IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

READING INTERNATIONAL, INC., CITADEL CINEMAS, INC.; and SUTTON HILL CAPITAL, LLC, Plaintiffs, v. OAKTREE CAPITAL MANAGEMENT LLC; ONEX CORPORATION; REGAL ENTERTAINMENT GROUP; UNITED ARTISTS THEATRE COMPANY; UNITED ARTISTS THEATRE CIRCUIT, INC.; LOEWS CINEPLEX ENTERTAINMENT CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; THE WALT DISNEY COMPANY; UNIVERSAL STUDIOS, INC.; PARAMOUNT PICTURES CORPORATION; METRO-GOLDWYN-MAYER DISTRIBUTION COMPANY; FOX ENTERTAINMENT GROUP, INC.; DREAMWORKS LLC; STEPHEN KAPLAN; and BRUCE KARSH, Defendants.	)	Case No. 03-CV-1895 (GEL) (THK)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

FEDERAL STATUTES AND RULES

Page

MISCELLANEOUS

INTEREST OF THE UNITED STATES

The United States, in conjunction with the Federal Trade Commission, has primary responsibility for enforcing the federal antitrust laws, and a strong interest in the correct application of those laws in various industries, including the motion picture industry. Moreover, in their Reply Memorandum dated July 18, 2003, defendants Oaktree Capital Management, Kaplan and Karsh (hereinafter collectively "Oaktree") discuss at some length the position of the United States with respect to the potential liability of business entities under Section 8 of the Clayton Act, 15 U.S.C. 19. The United States has an interest in ensuring that the position of the United States is clear.

QUESTION PRESENTED

The United States will address the following question:

Whether a business whose deputized representatives serve simultaneously as directors or officers of two competing corporations may violate Section 8 of the Clayton Act, 15 U.S.C. 19.[1]

STATEMENT

1. Section 8 of the Clayton Act provides in pertinent part:

> (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are –
>
> (A) engaged in whole or in part in commerce; and

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[1] The United States takes no position on any other issue, legal or factual, in this case. The United States therefore takes no position on whether plaintiffs' complaint adequately alleges facts sufficient to support a Section 8 violation.

> (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;
>
> if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

15 U.S.C. 19(a)(1). The Clayton Act further provides that the term "'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." *Id.* § 12(a). The term "'officer' means "an officer elected or chosen by the Board of Directors." *Id.* § 19(a)(4).

2. Plaintiffs' complaint alleges that Oaktree, a limited liability company (Compl. ¶ 15), "serves on the Board of Directors of both Regal and Loews" (Compl. ¶ 119), which are indisputably competitors, because defendant Karsh, the President of Oaktree, serves on the board of Loews and defendant Kaplan, a Principal of Oaktree, serves on the board of Regal (Compl. ¶¶ 24-25, 119, 123). The complaint further alleges that "[Oaktree's] strategy has been carefully coordinated" by Karsh and Kaplan (Compl. ¶ 4) and that Karsh and Kaplan "play key roles in orchestrating that coordination" to eliminate competition between Loews, Regal, and others (Compl. ¶ 6). As Oaktree acknowledges, plaintiffs in effect have alleged a "deputization" theory of Section 8 liability, "asserting that Karsh and Kaplan serve on these boards as Oaktree's deputies, and that Oaktree itself should be deemed to be serving as a 'director' for the purposes of Section 8." (Oaktree

Br. at 12.)

ARGUMENT

A BUSINESS IS A "PERSON" AND MAY SERVE AS A DIRECTOR OR OFFICER OF COMPETING CORPORATIONS, WITHIN THE MEANING OF SECTION 8, THROUGH ITS DEPUTIZED REPRESENTATIVES

The United States has long taken the position that a corporation or other business entity may violate Section 8 of the Clayton Act if its deputies serve as directors or officers of competing corporations barred from sharing directors or officers under the statute. *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). Oaktree's contrary position – that a corporation, acting through its agents, may achieve precisely the coordinated management of competing firms that the statute is designed to outlaw – is inconsistent with the statutory language, the statutory purpose, legal precedent, and the longstanding interpretation of the United States.

A. The Language of Section 8 Offers No Support For An Exemption for Corporations

Section 8 provides that no "person" may "serve as" a "director or officer" of two competing corporations meeting certain criteria. Section 1 of the Clayton Act expressly defines "person" to include associations and corporations:

> The word "person" or "persons" *wherever used in this Act* shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. 12 (emphasis added). Nothing in Section 8 suggests that Congress intended to

depart from this definition and to limit "person" to natural persons. A business, acting through its representatives, therefore can "serve as" a "director or officer" for Section 8 purposes.

Oaktree argues that the "ordinary or natural meaning" of the term "director" limits it to natural persons, but that contention wrongly strips the term out of its statutory context. *See Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[A] word is known by the company it keeps") (alteration in original) (citation omitted). Congress was well aware in 1914, when it defined "person" to include corporations and business associations, that such entities act through their agents. There is no more reason to limit Section 8 to natural persons than there would be to impose such a limitation on liability under other sections of the Clayton Act that prohibit acts necessarily carried out by a natural person, *e.g.*, Section 2(c) of the Act, 15 U.S.C. 13(c) (unlawful for any "person" to "pay or grant, or to receive or accept, anything of value" as a commission in certain circumstances); Section 2(d), 15 U.S.C. 13(d) (unlawful for any "person" to "pay or contract for the payment of anything of value" in compensation for certain services). Similarly, no one has suggested in recent times that when Congress imposed liability on any "person" who engages in an illegal conspiracy in restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. 1, it limited liability to the natural persons who actually enter into the agreements, exempting their corporate principals.

Had Congress intended to limit who may be treated as a "director or officer" under

Section 8 to individuals, it easily could have done so – *e.g.*, "No officer or director may serve on the boards of two competing corporations." And had Congress intended to forbid only the same individual from serving on competitor boards simultaneously, it also readily could have done so – *e.g.*, "No single officer or director" or "No natural person." But Congress instead chose to focus on the "person," which it expressly defined to include business entities, who acts in a board or management capacity in competing firms. That language is most naturally read to apply to business entities acting through their agents.

B. Exempting Business Entities That Serve on Competing Corporate Boards Through Their Representatives Would Undercut the Statutory Purpose

As the Second Circuit has emphasized, Section 8 has a "prophylactic purpose" to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *SCM Corp. v. Federal Trade Comm'n*, 565 F.2d 807, 811 (2d Cir. 1977) (quoting *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)). This "policy supports a broad reading of section 8." *Id.* "[T]he language of the section does not stand alone and should not be construed as though it did." *Id.* This Court likewise has made clear that "in view of the prophylactic and remedial purposes of § 8," it should not be read in a way that "would exalt form over substance." *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991). The Clayton Act was intended to supplement and strengthen the Sherman Act, which "is aimed at substance rather than form." *United States v. Yellow*

Cab Co., 332 U.S. 218, 227 (1947).

A holding that business entities are not "persons" who can serve as directors or officers through their representatives would allow business entities, acting through their agents, to do exactly what Congress intended to prohibit: coordinate the actions of competing firms by means of overlapping boards or management. Construing the statute in accord with the statutory definition of "person," on the other hand, helps to "remov[e] the opportunity or temptation to [antitrust] violations through interlocking directorates." *SCM Corp.*, 565 F.2d at 811. If business *C* is able to place its agents on the boards of competing corporations *A* and *B*, then *C* will have an obvious interest in attempting to increase its own profits and a temptation to achieve that goal by having *A* and *B* collude (perhaps through *C*) to reduce competition against each other and raise prices. The leading antitrust treatise thus explains that when "a third company, *C,* which does not compete with either *A* or *B*, could have different employees on the boards of *A* and *B* . . . . serious anticompetitive consequences could arise if *C* has an interest in limiting *A*-*B* competition[.]" 5 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1304, at 334 (2d ed. 2003). *See also Sears, Roebuck & Co.*, 111 F. Supp. at 620 ("a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation.").

We do not suggest that business entities are automatically liable whenever individuals having any arguable association with them serve as directors or officers of two or more competing corporations. Whether the officers or directors are acting as representatives of another business entity is necessarily a question of fact. But, if it can be demonstrated that they are acting for that business entity, there is no justification for exempting the business entity from the strictures of Section 8.

Oaktree quotes snippets of legislative history in an attempt to show that Section 8's purposes were narrow, but these quotations show nothing more than that the perceived abuses of 1914, which typically involved single natural persons, were prominent in the minds of individual members of Congress. Thus the House and Senate Reports, just two sentences before a passage quoted by Oaktree (Oaktree Br. 14 & n.6), say "[t]he concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions." None of Oaktree's quotations shows that Section 8 was or must be *limited* to cases of single individuals, and some are misleadingly cited out of context.[2] Moreover, to the extent that

[2] Oaktree cites a footnote from a 1990 House Report for the assertion that "Section 8 only regulates direct interlocks" (Oaktree Br. at 15 & n.10, Reply at 2 & n.2), but that footnote gives no explanation whatsoever and merely purports to parrot the Areeda treatise. H.R. Rep. No. 101-483 at 4 n.8 (1990). The most recent edition of the Areeda treatise, while acknowledging that Section 8 might "appear[]" not to encompass "indirect" interlocks, also recognizes that "serious anticompetitive consequences could arise" in the deputization context and that Section 8 can and should be read to encompass

these quotations suggest, as some clearly do, that only individuals can violate Section 8, then they are squarely inconsistent with Section 1's definition of "person" as including business entities, are also inconsistent with the controlling authority of the Second Circuit in *SCM Corp.*, which held that corporations are proper defendants in Section 8 cases, and therefore are not entitled to any weight.

C. Precedent Supports Application of Section 8 to Business Entities Acting Through Their Representatives

In *Square D*, this Court rejected arguments that Section 8 applies only to a natural person, denying a motion to dismiss a Section 8 claim where the plaintiff alleged that the defendant corporation attempted to place ten nominees or "agents" on the board of the plaintiff corporation although the defendant had subsidiaries that competed against the plaintiff. The claim was that "[defendant] Schneider would have agents on the Boards of both Square D and its competitors," *Square D*, 760 F. Supp. at 366. In holding that "a cause of action under § 8 is stated where a company attempts to place on the Board of a competitor individuals who are agents of, and have an employment or business relationship with, such company," *id.* at 367, this Court did not require that the agents be the same individuals. Instead, it based its reasoning on "the policies underlying § 8 – preventing the coordination of business decisions by competitors and the exchange of

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the *Cleveland Trust* situation in which a bank had two of its highest officers, as does Oaktree, sitting on the boards of competing companies. *Antitrust Law*, *supra*, ¶ 1304, at 335-36.

commercially sensitive information," *id.*, which are implicated just as strongly where different agents sitting on competing boards all serve the same master.

Similarly, courts have accepted consent decrees based on "deputization" theories. In *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975), the government alleged that Cleveland Trust sat on the boards of competing firms when one of its directors served on one competitor's board and a second Cleveland Trust director sat on the boards of the other two competitors. The consent decree squarely adopts the theory. *United States v. Cleveland Trust Co.*, 1975-2 Trade Cas. (CCH) ¶ 60, 611 (N.D. Ohio 1975). *See also United States v. Int'l Ass'n of Machinists and Aerospace Workers*, 1994-2 Trade Cas. (CCH) ¶ 70,813 (D.D.C. 1994) (Section 8 applies where separate agents of a union sit simultaneously on the boards of competing airlines). As the Areeda & Hovenkamp treatise observes, "[t]here seems little reason to preclude § 8 from embracing the *Cleveland Trust* fact situation, which involved directors who were important bank officers subject to the control and direction of their employer." *Antitrust Law*, *supra*, ¶ 1304 at 335-36.

D. Application of Section 8 to Business Entities That Act as Directors or Officers of Competing Corporations Through Their Representatives is Consistent With the Longstanding Enforcement Policy of the United States

In *Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983), the Supreme Court noted that its "long-held policy of giving great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement"

ordinarily should apply to Section 8 as it does to any other statute. *See also SCM Corp.*, 565 F.2d at 811 (adopting the Federal Trade Commission's "reasonable" and "sensible" interpretation of the statute). Oaktree argues at length in its reply brief (Reply at 5-7) that the United States has not consistently adhered to the position that a business entity may be liable under Section 8 when its representatives serve as directors or officers of competing corporations. Oaktree's characterization of the government's enforcement history, however, is inaccurate. The position of the United States has been clear since at least the *Cleveland Trust* litigation in 1974. *See also* U.S. Department of Justice, Antitrust Division, *Business Review Letter to UAW*, Trade Reg. Rep. (CCH) ¶ 50,425 (Feb. 26, 1981) ("the Government has previously taken the position that a corporation sat on the boards of competing corporations through representatives") (citing *Cleveland Trust*); *United States v. Int'l Ass'n of Machinists & Aerospace Workers*, 1994-2 Trade Cas. (CCH) ¶ 70,813 (D.D.C. 1994).

That this "deputization" theory represents the government's position is well understood and widely reported. *See*, *e.g.*, *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 217 n.2 (4th Cir. 1987) ("'deputization' theory has been advanced by the Justice Department in specific litigation"); ABA Section of Antitrust Law, *Antitrust Law Developments* 405 (5th ed. 2002) ("The Department of Justice and the Federal Trade Commission have taken the position that corporations and associations are 'persons' and may violate the statute if they have representatives serving on the boards of

two competing corporations, notwithstanding that the representatives are not the same person."); Julian O. von Kalinowki, Peter Sullivan & Maureen McGuirl, *Antitrust Laws and Trade Regulation* § 35.03[2] at 35-14 (2d ed. 2001); ABA Section of Antitrust Law, Monograph 10, *Interlocking Directorates Under Section 8 of the Clayton Act* 41 (1984) ("It should be emphasized that the Justice Department, both in the *Cleveland Trust* case and in a more recent business review letter, argued that this 'deputization' theory is covered by the statute as presently drafted.").

Oaktree nonetheless contends that there is ambiguity about the government's position. The snippets of testimony and out-of-context statements it offers do not support its assertion.

1. Oaktree cites the statement in *Bankamerica Corp.* that "the Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now." 462 U.S. at 130. But *Bankamerica* concerned "test cases," *id.* at 124, brought to challenge a bank/insurance company interlock. The Court's quoted comment refers only to the Antitrust Division's failure previously to challenge such bank/nonbank interlocks – "for over 60 years, the Government made no attempt . . . to apply Section 8 to interlocks between banks and nonbanking corporations," *id.* at 130 – and has nothing to do with the question at issue here.

2. Oaktree argues that a recent Business Review Letter approved an indirect

interlock.[3] But that letter did not even discuss Section 8. The proposed Platform Companies were simply vehicles for the patent-holding companies to decide licensing issues: they were not expected to have revenues of their own and certainly had no "surplus," "undivided profits," etc. that even approached the minimum threshold requirements of Section 8. Thus, Section 8 was not at issue.[4] In addition, the factual context was very different: multiple companies held essential patents in more than one potentially competing 3G technology. Oaktree has no intellectual property right requiring board membership on both Loews and Regal in the context of a patent pooling arrangement.

3. Oaktree cites congressional testimony by former Assistant Attorney General Ginsburg in 1986.[5] But that testimony was directed to the question whether Congress should amend Section 8 to establish minimum thresholds and did not purport to state a position on other Section 8 issues. The testimony had nothing to do with the liability of a business entity whose representatives serve as directors or officers of competing

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[3] U.S. Department of Justice, Antitrust Division, *Business Review Letter to 3G Patent Platform Partnership*, 6 Trade Reg. Rep. (CCH) ¶ 44,102 Letter 02-6 (Nov. 12, 2002).

[4] The letter specifies that "the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect."

[5] *The Interlocking Directorate Act of 1986: Hearing on S. 2163 Before the Senate Committee on the Judiciary*, 99th Cong., 13-23 (1986) [hereinafter *Hearing*] (Statement of D. Ginsburg, Assistant Attorney General, Antitrust Division).

corporations. The specific question that was asked by Senator Metzenbaum refers to the type of interlock in which competing corporations have individuals serving on a third company's board, a situation sometimes referred to as a "third company interlock." *Interlocking Directorates Under Section 8 of the Clayton Act*, *supra*, at 39. Such relationships raise different issues, from the standpoint of the statutory language and policy, than the kind of relationship alleged in this case. *See* Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 1304, at 334 (while third company interlock "might conceivably" facilitate antitrust violations, "deputization" situation threatens "serious anticompetitive consequences").[6]

[6] In any event, Assistant Attorney General Ginsburg did not even say that *all* "indirect interlocks" are outside the scope of Section 8, and in testimony not quoted by Oaktree he explained that the government would hesitate to intervene against indirect interlocks "*in the absence of any indication* that there is a competitive problem with such interlocks." *Hearing*, *supra* n.5, at 18 (emphasis added).

CONCLUSION

The United States takes no position on the sufficiency of the factual allegations in the complaint to state a claim upon which relief may be granted. The Section 8 claim, however, should not be dismissed on the ground that, as a matter of law, a business entity may not violate Section 8 through its deputized representatives' service as directors or officers of competing corporations.

Respectfully submitted.

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October 1, 2003

CERTIFICATE OF SERVICE

I hereby certify that today, October 1, 2003, I caused to be served, one copy of the foregoing Brief for the United States as Amicus Curiae, by Federal Express, overnight delivery, on:

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