice," in that the United States would have to either redraft the complaint and pursue a case it believed had no merit, or drop its case and allow conduct it believed to be anticompetitive to go unremedied. *Microsoft,* 56 F.3d at 1456.

[6] In any case, the Department properly excluded the Park Terrace from the relevant geographic market. Past investigations involving competition among movie theatres revealed that moviegoers typically will not travel more than 5 to 10 miles from their homes to see a movie. At approximately 10 miles from Regal's Crown Point, the Park Terrace is at the outer range. In addition, the Park Terrace is not located near a freeway exit, increasing the travel time. The Department's examination of the merging parties' data, as well as interviews with market participants, confirmed that the Park Terrace and the Crown Point draw moviegoers from very different areas.

The Department also properly included Mr. Bruner's Village Theatre in the market. Although that theatre may not show as many first-run movies as other theaters as result of the clearances that Mr. Bruner describes, it nevertheless provides some competition for the same group of moviegoers as the Stonecrest, which is less than three miles away.

Judgment as inconsistent with the public interest.

It appears that VTC is philosophically opposed to the existence of and enforcement of the antitrust laws in any case. *See http://voluntarytrade.org.* All of VTC's arguments in this case are directed toward the United States' decision to file the Complaint alleging a Section 7 violation, and its related decision to require that the Defendants divest certain theatres in order to restore competition and avoid the need to litigate this matter.[7] As such, none of VTC's arguments is directed to any issue relevant under the Tunney Act, *i.e.*, whether, in light of the violations charged in the Complaint, the terms of the proposed Final Judgment are inconsistent with the public interest. *Microsoft*, 56 F.3d at 1462. The Court should accordingly ignore VTC's comment.

V. Conclusion

After careful consideration of the public comments, the United States concludes that the entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, after publication in the **Federal Register** pursuant to 15 U.S.C. 16(b) and (d), the United States will move this Court to enter the Final Judgment.

Dated: September 24, 2008.

Respectfully Submitted,

Gregg I. Malawer (DC Bar No. 481685),

Anne Newton McFadden,

U.S. Department of Justice Antitrust Division, 450 5th Street, NW., Suite 4000, Washington, DC 20530, (202) 514–0230, Attorneys for Plaintiff the United States.

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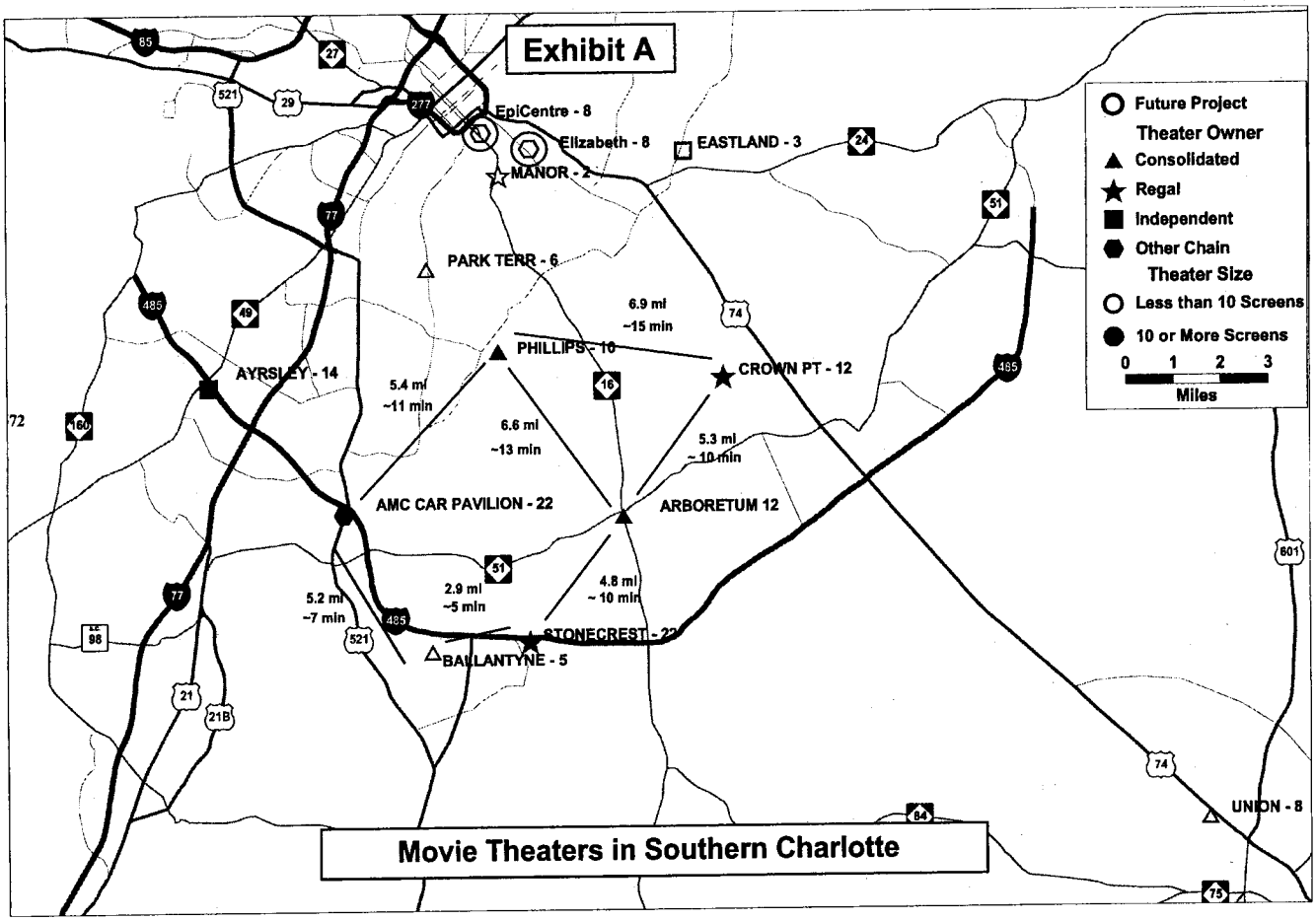

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Appendix

Public Comment from Robert B. Bruner (June 26, 2008) ..... A
Public Comment from Robert B. Bruner (July 22, 2008) ..... B
Public Comment from Voluntary Trade Council, Inc. (July 13, 2008) C

A

June 26, 2008

John R. Read, Chief,
Antitrust Division/Litigation III,
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This letter is a public comment to the proposed Final Judgment regarding the merger of Regal Cinemas, Inc. ("Regal") and Consolidated Theatres, GP ("Consolidated") (the "Merger"). More specifically it focuses on the competitive effect of the Merger in the

[7] The Department's conclusion that first-run, commercial movie exhibition is a proper relevant market, *see* Complaint at ¶ 17, was based on the application of standard antitrust principles to the visual entertainment options available to consumers in the areas where Regal and Consolidated operate movie theatres, as set forth in the Department's Merger Guidelines. *See* Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,555, § 1.1 (1992). Contrary to VTC's assertion, the mere existence of other forms of visual entertainment would not prevent a monopolist movie exhibitor from profitably raising prices or reducing quality relative to competitive levels.

Southern Charlotte, North Carolina, market area.

As noted below, even after the divesture of the Crown Point 12 the HHI for the Southern Charlotte market will be 5,032 points, nearly three times the 1,800 point threshold for a highly concentrated market set forth in the Merger Guidelines. Further, the Merger will still cause a HHI increase of 1,281 points, more than 25 times the 50 point increase for highly concentrated markets that the guidelines specify potentially raise significant competitive concerns and more than 12 times the 100 point increase threshold that the guidelines specify create a presumption of the creation or enhancement of market power or the facilitation of its exercise. Merger Guidelines Sec. 1.51c.

As discussed in detail below, to obtain an accurate view of the competitive effect of the Merger in the Southern Charlotte market, the inclusion of the Park Terrace Theatre in the market and the exclusion of the Village Theatre in the market is required. With these two adjustments, the Herfindahl Hirschman Index ("HHI") will more accurately reflect the market concentration and the competitive effect of the Merger in Southern Charlotte. As this revised HHI clearly shows the divestiture by Regal of the Crown Point 12 does not eliminate the noncompetitive effects of the Merger in the Southern Charlotte market.

Thus, additional changes to the proposed Final Judgment are necessary to reduce the market concentration of Regal in the Southern Charlotte market area. Because of its location, the entry of the Village Theatre into Southern Charlotte as a true first-run commercial movie theatre will, in reality, most likely be more beneficial to the consumers than the divestiture of Crown Point 12. The elimination or waiver of Regal's Stonecrest's clearance will allow the Village Theatre to enter the first-run commercial movie market in Southern Charlotte which will provide additional consumers a choice of venues [1] for first-run commercial movies in Southern Charlotte and help to deconcentrate the market and offset the anticompetitive effects of the Merger.[2]

The Complaint

On April 29, 2008, the United States of America brought a civil antitrust action to enjoin the proposed Merger of Regal and Consolidated and to obtain equitable relief (the "Compliant"). As stated by the United States in the Complaint, the Merger would substantially lessen competition and tend to create a monopoly in the theatrical exhibition of first-run commercial movies [3] in the Southern Charlotte market area in violation of Section 7 of the Clayton Act. Regal is the largest operator of theatres in the United States. Consolidated is the largest operator of theatres in the Southern Charlotte area.

As stated in Paragraphs 14–17 of the Complaint, tickets at theatres exhibiting first-run commercial movies usually cost significantly more than tickets at sub-run theatres. Art movies are released less widely than first-run commercial movies. The relevant product market within which to access the competitive effects of the Merger is the exhibition of first-run commercial movies.

Paragraph 19 of the Complaint sets forth the theatres in Southern Charlotte that the United States used in its review of the competitive impact in this market area, including its calculation of the HHI. As discussed below, Paragraph 19 of the Complaint wrongly includes the five screen Village Theatre in the relevant market and excludes the six screen Park Terrace.

Paragraph 30 of the Complaint states that the newly merged entity would control four of the six first-run commercial theatres in the Southern Charlotte area, with 56 out of 83 total screens and a 75% share of the 2007 box office receipts. The market concentration as measured by the HHI would increase 2,535 points to 6,050 points; substantially above the merger guidelines.

The Complaint also states that the Merger is likely to lead to higher ticket prices for moviegoers (*see* Paragraph 34 of the Complaint) and that the entry of a first-run commercial movie theatre in the Southern Charlotte area is unlikely (*see* Paragraph 37 of the Complaint).

The Complaint states that the likely effect of the Merger would be to lessen competition substantially for first-run commercial motion picture exhibition in violation of Section 7 of the Clayton Act, 15 U.S.C. Section 18.

The Proposed Final Judgment

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment stating that it will eliminate the anticompetitive effects of the Merger. In the Southern Charlotte market area, under the proposed Final Judgment, Regal is required to divest its ownership of the Crown Point 12 theatre.

In the Southern Charlotte market the exhibitors of film product are highly concentrated and the HHI for that area greatly exceeds the merger guidelines. Even after the divestiture of assets proposed by the United States the HHI in the Southern Charlotte market will increase by almost 130% from the pre-merger HHI.

Comment—The Final Judgment Does Not Adequately Reduce or Eliminate the Anticompetitive Effects of the Merger in Southern Charlotte

United States has found that the Merger would substantially lessen competition in the Southern Charlotte market and is in violation of Chapter 7 of the Clayton Act. *See* Exhibit 1.[4] The post-Merger HHI shows an excessive concentration of the market in Southern Charlotte as a result of the Merger. After divesture by Regal of the Regal Crown Point 12 Theatre the post-Merger HHI would still be an extremely high 5,032 points, reflecting an excessive concentration of the market after the Merger. *See* Exhibit 2.

In Paragraph 34 of its Complaint, the United States asserts that the Merger will enable price increases by the merged firm to be profitable because of the lack of remaining competition in the market Paragraph 37 of the Complaint notes the unlikelihood of new entry in Southern Charlotte to reduce the market power of the merged firm. However, the United States' Competitive Impact Statement, which orders the divestiture of the Crown Point 12, provides no analysis or data as to how that action will reduce or eliminate the substantial market concentration and anticompetitive effects of the Merger in Southern Charlotte. It provides only a conclusionary statement that the divestiture will "preserve existing competition between the defendant's theatres that are or would have been each others' most significant competitor. * * *" This statement is in error with respect to the Southern Charlotte market because the Crown Point 12 is on the periphery of the market on the far eastern edge of the Southern Charlotte market area, approximately five miles from its nearest competitor, the Arboretum 12 located to the west of the Crown Point 12. There are no competing theatres to the north, south or east.

Thus, the divestiture of the Crown Point 12 will have no real effect on competition in the Southern Charlotte market. The merged firm, Regal, will still have the power to raise prices and the likelihood of new entry will remain unlikely. The HHI of over 4,577, still an increase of, at a minimum, 1,000 to a maximum (see below) of over 3,000 points is still overwhelmingly establishes a Section 7 violation, particularly with entry barriers admittedly very high.

Comment—Competitive Effects in the Southern Charlotte Market

The review by the United States of the competitive effects of the Merger in the Southern Charlotte market is incomplete and inaccurate. The determination of which theatres show first-run commercial movies is important in assessing the competitive impact on the Southern Charlotte market. All facts and circumstances must be evaluated to determine the relevant market as a precondition to finding a violation of Chapter 7 of the Clayton Act. In determining whether a particular theatre (which may not clearly be a "first-run commercial theatre") shall be considered a "first-run commercial theatre", the public interest compels inclusion of theatres which are truly first-run competitors and the exclusion of theatres which are not.

[1] The five screen Village Theatre is Charlotte's only luxury theatre while Regal's Stonecrest is a 22 screen multiplex.

[2] Since these calculations were based upon the 2007 box office revenues and since the box office revenues for the Village Theatre should increase after the clearance is eliminated, the market share for the Village Theatre should increase and the competitive effect of the merger in the Southern Charlotte market will be reduced even further than that shown on Exhibit 5.

[3] The Complaint did not define the term first-run commercial movies. Generally, as stated in the Complaint, art movies are released less widely than commercial first-run movies. For purposes of this Comment Letter, the term first-run, commercial movies will include those movies with an initial release of more than 1,500 prints. This is the lower end of a release of what is typically a first-run commercial movie.

[4] The United States did not publish the details of their calculation of the HHI. Therefore, the numbers shown in this Public Comment Letter will not exactly match those of the United States; but there are no significant variations.

Consolidated's Park Terrace Should be Included in the Relevant Market. The United States wrongly excludes the Park Terrace Theatre from the Southern Charlotte market. The Park Terrace Theatre, acquired by Regal in the Merger, primarily shows first-run commercial movies. The Park Terrace Theatre is located in the Southern Charlotte market near the Phillips Place Theatre. It has stadium seating and its ticket prices are the same as at other first-run commercial theatres in the Southern Charlotte market area. Prior to the Merger both the Park Terrace Theatre and the Phillips Place theatre were owned by Consolidated. Because the Park Terrace 6 is in the same film zone as Phillips Place 10 (also a part of the Merger) and, more importantly, because the Phillips Place Theatre has only 10 screens, the Park Terrace 6 and the Phillips Place 10 share films.[5]

Most films start their run at Phillips Place and conclude the required run (usually four to five weeks) at Park Terrace. *See* Paragraph 12 of the Complaint. This relationship is critical. Since Phillips Place has only 10 screens sharing films with Park Terrace allows Phillips Place to exhibit more first-run commercial movies than it otherwise could show. This arrangement allows the film distributors to license more first-run commercial movies to Phillips Place/Park Terrace. Without the ability to "move over" films from Phillips Place to Park Terrace a substantial portion of the Southern Charlotte market would be deprived of many of the best first-run commercial movies. The first-run movies at the Park Terrace Theatre that are "moved over" from Phillips Place are still being shown on their first run at other first-run commercial theatres in Southern Charlotte.[6] Thus, Phillips Place 10 and Park Terrace 6 should be treated, for purposes of determining the competitive effect of the Merger in the Southern Charlotte market, as the Phillips Place/Park Terrace 16. Since the Park Terrace is a theatre that is being acquired by Regal in the Merger, its inclusion in the relevant market will result in a more accurate picture of the competitive effect of the Merger in the Southern Charlotte market.

Village Theatre Should be Excluded from the Relevant Market. The United States wrongly includes the Village Theatre from the Southern Charlotte market.

Background. The independently owned Village Theatre is a two year old five-plex stadium theatre with state of the art projectors and sound systems. The Village Theatre is the only luxury theatre in Southern Charlotte (and probably the entire Carolinas). It offers an array of amenities for the moviegoers, including valet parking, gourmet desserts, wine and beer, and luxury reserved seating. The Village Theatre has been voted the Critics' Choice award as the best theatre in Charlotte. It is a showcase venue and had hosted numerous world premieres of non-commercial movies. Numerous restaurants are in the theatre building and fronting plaza, all with the option of outdoor seating. The Village Theatre is the centerpiece of a $75mm mixed-use shopping center.

Regal's Stonecrest Theatre is in a competitive film zone[7] with the Arboretum Theatre[8] and the Village Theatre. The distance from Regal's Stonecrest to Arboretum is less than three miles (as the crow flies) and from Regal's Stonecrest to the Village Theatre is approximately 2.6 miles (as the crow flies).[9] The Arboretum was in operation before Regal's Stonecrest was built. Upon Regal's Stonecrest's opening, there was an agreement between Regal's Stonecrest and the Arboretum that there would be no clearance given to either theatre in that film zone and that each theatre would show the same movies on a "day-and-date" basis.[10] Even though the Village Theatre has only five screens compared to the 22 screens at Regal's Stonecrest, since the Village Theatre opened in March 2006 (much after the opening of Regal's Stonecrest), Regal's Stonecrest has invoked clearance against the Village Theatre on every first-run commercial movie shown at Regal's Stonecrest while continuing to not invoke clearance against the bigger competitor—the 12 screen Arboretum Theatre.

The Village Theatre is the most centrally located of all the first-run commercial movie theatres in the Southern Charlotte area. It has the ability to become an attractive option for customers desiring to see first-run commercial movies in this market.

Exclude the Village Theatre. Village Theatre has desired to exhibit first-run commercial movies since it opened but because it is in a competitive or split zone with Regal's Stonecrest and there has been no allocation of product between the Village Theatre and Regal's Stonecrest, Regal's Stonecrest has invoked the benefits of clearance to prevent the Village Theatre from showing virtually all first-run commercial movies.

Thus, Regal's Stonecrest's use of clearance has effectively kept the Village Theatre from being a first-run commercial movie theatre. Since June 1, 2006 the Village Theatre has shown only three first-run commercial movies while Regal's Stonecrest has shown over 300 first-run commercial movies. For example, for the summer of 2008 the Village Theatre has not been able to obtain *Indiana Jones, Get Smart, The Hulk, Ironman, Sex and the City, Hancock* or any other first-run commercial movie. Therefore, for purposes of determining the competitive effect of the proposed Merger, Village Theatre cannot be considered as a first-run commercial movie theatre and it should not be included in the relevant market or the calculation of the HHI. As discussed below, the Village Theatre should only be included in the calculation of HHI if the clearance of Regal's Stonecrest is eliminated so that the Village Theatre can show first-run commercial movies on a "day and date" basis with the Regal's Stonecrest Theatre.

Impact on Market Concentration in the Southern Charlotte Market Area. Based on the facts above, the Park Terrace Theatre should have been included in the review of the competitive impact on market concentration in the Southern Charlotte market area and the Village Theatre should have been excluded. Exhibits 3 and 4 set forth the revised figures for the competitive effect of the Merger with the inclusion of the Park Terrace Theatre and the exclusion of the Village Theatre. Exhibits 3 and 4 show a major increase in the market concentration from that set forth in Paragraph 30 of the Complaint. The benchmark for determining the competitive effects of the Merger on the Southern Charlotte market is the HHI before the Merger. After giving effect to these changes (before the divestiture of Crown Point 12), after the Merger, Regal would control five of the six first-run, commercial theatres in the Southern Charlotte market area (instead of four of six as shown in the Complaint), with 62 out of 84 total screens (instead of 56 of 83 as shown in the Complaint), and a 78% share of the 2007 box office receipts (instead of 75% as shown in the Complaint). The market concentration as measured by the HHI would increase 2,867 points to 6,618 points as compared to the increase of 2,535 points to 6,050 points as set forth in Paragraph 30 of the Complaint, a substantial additional increase in the Regal's actual post-Merger market concentration.

Exhibit 6 is a summary of the Competitive Effects of the Merger on the Southern Charlotte market. As discussed above, Paragraph 30 of the Complaint erroneously included the Village Theatre and excluded the Park Terrace Theatre. Exhibits 3 and 4 accurately reflect the competitive effects before the Merger, after the Merger and after the divestiture of Crown Point 12 by including the Park Terrace Theatre and excluding the Village Theatre.

Comment—New Entry Into the Southern Charlotte Market

The entry of an additional first-run commercial movie theatre in the Southern Charlotte market is beneficial from a competitive effects point of view because the new entry will obtain a share of the market, thereby reducing Regal's market concentration. More importantly it will give moviegoers in Southern Charlotte another

[5] Although Phillips Place has only 10 screens, from June 1, 2006 to present it has showed 235 first-run commercial movies. This is compared to the 325 first-run commercial movies shown on the 22 screens at the Regal's Stonecrest, its nearest competition. If Phillips Place and Park Terrace were not sharing movies then, because of required commitments to the film distributors to show a film for a certain length of time (typically four to five weeks), Phillips Place would have been able to show less than 150 films over this time period.

[6] For example, on June 26, 2008 all six movies exhibited at Park Terrace were also on their first-run at the AMC Carolina Pavilion, four of the six were on their first-run at Regal's Stonecrest.

[7] The industry standard for a film zone is a five mile radius around the theatre in question. The only exceptions to the five mile standard are urban areas that are densely populated like New York City.

[8] Prior to the Merger, the Arboretum Theatre was a Consolidated theatre; Regal acquired ownership of the Arboretum Theatre as part of the Merger.

[9] Competitive zones are calculated upon mileage "as the crow flies" and not based upon road driving distance between the two theatres because the purpose of a competitive zone is to effect upon the moviegoers within that area.

[10] The term "day and date" refers to the right of two or more theatres located within the same film zone to exhibit the same movie at the same time. In that case there can be no clearance.

real choice of venues [11] for viewing first-run commercial movies in a market in which, as the United States states in Paragraph 37 of its Complaint, the entry of an additional first-run commercial movie theatre in Southern Charlotte is very unlikely.

However, there is an opportunity to have a new entry exhibiting first-run commercial movies in the Southern Charlotte market. With the elimination of clearance between Regal's Stonecrest and the Village Theatre,[12] the Village Theatre would enter the Southern Charlotte market as an additional first-run commercial movie theatre. The entry of the Village Theatre as an additional first-run commercial movie theatre in the Southern Charlotte market benefits competition because the Village Theatre will obtain a share of the market and thereby reduce Regal's market concentration. The impact of this action on the market is shown on Exhibit 5. It will benefit consumers by giving them an additional choice of venues for first-run commercial movies in a heavily concentrated market. Eliminating clearance is a more effective way to increase competition and give moviegoers a choice of venues than divesting the Crown Point 12.

Comment—Conclusion

The Competitive Impact Statement filed by the United States in *United States* v. *Regal Cinemas, Inc. and Consolidated Theatres Holdings, GP* is in error with respect to the Southern Charlotte first-run commercial movie market. It wrongly asserts that the divestiture of the Regal Crown Point 12 will preserve existing competition between the merging entities and eliminate the anticompetitive effects of the Merger. In point of fact, the divestiture will have little effect on the extremely concentrated market because of the location of the Crown Point 12 on the periphery of the market. Further, the divestiture will not begin to overcome the presumption contained in the Merger Guidelines which follows from the very substantial increase in the HHI in a highly concentrated market like Southern Charlotte.

The Competitive Impact Statement also wrongly excludes the six screen Park Terrace Theatre and includes the five screen Village Theatre in the Southern Charlotte market, rendering the market definition inaccurate and less concentrated than actually is the case. The post-Merger HHI is actually about 6,618 points if the market is correctly defined and remains at an alarming 5,032 points even after the divesture of the Crown Point 12.

Although the United States asserts that new entry for a first-run commercial movie theatre is unlikely there is one potential new entrant, the independently owned five screen Village Theatre, waiting in the wings in a prime location in the Southern Charlotte market. As shown on Exhibit 5, this new entry will have a positive effect on the post-Merger market concentration of Regal.

The United States should therefore act to assure a more competitive market and provide additional consumer choice by enabling the Village Theatre to become a viable first-run commercial movie venue in Southern Charlotte. To do so, clearance for first-run commercial movies that Regal's 22 screen Stonecrest exercises against the Village Theatre in Regal's Stonecrest's film zone must be eliminated. The elimination or waiver of Regal's Stonecrest's clearance will permit the Village Theatre to enter the first-run commercial movie market in Southern Charlotte, will provide additional consumer choice of venues [13] for first-run commercial movies in Southern Charlotte, will eliminate Regal's unreasonable restraint of trade, and will help to deconcentrate the market and offset the anticompetitive effects of the Merger.[14]

The Final Judgment should therefore be amended to enhance consumer choice and allow entry of the Village Theatre into the Southern Charlotte first-run commercial movie market by eliminating the exercise of clearance by Regal's Stonecrest Theatre.

Sincerely submitted,

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704/369–5001.

Appendix A—Clearance as It Relates to the Village Theatre

Clearance in General. "Clearance" refers to an agreement between a theatre and a film distributor that a particular film will not be played simultaneously for a particular period of time at two different theatres located the same film zone. *See United States* v. *Paramount Pictures*, 334 U.S. 131, 145 (1948). Clearance agreements are allowed in the film exhibition industry for the legitimate business purpose of ensuring that a particular theatre's income from a film will not be greatly diminished because the film is also being shown at a nearby competing theatre. *See id.* If clearances are reasonable, they are considered allowable restraints of trade. *See id.* at 146. Clearances between theatres not in substantial competition are per se unreasonable. *See id.* at 145–46.

Thus, clearance is a reasonable restraint of trade only when each of the following factors are met: (1) The clearance is used for the legitimate business purpose of ensuring the exhibitor that its income from a film will not be greatly diminished because the film is also being shown at a nearby competing theatre, and (2) the theatres which are subjected to clearance are in substantial competition. As discussed below, the clearance between Regal's Stonecrest and the Village Theatre does not satisfy either condition.

Regal's Stonecrest and the Village Theater are not in Substantial Competition. As stated above, there should be no clearance between theatres not in substantial competition.[15] *United States* v. *Paramount*, 334 U.S. 131 at 145–46.

The Village Theatre cannot be considered a first-run commercial movie theatre, since it has shown only three first-run commercial movies since June 1, 2006 as compared to Regal's Stonecrest's showing of 300-plus first-run commercial movies in the same period. Thus, Regal's Stonecrest and the Village Theatre are not in substantial competition, and the use of clearance by Regal's Stonecrest against the Village Theatre is an unreasonable restraint of trade and should be prohibited.

Regal's Stonecrest's invocation of clearance against the Village Theatre is not for a proper business purpose. As stated above, even if Regal's Stonecrest and the Village Theatre were determined to be in substantial competition, clearance can be reasonable only if it is necessary to ensure the exhibitor's expected income will not be greatly diminished because the film is also being shown simultaneously or soon thereafter at a nearby competing theatre. *See United States* v. *Paramount Pictures*, 334 U.S. 131 at 145. Regal's Stonecrest's invocation of clearance against the Village Theatre is unjustified. *See Theee Movies of Tarzana* v. *Pacific Theatres Inc.*, 828 12d 1395, 1399 (9th Cir. 1987).

First, the Village Theatre has only five screens while Regal's Stonecrest has 22 screens. Having only five screens will reduce the number of first-run commercial movies that the Village Theatre will be able to exhibit at any one time. With 22 screens, Regal's Stonecrest has the ability to exhibit practically every first-run commercial movie that is available. This summer Regal's Stonecrest has shown some of the blockbuster movies (which are the most popular and thus the most profitable) on up to six screens. Obviously, with only five screens the Village Theatre cannot show a movie on six screens. Given the requirements of the film distributors that films show for a four to five week run, the Village Theatre does not have the capacity to greatly diminish the expected income at Regal's Stonecrest. *See* Paragraph 12 of the Complaint.

Second, Regal's Stonecrest's voluntary waiver of clearance against the Arboretum, a theatre with over twice the number of screens as the Village Theatre, demonstrates that Regal's Stonecrest does not need clearance in its film zone to ensure that it's expected income will not be greatly diminished. *See Id.*

Third, Regal's Stonecrest's use of clearance discriminatorily against the Village Theatre while waiving it as to the Arboretum thus

[11] The five screen Village Theatre is Charlotte's only luxury theatre while Regal's Stonecrest is a 22 screen multiplex.

[12] See Appendix A for a discussion of clearance as it relates to the Village Theatre.

[13] The five screen Village Theatre is Charlotte's only luxury theatre while Regal's Stonecrest is a 22 screen multiplex.

[14] Since these calculations were based upon the 2007 box office revenues and since the box office revenues for the Village Theatre should increase after the clearance is eliminated, the market share for the Village Theatre should increase and the competitive effect of the merger in the Southern Charlotte market will be reduced even further than that shown on Exhibit 5.

[15] The use of clearance presumes that there is an allocation of first-run commercial movies between all of the theatres within the same film zone. Clearly, if one theatre is able to obtain the entire film product, there is no need for that theatre to have clearance to protect against another theatre's showing of the film simultaneously in the same zone. As amply demonstrated above, in the instant case, the Village Theatre has no allocation of product, and Regal's Stonecrest has no need for clearance against the Village Theatre.

operates to deprive movie consumers of choice, injures the Village Theatre and unreasonably restricts competition between the theatres in the zone. *Id.; U.S.* v. *Paramount Pictures*, 66 F. Supp. 323, 346 (S.D.N.Y. 1946), opinion issued, 70 F. Supp. 53 (S.D.N.Y. 1946) and judgment aff'd in part, rev'd in part on other grounds, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948). Therefore, the use of clearance by Regal's Stonecrest against the Village Theatre is an unreasonable restraint of trade and should be prohibited.

The Clearance between Regal's Stonecrest and the Village Theatre is an Unreasonable Restraint of Trade. The clearance between Regal's Stonecrest and the Village Theatre cannot be justified on the grounds that the theatres are in substantial competition and that clearance is being used to assure Regal's Stonecrest that a distributor will not license a competitor to show a movie at the same time or so soon thereafter that the Regal's Stonecrest's expected income will be greatly diminished. *See Theee Movies of Tarzana*, 828 F.2d 1395 at 1399.

Regal's Stonecrest and the Village Theatre are not in substantial competition because the Village Theatre cannot be considered a first-run commercial move theatre. Moreover, clearance is not necessary to ensure Regal's Stonecrest's expected income will not be greatly diminished. *See Id.* This is obviously true because the Village Theatre has only five screens compared to the 22 at Regal's Stonecrest. Also, Regal's Stonecrest has voluntarily waived clearance against another theatre, the Arboretum Theatre, in the same film zone with which it is substantially competitive, and the invocation of clearance against the Village Theatre operates primarily to injure the Village Theatre and overly restrict competition between theatres in the zone.[16] *Id.* The clearance is, therefore, an unreasonable restraint of trade. *See United States* v. *Paramount*, 334 U.S. 131 at 145–46; see *Theee Movies of Tarzana*, 828 F.2d 1395 at 1399.

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Exhibit 1
HHI Calculations
Southern Charlotte Market

Per DOJ Calculations - After the Merger; Before the sale of Crown Point 12

Theatre		# screens	2007 box office revenues	Market Share	HHI Before the Merger	HHI Afer the Merger
Regal						
Stonecrest		22	$6,446,957	37.23%		
Crown Point		12	$1,973,133	11.39%		
	Total	34	$8,420,090	48.62%	2364	
Consolidated						
Phillips Place		10	$2,751,090	15.89%		
Arboretum		12	$1,724,889	9.96%		
	Total	22	$4,475,979	25.85%	668	
Regal & Consolidated Total		56	$12,896,069	74.47%		5546
Other						
AMC South Blvd		22	$3,668,978	21.19%	449	449
Village		5	$751,695	4.34%	19	19
	Total	27	$4,420,673	25.53%		
Grand Total		83	$17,316,742	100.00%	3500	6014

[16] Even if Regal's Stonecrest and the Village Theatre were in substantial competition and Regal's Stonecrest had demonstrated a need to protect against diminution of its income, as opposed to demonstrating the opposite by waiving clearance against the Arboretum, the clearance Regal's Stonecrest is invoking against the Village Theatre is unduly extended as to duration. *See United States* v. *Paramount*, 334 U.S. 131 at 145–46. The common duration of dearance is generally fourteen days. See, e.g., *Westway Theatre* v. *Twentieth Century-Fox Film Corporation*, 30 F.Supp. 830, 836 D.C. MD. 1940. (fourteen-day period for clearance was not uncommon in duration and did not, under the particular facts of the case, constitute an unreasonable restraint of trade).

Exhibit 2
HHI Calculations
Southern Charlotte Market

Per DOJ Calculations - After the Merger; After the sale of Crown Point 12

Theatre	# screens	2007 box office revenues	Market Share	HHI After the Sale of Crown Point 12
Regal/Consolidated				
Stonecrest	22	$6,446,957	37.23%	
Phillips Place	10	$2,751,090	15.89%	
Arboretum	12	$1,724,889	9.96%	
Total	**44**	**$10,922,936**	**63.08%**	**3979**
Other				
AMC South Blvd	22	$3,668,978	21.19%	449
Village	5	$751,695	4.34%	19
Crown Point	12	$1,973,133	11.39%	130
Total	**39**	**$6,393,806**	**36.92%**	
Grand Total	**83**	**$17,316,742**	**100.00%**	**4577**

Exhibit 3
HHI Calculations
Southern Charlotte Market

Include Park Terrrace 6; Exclude Village 5 - After the Merger; Before the Sale of Crown Point 12

Theatre	# screens	2007 box office revenues	Market Share	HHI Before the Merger	HHI Afer the Merger
Regal					
Stonecrest	22	$6,446,957	37.88%		
Crown Point	12	$1,973,133	11.59%		
Total	**34**	**$8,420,090**	**49.47%**	**2447**	
Consolidated					
Phillips Place	10	$2,751,090	16.17%		
Arboretum	12	$1,724,889	10.14%		
Park Terrace	6	$452,652	2.66%		
Total	**62**	**$4,928,631**	**28.97%**	**839**	
Regal & Consolidated Total		**$13,348,721**	**78.44%**		**6153**
Other					
AMC South Blvd	22	$3,668,978	21.56%	465	465
Grand Total	**84**	**$17,017,699**	**100.00%**	**3751**	**6618**

Exhibit 4

HHI Calculations

Southern Charlotte Market

Include Park Terrrace 6; Exclude Village 5 - After the Merger; After the Sale of Crown Point 12

Theatre	# screens	2007 box office revenues	Market Share	HHI After the Sale of Crown Point 12
Regal/Consolidated				
Stonecrest	22	$6,446,957	37.88%	
Phillips Place	10	$2,751,090	16.17%	
Arboretum	12	$1,724,889	10.14%	
Park Terrace	6	$452,652	2.66%	
Regal & Consolidated Total	**50**	**$11,375,588**	**66.85%**	**4433**
Other				
AMC South Blvd	22	$3,668,978	21.56%	465
Crown Point	12	$1,973,133	11.59%	134
Grand Total	**84**	**$17,017,699**	**100.00%**	**5032**

Exhibit 5

HHI Calculations

Southern Charlotte Market

Include Park Terrrace 6; Include Village 5 - After the Merger; After the Sale of Crown Point 12

Theatre	# screens	2007 box office revenues	Market Share	HHI After the Sale of Crown Point 12
Regal/Consolidated				
Stonecrest	22	$6,446,957	36.28%	
Phillips Place	10	$2,751,090	15.48%	
Arboretum	12	$1,724,889	9.71%	
Park Terrace	6	$452,652	2.55%	
Regal & Consolidated Total	**50**	**$11,375,588**	**64.02%**	**4099**
Other				
AMC South Blvd	22	$3,668,978	20.65%	426
Crown Point	12	$1,973,133	11.10%	123
Village	5	$751,695	4.23%	18
Grand Total	**89**	**$17,769,394**	**100.00%**	**4666**

Exhibit 6

Summary of Competitive Effects of the Merger
Southern Charlotte Market

	Post-Merger					
	Theatres	Screens	Share of 2007 Box Office Revenues	HHI Before the Merger	HHI After the Merger	Increase in HHI
Paragraph 30 of the Complaint						
As set forth in the Complaint (1)	4 of 6 (67%)	56 of 83 (67%)	75%	3,523	6,058	2,535
After the divestiture of Crown Point 12 (2)	3 of 6 (50%)	44 of 83 (53%)	63%		4,577	1,054
Include Park Terrace 6; Exclude Village Theatre						
Before divestiture of Crown Point 12 (3)	5 of 6 (83%)	62 of 84 (74%)	78%	3,751	6,618	2,867
After the divestiture of Crown Point 12 (4)	4 of 6 (67%)	50 of 84 (59%)	67%		5,032	1,281
Include Park Terrace 6; Include Village Theatre						
After the divestiture of Crown Point 12 (5)	4 of 7 (57%)	50 of 89 (56%)	64%		4,666	915

(1) See Exhibit 1
(2) See Exhibit 2
(3) See Exhibit 3
(4) See Exhibit 4
(5) See Exhibit 5

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Antitrust Division/Litigation III,
450 5th Street, NW., Suite 4000,
Washington, DC 20530.

This letter is Supplement #1 to my letter dated June 26, 2008 (the "Comment Letter") commenting on the proposed Final Judgment regarding the merger of Regal Cinemas, Inc. ("Regal") and Consolidated Theatres, GP ("Consolidated") (the "Merger"). The Comment Letter and this Supplement #1 focus on the competitive effect of the Merger in the Southern Charlotte, North Carolina, market area. For purposes of this Supplement #1 all terms used herein shall have the same meanings as used in the Comment Letter.

On July 9, 2008, in the case styled as *Village Theatre, LLC,* v. *Consolidated Theatres Management, LLC, et al.,* Civil Action No. 008–CVS–11031, currently pending in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, Regal filed a Motion to Dismiss, Answer and Counterclaims, in which they declared as follows:

"The [Village] Theatre has been operated as an independent art film theatre since its March 2006 opening date."

Therefore, Regal admits that the Village Theatre, as it operates today, should not be treated as a "first-run commercial movie theatre" in the Southern Charlotte market.

This allegation is in direct conflict with the Department of Justice's proposed Final Judgment, which is predicated in part upon the fact that the Village Theatre was a "first-run commercial movie theatre". Since this is not the case then the relevant market is incorrectly defined in the proposed Final Judgment.

From an anti-trust point of view, the Merger remains highly suspect. The Merger was determined by the United States to be illegal and in violation of Section 7 of the Clayton Act. As stated in the Comment Letter and as shown in the Exhibits to the Comment Letter, the exclusion of the Village Theatre as a first-run commercial movie theatre further increases the market concentration of Regal's Stonecrest Theatre in the Southern Charlotte market. Without the inclusion of the Village Theatre as a "first-run commercial movie theatre", the post-Merger market concentration of Regal in the Southern Charlotte area (even after the sale of the Crown Point 12 Theatre and irrespective of the treatment of the Park Terrace Theatre) will be excessively high. The United States should impose requirements on Regal necessary to reduce its market concentration in the Southern Charlotte market to as close to the pre-Merger level as is possible.

The most obvious, and simplest, pro-competitive, pro-consumer solution is to require Regal's Stonecrest Theatre to waive clearance against the Village Theatre. This is obvious and simple because Regal's Stonecrest Theatre has for years voluntarily waived clearance with respect to the Arboretum Theatre which is also in the Regal's Stonecrest Theatre film zone. Regal's Stonecrest Theatre's voluntary waiver of clearance against the Arboretum Theatre demonstrates that Regal's Stonecrest Theatre does not need clearance in this film zone. Since Regal's Stonecrest Theatre has already waived clearance against the 12-screen Arboretum Theatre it is not too burdensome to require the waiver of clearance in the same film zone against the much smaller five-screen Village Theatre. This small action will greatly increase consumer choice and increase competition.

Clearance must be removed so that the Village Theatre can be considered a "first-run commercial movie theatre" and, thus, reduce Regal's market concentration in the Southern Charlotte area. Requiring Regal to waive clearance with the five screen Village Theatre simply authenticates the proposed Final Judgment, greatly enhances consumer choice, and is necessary given the excessively high post-Merger market concentration of Regal.

Sincerely submitted,

Robert B. Bruner,

14825 John J. Delaney Dr., Suite 240–17, Charlotte, North Carolina 28277, 704–369–5001.

C

United States District Court for the District of Columbia

Case 1:08–cv–00746

United States of America, Plaintiff, v. *Regal Cinemas, Inc., and Consolidated Theatres Holdings, GP, Defendants;* Public Comments of the Voluntary Trade Council, Inc.

Before: Judge Richard J. Leon

Filed: July 13, 2008.

The Voluntary Trade Council, Inc., a Virginia non-profit corporation, respectfully files the following public comments regarding the Proposed Final Judgment in the above-captioned case.

Introduction and Interest of Commenter

On April 29, 2008, the Antitrust Division of the United States Department of Justice (the Division) filed with the Court a Complaint against Regal Cinemas, Inc. (Regal) and Consolidated Theatres Holdings, GP (Consolidated), alleging Regal's contract to purchase Consolidated was illegal under 15 U.S.C. 18, commonly known as the Clayton Act.

Regal and Consolidated did not contest the Division's Complaint, and they acceded to the Division's demand to sell certain assets in order to allow their merger to proceed. Accordingly, on May 15, 2008, the Division published a notice in the **Federal Register** containing a proposed Final Judgment and supporting documents. Under 15 U.S.C. 16, the proposed Final Judgment is subject to a 60-day public comment period, and the Court is required to review any comments received, along with the Division's response, before deciding whether entry of the Proposed Final Judgment is in the "public interest."

The Voluntary Trade Council, Inc.[1] (VTC), is a research center dedicated to antitrust and competition regulation. Working in the tradition of the Austrian School of economics, VTC offers free-market criticism of the Department of Justice, the Federal Trade Commission and other agencies that intervene to prevent the voluntary exchange of goods, services and ideas. In the past six years, VTC has filed public comments in dozens of DOJ antitrust cases, providing independent economic and legal analysis.[2]

Summary

The Division claims it was necessary to intervene in Regal's acquisition of Consolidated in order to preserve competition in the market for the "theatrical distribution of feature length motion picture films" in the Charlotte, Raleigh and Asheville areas of North Carolina. The Division alleges a voluntary combination of Regal and Consolidated's movie theaters in these markets would "eliminate competition" and likely lead to higher ticket prices and "reduced incentives to maintain, upgrade, and renovate their theaters." To remedy these *hypothetical* harms, the proposed Final Judgment requires Regal and Consolidated to sell four movie theaters located in the three areas to a buyer approved by the Division.

The Division's claims of consumer harm are not supported by the facts or economic principles. The Complaint presents a false and misleading analysis of the marketplace and relies heavily on an irrelevant mathematical formula to justify the violation of Regal and Consolidated's property rights. The "public interest" in this case is best served by rejecting the Division's meritless intervention. The Court should not enter the Proposed Final Judgment.

Argument

"Movies are a unique form of entertainment," according to the Division's complaint.[3] Beyond this unremarkable insight, the Division's attempt to define a "relevant market" presents a work of economic fiction that is comparable to the fantastic movies of Steven Spielberg (or even his "non-union Mexican equivalent"[4]). The Division misrepresents the nature of

[1] Formerly known as Citizens for Voluntary Trade.

[2] For a compilation of VTC's public comments, see *http://www.voluntarytrade.org/joomla15/index.php/docs/cat_view/12-voluntary-trade-council-documents/23-public-comments.*

[3] Complaint para. 11.

[4] With apologies to Al Jean, Mike Reiss and Ken Keeler.

consumer time preference, confuses products with methods of distribution and wastes an inordinate amount of energy on "special effects" in the form of a useless mathematical formula. In short, there is no economic substance to the Division's complaint—and thus no rational basis for seeking the relief contained in the proposed Final Judgment.

A. Method of Distribution Is Not a Distinct Product

Thomas A. Lambert, an associate professor at the University of Missouri School of Law, responding to the Federal Trade Commission's lawsuit against the merger of Whole Foods Market, Inc. and Wild Oats Markets, Inc. (which this court rejected [5]), said, "defining markets to consist of specific types of distribution channels, rather than groups of products and services, opens the door to finding narrow 'markets' (and thus market power) everywhere." [6] The essence of marketing, Lambert writes, is when sellers "distinguish their products or services by offering them differently than their competitors." [7]

The Division repeats the FTC's *Whole Foods* error in this case by improperly defining a method of distribution as a distinct product market. Regal and Consolidated do not manufacture the product—motion pictures—but rather provide distinct venues for their distribution. Like Whole Foods, Regal and Consolidated offer a place where sellers (movie producers) and buyers (movie consumers) meet to engage in voluntary exchange. But the distinctiveness of the venue should not be confused with the nature of the products themselves.

A motion picture can be distributed through several channels: First-run theatrical exhibition, sub-run theatrical exhibition, television (including over-the-air broadcast, basic cable, pay and premium cable, and satellite), and direct sales and rentals (VHS, DVD, Blu-Ray, iTunes). A theatrical producer can utilize one, several or all of these channels depending on the nature of the motion picture and its expected audience. Many films begin their journey to the consumer in first-run theatres like those operated by Regal and Consolidated. Others are marketed directly to the consumer, such as the Walt Disney Company's practice of straight-to-video sequels of its classic animated films. However a particular film is marketed to the consumer, the product is the film and not the *method* of distribution.

The Division argues there's a "significant difference between viewing a newly-released, first-run movie and an older sub-run movie," because first-run theatres usually charge higher ticket prices. Sub-run theatres show films that "are no longer new releases, and moviegoers generally do not regard sub-movies as an adequate substitute for first-run movies * * *" It's not clear what "moviegoers" the Division interviewed or surveyed to reach this conclusion. Without any empirical data or deductive arguments, the Division simply concludes there are wholly distinct markets for "first-run" and "sub-run" moviegoers, and never the two shall meet. This argument is just plain wrong.

What distinguishes one movie-distribution channel from another is consumers' aggregate time preference. Many consumers will pay a premium to see a "first-run" movie when it is first released, while others may wait and spend less to view the film in a "sub-run" theatre; and others will wait even longer and spend even less to view the film on home video.

The problem, which the Division fails to acknowledge, is that time preference varies from product to product—that is, from movie to movie. Some films perform poorly in first-run theatres only to enjoy greater success in later distribution channels (hence the phenomenon of "cult" films). Other films enjoy overwhelming first-run success and spawn one or more sequels, such as the James Bond, Star Trek and Star Wars films. In the case of these movie franchises, time preference is such that moviegoers will purchase tickets well in advance of these films' release. In other cases, an unknown film may start out with modest sales and gather momentum as "word of mouth" spreads.

First-run theatres clearly compete against other distribution channels by persuading consumers that their entertainment demand is best satisfied by paying a premium to see a particular movie now rather than paying less to see it in another distribution channel later. To that end, first-run theatres always have an incentive to improve the quality of their product regardless of the number of first-run theatres in a given geographical area. The Division itself makes a big deal about movie theaters having "stadium seating"—which was an innovation developed in response to *competition from other distribution channels* such as home video and pay per view cable.

Similarly, movie producers are now promoting 3D projection as the future of first-run exhibition. Jeffrey Katzenberg, CEO of DreamWorks Animation, recently announced that his studio's future films will be exclusively in 3D. Disney and its subsidiary Pixar Animation Studios also plan to release (and re-release) future films in 3D. (And the same weekend as this comment was filed, Walden Media released a 3D version of "Journey to the Center of the Earth".) Kevin Maney explains in the July 2008 issue of *Portfolio* that,

> Studios are latching onto 3–D for much the same reason that Bob Dole took Viagra. Most of Hollywood's businesses are making money—for all Katzenberg's complaining, DreamWorks' first-quarter profit was up 69 percent—but the sector that makes Hollywood feel best about itself, theatrical showings, is deflating, in large part because *the difference between seeing a movie in your local multiplex and on a 52-inch high-definition TV in your family room is not that vast.*
>
> The Motion Picture Association of America claims that 2007 was a good year for the cinema business, with U.S. box office revenue up 5 percent to $9.6 billion. But that's unsupportable spin. *The jump can be almost entirely attributed to a bump in ticket prices.* The number of tickets sold in the U.S. stayed flat from 2006 to 2007, at 1.5 billion. (In 1950, while TV was taking off, US. theaters sold 3 billion tickets a year—and the population was half what it is today.) Meanwhile, 379 screens were added between 2006 and 2007. Do the math and movies are doing worse than ever in theaters.[8] (Emphasis added)

The Division incorrectly believes that intra-theater competition between Regal and Consolidated drive innovation and hold ticket prices down. That's not the case, and the Court should not accept the Division's "market definition" at face value.

B. The Division's Market Definition Improperly Excluded Other Types of Motion Pictures and Entertainment

The Division argues, "The experience of viewing a movie in a theatre is an inherently different experience from live entertainment (*e.g.*, a stage production), a sporting event, or viewing a movie in the home (*e.g.*, on a DVD or via pay-per-view)," [9] But the question isn't whether these are different experiences; it's whether they are *competing* experiences that

[5] *Federal Trade Commission* v. *Whole Food Market, Inc.*, Civil Action No. 07–1021 (D.D.C. Aug. 16, 2007).

[6] Thom Lambert, "Ignoring the Lessons of *Von's Grocery:* Some Thoughts on the FTC's Opposition to the Whole Foods/Wild Oats Merger," eSapience Center for Competition Policy June 2007).

[7] *Id.*

[8] Kevin Meaney, "The 3–D Dilemma," available at *http://www.portfolio.com/culture-lifestyle/culture-inc/arts/2008/06/16/Hollywoods-3-D-Cinema-Dreams.*

[9] Complaint para. 11.

individuals consider when allocating scarce time and money towards entertainment. The Division treats consumers as a monolith that considers *only* first-run movie theaters to the exclusion of all other forms of entertainment. This approach insults consumers by reducing them to a reactionary mob and has no empirical or deductive foundation.

In the Division's perfect economic world, no consumer ever asks, "Should I go to a movie tonight or stay home and watch the football game?" Nor does anyone think, "I really don't want to see that chick flick with my wife and her friends, so I'll shoot pool with the guys." Perfect consumers behave in unison—like background characters in an animated film—and in direct, negative response to short-term price increases.

The Division goes to great lengths to explain why "moviegoers do not regard" art and foreign language movies "as adequate substitutes for first-run commercial movies," thus justifying their exclusion from the market definition. Again, the Division misses the point. Every consumer has individual preferences. Sure, many consumers don't watch art and foreign films. But other consumers never watch animated films. Or war films. Or "chick flicks." Or films featuring Mike Myers. And it's unlikely that any moviegoer anytime, anywhere has said, "Honey, I want to see a first-run commercial movie tonight, *and nothing else will suffice*!"

The Division's attempted market definition also ignores the cross-competition that occurs within the entertainment industry. "First-run commercial movies" are not a closed system. Many popular commercial films are derived from other entertainment sources. In 2008 alone, several number-one U.S. box office films were derived from non-film sources: *Hellboy II, The Incredible Hulk* and *Iron Man* were based on popular comic books; *Sex and the City* was based on a long-running premium cable series (which itself was based on a compilation of popular newspaper columns); and *Horton Hears a Who!* and *The Chronicles of Narnia: Prince Caspian* were based on popular books.[10] Demand for non-film entertainment drives demand for motion pictures, and vice versa. And once again, the number of first-run theatres in a given geographic area is *irrelevant* to the market's competitiveness.

[10] *See* "Box office number-one films of 2008 (USA)," *http://en.wikipedia.org/wiki/Box_office_number-one_films_of_2008_(USA).*

C. The Herfindahl Index Proves Nothing Aside From the Division's Ability To Perform Basic Multiplication

Relying on its misleading market definition, the Division offers a lengthy series of random numbers purportedly representing the "Herfindahl-Hirschman Index" (HHI), which the Division claims is a "measure of market concentration." [11] For example, in part of Charlotte, North Carolina, the Division alleges the Regal Consolidated merger would "yield a post-merger HHI of approximately 6,058, representing an increase of roughly 2,535 points." [12] The implication is that a higher HHI indicates a greater likelihood of post-merger consumer "injury" in the form of higher prices. But even assuming that the HHI figures given in the complaint are valid, this alone does not prove the existence of "market power" or justify the Division's proposed Final Judgment. As economics professor Dominick T. Armentano has explained, there is no economic merit to the HHI:

> Although the general public has the impression that there must be some good reason for the antitrust authorities' choice of particular limits in the Herfindahl Index of market concentration, those limits are completely arbitrary. No one—and certainly not the antitrust authorities—can ever know whether a merger of firms that creates, say, a 36-percent market share, or one that raises the Herfindahl Index by 150 points, can create sufficient economic power to reduce market output and raise market price. No one knows, or can know, whether monopoly power begins at a 36 percent market share or a 36.74-percent market share. Neither economic theory nor empirical evidence can justify any merger guideline or prohibition.[13]

D. Consumers Were Never in Danger of the Type of "Injury" Alleged in the Complaint

Ultimately, the Division's complaint rests on the ridiculous proposition that consumers would have been injured by higher post-merger prices but for the redistribution of property mandated in the proposed Final Judgment. The Division's argument is that "[o]ver the next two years, the demand for more movie theatres in [the identified geographic areas] is not likely to support entry of a new theatre," and without additional theaters there would be "an increase in movie ticket prices or a decline in theatre quality." [14] The decline in quality issue has already been addressed and dismissed above. As for a *hypothetical* increase in ticket prices, it's unclear how this would "injure" consumers who are willing to pay. There's no question of fraud: Ticket prices are generally posted and well known to the customer before purchase. Nor has the Division explained how "competitive" ticket prices should be determined outside of, well, the competitive process of the market. The Division simply draws an arbitrary line where pre-merger prices are assumed to be "competitive" and any hypothetical future increase—regardless of cause—is "anticompetitive." By this reasoning, the most logical course of action would be for the Division to simply fix ticket prices, which of course would violate Section 1 of the Sherman Act.

[11] Complaint para. 30.

[12] *Id.*

[13] Dominick T. Armentano *Antitrust: The Case for Repeal*, at 85–86 (2d ed., Ludwig von Mises Institute 1999).

[14] Complant para. 37.

The Division's real concern, which it states, is that it fears consumers won't immediately respond to an increase in ticket prices by reducing demand sufficiently to make the increase "unprofitable." But that has *nothing* to do with consumer injury. Consumers are not legally obligated to adjust their spending habits to accommodate the Division's mathematical models. Nor should sellers be punished because there's insufficient demand to support the number of competing sellers that the Division deems ideal. Ultimately, real markets don't function according to the whims of government lawyers.

Conclusion

The proposed Final Judgment is built on a series of false, misleading and laughably nonsensical arguments. Just as the "movie palaces" of the 1930s gave way to the multiplexes of the late 20th century, which in turn yielded to the "stadium seating" megaplexes at issue in this case, the subset of the entertainment industry dedicated to first-run theatrical exhibition continually evolves to satisfy shifting consumer demand. This process works best with a minimum of government intervention, especially from unqualified mid-level Justice Department attorneys. The Court can best serve the public interest by rejecting the proposed Final Judgment and ordering the Division to spend less time pretending they're movie theatre executives and more time * * * well, going to the movies.

Dated: July 13, 2008.

Respectfully Submitted,

S.M. Oliva,

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