

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMC ENTERTAINMENT HOLDINGS,
INC.,

and

CARMIKE CINEMAS, INC.,

Defendants.

Case No.: 1:16-CV-02475 (RDM)

**DEFENDANTS' UNOPPOSED MOTION & SUPPORTING MEMORANDUM TO
MODIFY FINAL JUDGMENT AND ENTER AMENDED FINAL JUDGMENT**

Defendants AMC Entertainment Holdings, Inc. ("AMC") and Carmike Cinemas, Inc. ("Carmike") (collectively "Defendants")¹ move this Court to modify the Final Judgment entered in this case on March 7, 2017 ("Final Judgment") (Dkt. 13), by entering the proposed Amended Final Judgment attached as Exhibit 1. This relief is sought because of unforeseen and unique changed circumstances that have arisen from the ongoing COVID-19 pandemic. For the Court's convenience, a redline comparison of the original Final Judgment and the proposed Amended Final Judgment is attached as Exhibit 2.

¹ On December 21, 2016, consistent with the Hold Separate Stipulation and Order entered by this Court on December 20, 2015 (Dkt. #7) and the Final Judgment (Dkt. #13), AMC Entertainment Holdings, Inc. closed its acquisition of Carmike Cinemas, Inc. and thus, hereby submits this motion on behalf of all Defendants.

Specifically, the Defendants seek to modify the Final Judgment to allow AMC to reacquire certain theatres and related assets previously divested to New Vision Cinemas LLC (“New Vision”) pursuant to the Final Judgment under circumstances where (i) New Vision has abandoned its lease and/or the landlord has terminated the lease due to default by New Vision, and (ii) AMC remains financially liable in the event of default by New Vision or has expressly guaranteed the obligations of New Vision.

New Vision has commenced liquidation proceedings in Georgia state court. This modification to the Final Judgment will achieve two outcomes that are in the public interest: (i) it will continue to enhance output by providing the opportunity for theatrical exhibition to continue at certain locations at a time when most theatrical exhibition companies are closing locations and not looking to expand operations; and (ii) it will permit AMC to negotiate a new lease and operate a theatre at affected locations, providing the landlords with much needed revenue to help mitigate the financial obligations arising from New Vision’s default and the general economic hardship on the landlords that has resulted from the COVID-19 pandemic.

Accordingly, for the reasons set forth herein, AMC respectfully requests that the Court enter the proposed Amended Final Judgment submitted with this unopposed motion.

I. Background

On December 20, 2016, the United States filed the Complaint in this case alleging that AMC’s proposed acquisition of Carmike violated Section 7 of the Clayton Act. The United States and Defendants simultaneously settled the case pursuant to the terms of the Final Judgment. Paragraph IV.A of the Final Judgment required that AMC divest certain movie theatre locations and their respective assets (collectively defined in the Final Judgment as the “Theatre Divestiture Assets”) to a buyer approved by the United States. Section XVI of the

Final Judgment provides that “Defendants may not reacquire any part of the Theatre Divestiture Assets . . . during the term of this Final Judgment,” which is in effect until March 7, 2027.

AMC made the required theatre divestitures to New Vision after approval by the United States and otherwise in accordance with the terms of the Final Judgment. In order to secure consent from certain landlords for the required assignment of the leases to New Vision, AMC retained some financial obligations in the event that New Vision defaulted. In certain cases, the landlord refused to release AMC from liability if New Vision defaulted on its obligations, while in other cases, AMC had to affirm guarantee of the lease obligations in the event New Vision defaulted.

The recent COVID-19 pandemic has put unprecedented pressure on the theatrical exhibition industry. On March 17, 2020, AMC suspended operations at all U.S. locations,² and AMC subsequently furloughed its entire headquarters staff, including its CEO.³ New Vision similarly had to close its theatres, and on July 3, 2020, New Vision began an Assignment for the Benefit of Creditors (“ABC”) proceeding in Georgia,⁴ through which New Vision’s assets have been assigned to a trustee for liquidation. The trustee will distribute the proceeds to the creditors following liquidation. The liquidation and distribution are proceeding pursuant to Georgia state statutes. Separately, as detailed below, several landlords already have claimed New Vision is in

² Press Release, AMC Theatres to Close All U.S. Locations for 6 to 12 Weeks Beginning Tuesday Morning, March 27, (March 17, 2020), <http://investor.amctheatres.com/file/Index?KeyFile=403312139>. Similarly, AMC shut down its theatres outside the United States around the same time.

³ Reuters, *AMC Theatres Furloughs CEO, Corporate Employees Due to Virus* (March 25, 2020), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/03/amc-furloughs-entire-headquarters-staff.html?page=all>.

⁴ The process was started with an assignment that was filed with the Muscogee County, GA recorder. AMC’s understanding is that there will not be a judicial proceeding.

default and seek to collect from AMC. Accordingly, AMC seeks to modify Section XVI of the Final Judgment (No Reacquisition).

While the precise details of how AMC would structure new leases and operations with landlords is subject to negotiation and not yet known, such activities would be prohibited under Section XVI of the Final Judgment, which prohibits Defendants from reacquiring any of the Theatre Divestiture Assets. Theatre Divestiture Assets are defined to include:⁵

1. All tangible assets that comprise the business of operating theatres that exhibit movies, including, but not limited to, real property and improvements, research and development activities, **all equipment, fixed assets, and fixtures, personal property, inventory, office furniture, materials, supplies, and other tangible property** and all assets used in connection with the Initial Theatre Divestiture Assets; all licenses, permits, and authorizations issued by any governmental organization relating to the Initial Theatre Divestiture Assets; **all contracts (including management contracts), teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Initial Theatre Divestiture Assets**, including supply agreements (provided however, that supply agreements that apply to all of each Defendant's theatres may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)); all customer lists (including rewards and loyalty club data at the option of the Acquirer(s), copies of which may be retained by Defendants at their option), contracts, accounts, and credit records relating to the Initial Theatre Divestiture Assets; all repair and performance records and all other records relating to the Initial Theatre Divestiture Assets; and
2. All intangible assets relating to the operation of the Initial Theatre Divestiture Assets, including, but not limited, to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, (provided, however, that the names Carmike, AMC, and any registered service marks of Carmike or AMC may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), technical information, computer software and related documentation (provided, however, that Defendants' proprietary software may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), know-how and trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and

⁵ As defined in the Final Judgment, Theatre Divestiture Assets includes both Initial Theatre Divestiture Assets and Screen Transfer Divestiture Assets. Only the Initial Theatre Divestiture assets are at issue here.

development, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Carmike or AMC provide to their own employees, customers, suppliers, agents, or licensees (except for the employee manuals that Carmike or AMC provide to all its employees), and all research data concerning historic and current research and development.

Final Judgment, Paragraph II.E (emphasis added). Under the circumstances, it may be necessary for AMC to reacquire certain Theatre Divestiture Assets.

II. Legal Standard

Section XVII of the Final Judgment contemplates the potential for modifications and specifically provides that “[t]his Court retains jurisdiction to enable any party to [the] Final Judgment to apply to this Court at any time . . . to modify any of its provisions.” The Court also has the jurisdiction to modify the Final Judgment pursuant to Federal Rule of Civil Procedure 60(b).

It is well-established that a change of circumstances may justify the modification of a merger consent decree. *See, e.g., United States Western Elec. Co.*, 46 F.3d 1198, 1202-05 (D.C. Cir. 1995) (granting modification under Rule 60(b)(5) when it was “no longer equitable that the judgment should have prospective application” based “on what the parties and the court reasonably anticipated” (internal citations omitted)); *accord Rufo v. Inmates of The Suffolk County Jail*, 502 U.S. 367, 384 (1992) (“Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous.”).

Furthermore, where the motion is not opposed, the “relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the ‘public interest.’” *See United States v. Western Elec. Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990).

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”) does not require a notice-and-comment period prior to the Court’s entry of the proposed

Amended Final Judgment. The Tunney Act requires, among other things, that “any proposal for a consent judgment submitted by the United States” be filed with the Court and published in the *Federal Register*, as well as in newspapers of general circulation, at least 60 days prior to the effective date of such judgment.⁶ The Tunney Act further requires that any written comments relating to the proposed Final Judgment, and any responses by the United States to those comments, be filed with the court and published in the *Federal Register* prior to entry of the proposed Final Judgment.⁷ These procedures are designed to facilitate a public interest determination “[b]efore entering any consent judgment proposed by the United States.”⁸ The language of the Tunney Act does not require that a proposed Amended Final Judgment be subject to these same procedures. Accordingly, consistent with the recent practice of this Court,⁹ the United States is not required to publish the proposed Amended Final Judgment for notice and public comment.

⁶ 15 U.S.C. § 16 (b)-(c).

⁷ 15 U.S.C. § 16 (d).

⁸ 15 U.S.C. § 16 (e).

⁹ Courts in this district have modified final judgments without requiring a public notice-and-comment period. *See, e.g., Ticketmaster Entm’t*, 2020 WL 1061445 (extending the term of the Final Judgment and adding language on retaliation conditioning); *United States v. Verizon Commc’ns, Inc.*, No. 1:08-cv-01878, 2011 WL 1882488 (D.D.C. Apr. 8, 2011) (extending the term of transition services agreements); *United States v. Cemex, S.A.B. de C.V.*, No. 1:07-cv-00640, 2007 WL 7315362 (D.D.C. Nov. 28, 2007) (substituting a 40-year lease of real property for a sale of that property); *United States v. Halliburton Co.*, No. 1:98-cv-2340, slip op. (D.D.C. Mar. 13, 2000) (substituting access to one test well for access to a different test well), *available at* <https://www.justice.gov/atr/case-document/file/498246/download>. Two courts outside of this district have further held that the Tunney Act is not applicable to judgment termination proceedings, suggesting that those courts would not view the Tunney Act as applicable to minor judgment modifications. *See, e.g., United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983); *United States v. General Motors Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,614, at ¶ 69,093 (N.D. Ill. 1983). *But see Western Elec. I*, 900 F.2d at 289 (in which the parties voluntarily agreed to apply Tunney Act procedures to the modification at issue).

Prior to the entry of the original Final Judgment, the United States complied with the procedures of the Tunney Act and certified its compliance with the Court.¹⁰ The proposed modifications would allow AMC to reacquire certain theatre assets that have been abandoned or are in default, thereby increasing the likelihood that the assets remain in the market. Absent such modification, many of the divested theatres might remain shuttered permanently. Because the proposed modifications allow AMC to reacquire only certain theatres that otherwise would likely exit the market, the proposed modifications will not adversely impact competition. The Court previously found the underlying Final Judgment to be in the public interest. Therefore, no notice or public comment period is necessary for a determination that the proposed modification is in the public interest.

III. Discussion

The degree of economic hardship currently being experienced by AMC, New Vision, and the entire theatre exhibition industry is a unique changed circumstance that could not have been anticipated at the time the Final Judgment was entered. By way of illustration, AMC's revenue declined from \$1.4 billion in the fourth quarter of 2019 to \$941 million in the first quarter of 2020 (where COVID-19 shutdowns only impacted two weeks of the first quarter) and now have declined to virtually zero.¹¹ The additional significant financial burden resulting from New

¹⁰ Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, ECF No. 10-3 (Feb 8, 2018).

¹¹ Press Release, AMC Entertainment Holdings, Inc. Announces Fourth Quarter and Fully Year 2019 Results (Feb. 27, 2020), <http://investor.amctheatres.com/Cache/IRCache/d9fd1c04-606d-7f92-f315-feb5436d7905.PDF?O=PDF&T=&Y=&D=&FID=d9fd1c04-606d-7f92-f315-feb5436d7905&iid=4171292>; Press Release, AMC Entertainment Holdings, Inc. Reports First Quarter 2020 Results and COVID-19 Response Actions, <http://investor.amctheatres.com/Cache/IRCache/c2d07205-0454-f413-4c1e-4f5f82ac381b.PDF?O=PDF&T=&Y=&D=&FID=c2d07205-0454-f413-4c1e-4f5f82ac381b&iid=4171292>.

Vision defaulting on its obligations will put additional financial strain on AMC's ability to manage the short- and long-term viability of its business and the communities it serves.

Set forth below is a list of the locations where AMC remains financially liable as a result of New Vision's default. Defendants seek a modification of the Final Judgment that will permit the United States to provide written consent to Defendants to negotiate, enter into new leases, and begin to operate a theatre at any of these locations.

Theatres	Address
Oakdale 20	1188 Helmo Ave. N, Oakdale, MN 55128
Tilghman Square 8 ¹²	Tilghman Square, 4608 Broadway, Allentown, PA 18104
Lawton 12	200 SW C Ave., Lawton, OK 73501
Pekin 14 ¹³	1124 Edgewater Dr., Pekin, IL 61554
Fitchburg 18 ¹⁴	6091 McKee Rd., Fitchburg, WI 53719
Wynnsong 15 ¹⁵	2430 County Hwy 10, Mounds View, MN 55112
Boulevard 10 ¹⁶	465 Grand Blvd., Miramar Beach, FL 32550
Fleming Island 12 ¹⁷	1820 Town Center Blvd., Fleming Island, FL 32003
Chantilly 13 ¹⁸	10477 Chantilly Pkwy, Montgomery, AL 36117
Sparta 3	25 Centre St., Sparta Township, NJ 07871

Permitting AMC to negotiate new leases and operate theatres at locations where New Vision has defaulted on its leases and will no longer be able to operate is in the public interest. It would benefit consumers by ensuring theatrical exhibition continues at these locations; it would provide important revenue to the landlords of these properties to help offset their financial

¹² Landlord has sent demand letters to both New Vision and AMC.

¹³ Landlord is seeking recovery from AMC.

¹⁴ Landlord is seeking recovery from AMC.

¹⁵ Landlord has sent default letters and indicated it will seek recovery from AMC.

¹⁶ Landlord has sent demand letters to both New Vision and AMC.

¹⁷ Landlord has commenced litigation against both New Vision and AMC.

¹⁸ Landlord has commenced litigation against both New Vision and AMC.

obligations arising from New Vision's default; and it would provide important revenue that will help the affected landlords manage the economic hardship caused by the COVID-19 pandemic.

Accordingly, the Defendants move to amend the Final Judgment by:¹⁹

- Replacing the "No Reacquisition" provision of Section XVI of the Final Judgment with "Defendants may not reacquire any part of the Theatre Divestiture Assets or the NCM Divestiture Assets during the term of the Amended Final Judgment unless the United States, in its sole discretion, provides written approval of such a reacquisition" and
- Revising Section XVIII to conform with the original entry date and term of the Final Judgment: "Unless this Court grants an extension, this Final Judgment shall expire on March 7, 2027."

For the foregoing reasons, the Defendants respectfully request that the Court grant the present unopposed motion and enter the proposed Amended Final Judgment attached to this motion as Exhibit 1.

Dated: August 27, 2020

Respectfully submitted,

/s/ Michael B. Bernstein

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¹⁹ Since the original Final Judgment was filed, the Antitrust Division of the Department of Justice has updated its standard language to add additional enforcement provisions consistent with new initiatives. *See e.g.*, <https://www.judiciary.senate.gov/imo/media/doc/10-03-18%20Delrahim%20Testimony.pdf> at 2. Those additional provisions are included in Section XVIII of the proposed Amended Final Judgment.

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was served to counsel of record via ECF.

/s/ Justin P. Hedge
Justin P. Hedge