UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. REGAL CINEMAS, INC., and CONSOLIDATED THEATRES HOLDINGS, GP, *Defendants*.	Civil Action No: 1:08-cv-00746 Judge: Leon, Richard J. Filed:

PLAINTIFF'S CERTIFICATE OF COMPLIANCE WITH THE ANTITRUST PROCEDURES AND PENALTIES ACT

The United States of America hereby certifies that it has complied with the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), and states:

1. The Complaint, proposed Final Judgment ("PFJ"), and Hold Separate Stipulation and Order ("Hold Separate Order"), by which the parties have agreed to the Court's entry of the Final Judgment following compliance with the APPA, were filed on April 29, 2008. The United States filed it Competitive Impact Statement on April 30, 2008;

2. Pursuant to 15 U.S.C. § 16(b), the PFJ, Hold Separate Order, and Competitive Impact Statement were published in the *Federal Register* on May 15, 2008, Volume 73, Number 95, beginning on page 28154 (a copy of which is attached as Exhibit 1);

3. Pursuant to 15 U.S.C. §16(b), the United States furnished copies of the

Complaint, Hold Separate Order, PFJ, and Competitive Impact Statement to anyone requesting them;

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the PFJ, Hold Separate Stipulation and Order, and Competitive Impact Statement was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, during a seven-day period of May 23 through May 29, 2008 (a copy of the Proof of Publication from *The Washington Post* is attached hereto as Exhibit 2);

5. As required by 15 U.S.C. § 16(g), defendant filed with the Court a description of written or oral communications by or on behalf of the defendant, or any other person, with any officer or employee of the United States concerning the PFJ, on May 5, 2008;

6. The 60-day comment period specified in 15 U.S.C. § 16(b) commenced on May 29, 2008 and terminated on July 28, 2008. During that period, the United States received two comments on the PFJ. The United States evaluated and responded to each comment and filed with the Court the comments and responses on September 24, 2008. Pursuant to 15 U.S.C. §§ 16(b) and (d), the United States published the comments and its responses in the Federal Register on October 21, 2008, Volume 73, Number 204, beginning on page 62543 (a copy of which is attached as Exhibit 3);

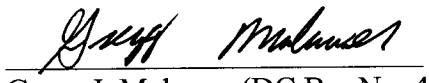
7. The public comments did not persuade the United States to withdraw its consent to entry of the PFJ. With the United States having published its proposed settlement, filed and published its responses to public comments, and the defendants having certified their presettlement contacts with government officials, the parties have fulfilled their obligations under the APPA. Pursuant to the Stipulation and Order filed on April 29, 2008, and entered by this Court on May 2, 2008, and 15 U.S.C. § 16(e), the Court may now enter the Final Judgment, if the

Court determines that the entry of the Final Judgment is in the public interest; and

8. Plaintiff requests that this Court enter the Final Judgment without further hearings and is authorized by counsel for defendants to state that defendants join in this request.

Dated: October 23, 2008.

Respectfully submitted,



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Antitrust Division, Litigation III Section
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CERTIFICATE OF SERVICE

I, Gregg I. Malawer, hereby certify that on October 23, 2008, I caused copies of the foregoing Certificate of Compliance with the Antitrust Procedures and Penalties Act to be served in this matter in the manner set forth below:

By electronic mail and certified mail:

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EXHIBIT 1

The Washington Post

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Department of Justice
Antitrust Division

Take notice that a proposed Final Judgment has been filed in a civil antitrust case, **United States of America v. Regal Cinemas, Inc. and Consolidated Theatres Holdings, GP**, Civil Action No. 08-00746. On April 29, 2008, the United States filed a Complaint alleging that the proposed merger of Regal Cinemas, Inc. and Consolidated Theatres Holdings, GP would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The proposed Final Judgment, filed the same time as the Complaint, requires the defendants to divest first-run, commercial movie theatres, along with certain tangible and intangible assets, in Asheville, Charlotte, and Raleigh, North Carolina. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, the industry, and the remedies available to private litigants who may have been injured by the alleged violation. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, N.W., Suite 1010, Washington, D.C. 20530, and on the Department of Justice's website (**www.usdoj.gov/atr**), and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, D.C.

Interested persons may address comments to John R. Read, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street N.W., Suite 4000, Washington, D.C. 20530 (telephone: 202-307-0468).

EXHIBIT 2

results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: May 9, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–10785 Filed 5–14–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Proposed Administrative Settlement Agreement and Order on Consent Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Notice is hereby given that on May 1, 2008, a proposed Settlement Agreement regarding the Asarco Hayden Plant Site in Hayden, Arizona was filed with the United States Bankruptcy Court for the Southern District of Texas in *In re Asarco LLC*, No. 05–21207 (Bankr. S.D. Tex.). The proposed Agreement, entered into by the United States Environmental Protection Agency, the Arizona Department of Environmental Quality, and Asarco LLC, provides, *inter alia*, that Asarco LLC will conduct environmental cleanup actions in Hayden and Winkelman, Arizona, including cleanup of residential areas and environmental investigative work at the Hayden Smelter.

The Department of Justice will receive comments relating to the proposed Agreement for a period of twenty (20) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In re Asarco LLC*, DJ Ref. No. 90–11–3–09141/4.

The proposed Agreement may be examined at the Region 9 Office of the United States Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California 94105. During the public comment period, the proposed Agreement may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the proposed Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $11.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert E. Maher, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–10820 Filed 5–14–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Regal Cinemas, Inc. and Consolidated Theatres Holdings, GP; Complaint, Proposed Final Judgment, and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 1 6(b)–(h), that a Complaint, proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the *United States District Court for the District of Columbia in States of America* v. *Regal Cinemas, Inc.* and Consolidated Theatres Holdings, GP, Civil Action No. 08–00746. On April 29, 2008, the United States filed a Complaint alleging that the proposed acquisition by Regal Cinemas, Inc. of Consolidated Theatres Holdings, GP, would violate Section 7 of the Clayton Act, 15 U.S.C. 18 by lessening competition for theatrical exhibition of first-run movies in Asheville, Charlotte, and Raleigh, North Carolina. The proposed Final Judgment, filed the same time as the Complaint, requires the defendants to divest first-run, commercial movie theatres, along with certain tangible and intangible assets, in those three geographic regions in order to proceed with the proposed $210 million transaction. A Competitive Impact Statement filed by the United States on April 30, 2008 describes the Complaint, the proposed Final Judgment, the industry, and the remedies available to private litigants who may have been injured by the alleged violation.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC in Suite 1010, 450 Fifth Street, NW., Washington, DC 20530, and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to John R. Read, Chief, Litigation III Section, Suite 4000, Antitrust Division, Department of Justice, 450 Fifth Street, NW., Washington, DC 20530, (telephone: 202 307–0468). At the conclusion of the sixty (60) day comment period, the U.S. District Court for the District of Columbia may enter the proposed consent decree upon finding that it serves the public interest.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. Regal Cinemas, Inc., and Consolidated Theatres Holdings, GP, Defendants.

Case: 1:08-cvOQ746.
Assigned To: Leon, Richard J.
Assign. Date: 4/29/2008.
Description: Antitrust.
Filed:

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this

civil antitrust action to enjoin the proposed merger of Regal Cinemas, Inc. and Consolidated Theatres, GP, and to obtain equitable relief. If the merger is permitted to proceed, it 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 merger would substantially lessen competition and tend to create a monopoly in the theatrical exhibition of commercial, first-run movies in the above listed markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

I. Jurisdiction and Venue

This action is filed by the United States pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to obtain equitable relief and to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

2. One defendant operates theatres in this District; the other attracts patrons from and advertises in this District. In addition, the distribution and exhibition of commercial, first-run films is a commercial activity that substantially affects, and is in the flow of, interstate trade and commerce. Defendant's activities in purchasing equipment, services, and supplies as well as licensing films for exhibitors substantially affect interstate commerce. The Court has jurisdiction over the subject matter of this action and jurisdiction over the parties pursuant to 15 U.S.C. 22, 25, and 26, and 28 U.S.C. 1331, 1337(a), and 1345.

3. Venue in this District is proper under 15 U.S.C. 22 and 28 U.S.C. 1391(c). In addition, defendants have consented to venue and personal jurisdiction in this judicial district.

II. Defendants and the Proposed Merger

4. Regal Cinemas, Inc. ("Regal") is a Tennessee corporation with its headquarters in Knoxville. Regal operates more than 6,400 screens at approximately 540 theatres in 39 states and the District of Columbia under the Regal, United Artists, Edwards, and Hoyts names.

5. Consolidated Theatres Holdings, GP, is a North Carolina partnership (hereinafter referred to as "Consolidated"). Consolidated operates 400 screens at 28 theatres in Georgia, Maryland, North Carolina, South Carolina, Tennessee, and Virginia, with additional theatres projected to open in the next few years, including the Biltmore Grande 15, which is scheduled to open in Asheville, North Carolina in August 2008.

6. On January 14, 2008, Regal and Consolidated signed a purchase and sale agreement. The deal is structured as an asset purchase, with Regal acquiring Consolidated for approximately $210 million.

III. Background of the Movie Industry

7. Theatrical exhibition of feature length motion picture films ("movies") provides a major source of out-of-home entertainment in the United States. Although they vary, ticket prices for movies tend to be significantly less expensive than many other forms of out-of-home entertainment, particularly live entertainment such as sporting events and live theatre.

8. Viewing movies in the theatre is a very popular pastime. Over 1.4 billion movie tickets were sold in the United States in 2007, with total box office revenue exceeding $9.7 billion.

9. Companies that operate movie theatres are called "exhibitors." Some exhibitors own a single theatre, whereas others own a circuit of theatres within one or more regions of the United States. Established exhibitors include AMC, Carmike, and Cinemark, as well as Regal and Consolidated.

10. Exhibitors set ticket prices for each theatre based on a number of factors, including the competitive situation facing each theatre, the age of the theatres, the prices of nearby, comparable theatres, the population demographics and density surrounding the theatre, and the number and type of amenities each theatre offers, such as stadium seating.

IV. Relevant Market

A. Product Market

11. Movies are a unique form of entertainment. 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).

12. Typically, viewing a movie at home lacks several characteristics of viewing a movie in a theatre, including the size of screen, the sophistication of sound systems, and the social experience of viewing a movie with other patrons. Additionally, the most popular, newly released or "first-run" movies are not available for home viewing. Movies are considered to be in their "first-run" during the four to five weeks following initial release in a given locality. If successful, a movie may be exhibited at other theatres after the first run as part of a second or subsequent run (often called a sub-run).

13. Reflecting the significant differences of viewing a movie in a theatre, ticket prices for movies are generally very different from prices for other forms of entertainment: Live entertainment is typically significantly more expensive than a movie ticket, whereas renting a DVD for home viewing is usually significantly cheaper than viewing a movie in a theatre. Going to the movies is a different experience from other forms of entertainment, and a small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run commercial movies would not cause a sufficient number of customers to shift to other forms of entertainment to make such a price increase unprofitable.

14. Reflecting the significant difference between viewing a newly released, first-run movie and an older sub-run movie, tickets at theatres exhibiting first-run movies usually cost significantly more than tickets at sub-run theatres. Movies exhibited at sub-run theatres are no longer new releases, and moviegoers generally do not regard sub-run movies as an adequate substitute for first-run movies and a small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run commercial movies would not cause a sufficient number of customers to switch to theatres exhibiting sub-run movies to make such a price increase unprofitable.

15. Art movies and foreign language movies are also not substitutes for commercial, first-run movies. Although art and foreign language movies appeal to some viewers of commercial movies, potential audience and demand conditions are quite distinct. For example, art movies tend to appeal more universally to mature audiences and art movie patrons tend to purchase fewer concessions. Exhibitors consider art theatre operations as distinct from the operations of theatres that exhibit commercial movies. Theatres that primarily exhibit art movies often contain auditoriums with fewer seats than theatres that primarily play commercial movies. Typically, art movies are released less widely than commercial movies. A small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run commercial movies would not cause a sufficient number of customers to switch to theatres exhibiting art movies to make such a price increase unprofitable.

16. Similarly, foreign language movies do not widely appeal to U.S. audiences. As a result, moviegoers do not regard foreign language movies as adequate substitutes for first-run, commercial

movies. A small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run movies would not cause a sufficient number of customers to switch to theatres exhibiting foreign language movies to make such a price increase unprofitable.

17. The relevant product market within which to assess the competitive effects of this merger is the exhibition of first-run, commercial movies.

B. Geographic Markets

18. Data show that moviegoers typically are not willing to travel very far from their homes to attend a movie. As a result, geographic markets for the exhibition of first-run, commercial movies are relatively local.

Charlotte, North Carolina Area

19. Regal and Consolidated account for the vast majority of first-run movie tickets sold in southern Charlotte, North Carolina ("Southern Charlotte"), an area which encompasses Consolidated's Philips 10 theatre, Consolidated's Arboretum 12, Regal's Crown Point 12 and Regal's Stonecrest 22 theatre. In this area, the only other theatres showing first-run, commercial movies are an independent five-plex stadium theatre and the AMC Carolina Pavilion 22, a stadium theatre.

20. Moviegoers who reside in Southern Charlotte are reluctant to travel significant distances out of that area to attend a movie except in unusual circumstances. A small but significant increase in the price of movie tickets in Southern Charlotte would not cause a sufficient number of moviegoers to travel out of Southern Charlotte to make the increase unprofitable. Southern Charlotte constitutes a relevant geographic market in which to assess the competitive effects of this merger.

Raleigh, North Carolina Area

21. Regal and Consolidated account for the vast majority of first-run movie tickets sold in Northern Raleigh, North Carolina ("Northern Raleigh"), which encompasses Regal's Brier Creek 14, Regal's North Hills 14, and Consolidated's Raleigh Grand. The only other theatres showing first-run, commercial movies in the Northern Raleigh area are the sloped-floor, six screen Six Forks and the 15-screen Carmike theatre with stadium seating.

22. Moviegoers who reside in Northern Raleigh are reluctant to travel significant distances out of their area to attend a movie except in unusual circumstances. A small but significant increase in the price of movie tickets in Northern Raleigh would not cause a sufficient number of moviegoers to travel out of Northern Raleigh to make the increase unprofitable. Northern Raleigh constitutes a relevant geographic market in which to assess the competitive effects of this merger.

23. Regal and Consolidated account for all of the first-run movie tickets sold in the suburb of Gamer to the south of Raleigh, North Carolina ("Southern Raleigh"), which encompasses Regal's Garner Towne Square 10 and Consolidated's White Oak 14. There are no other theatres showing first-run, commercial movies in Southern Raleigh.

24. Moviegoers who reside in Southern Raleigh are reluctant to travel significant distances out of their area to attend a movie except in unusual circumstances. A small but significant increase in the price of movie tickets in Southern Raleigh would not cause a sufficient number of moviegoers to travel out of Southern Raleigh to make the increase unprofitable. Southern Raleigh constitutes a relevant geographic market in which to assess the competitive effects of this merger.

Asheville, North Carolina Area

25. After the completion of Consolidated's Biltmore Grande 15 around August 2008, Regal and Consolidated will likely account for the vast majority of first-run movie tickets sold in the Asheville, North Carolina area ("Asheville"), which encompasses the area around Regal's Hollywood 14 and the developing site of Consolidated's Biltmore Grande 15. There are only two other non-Regal theatres showing first-run, commercial movies in Asheville—a Carmike theatre with 10 screens and a Fine Arts theatre with two screens.

26. Moviegoers in Asheville are reluctant to travel significant distances out of that area to attend a movie except in unusual circumstances. A small but significant increase in the price of movie tickets in Asheville would not cause a sufficient number of moviegoers to travel out of Asheville to make the increase unprofitable. Asheville constitutes a relevant geographic market in which to assess the competitive effects of this merger.

27. The exhibition of first-run, commercial movies in Southern Charlotte, Northern Raleigh, Southern Raleigh and Asheville each constitutes a relevant market (i.e., a line of commerce and a section of the country) within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

V. Competitive Effects

28. Exhibitors compete on multiple dimensions to attract moviegoers to their theatres over the theatres of their rivals. They compete over the quality of the viewing experience. They compete to offer the most sophisticated sound systems, best picture clarity, nicest seats with best views, and cleanest floors and lobbies for moviegoers. And, to gain market share, exhibitors seek to license the first-run movies that are likely to attract the largest numbers of moviegoers. Exhibitors also compete on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, children, etc.), moviegoers will begin to frequent their rivals.

29. In the geographic markets of Southern Charlotte, Northern and Southern Raleigh, and Asheville, Regal and Consolidated compete head-to-head for moviegoers. These geographic markets are very concentrated and in each market, Regal and Consolidated are the other's most significant competitor given their close proximity to one another and to local moviegoers, and from the perspective of such moviegoers, the relative inferiority in terms of location, size or quality of other theatres in the geographic markets. Their rivalry spurs each to improve the quality of the viewing experience and keeps prices in check.

30. In Southern Charlotte, the proposed merger would give the newly merged entity control of four of the six first-run, commercial theatres in that area, with 56 out of 83 total screens and a 75% share of 2007 box office revenues, which totaled approximately $17.1 million. Using a measure of market concentration called the Herfindahl-Hirschman index ("HHI"), explained in Appendix A, the merger would yield a post-merger HHI of approximately 6,058, representing an increase of roughly 2,535 points.

31. In Northern Raleigh, the proposed merger would give the newly merged entity control of three of the five first-run, commercial theatres in that area, with 44 of 65 total screens and 79% of 2007 box office revenues, which totaled approximately $11.6 million. The merger would yield a post-merger HHI of roughly 6,523, representing an increase of around 2,315 points.

32. In Southern Raleigh, the proposed merger would give the newly merged entity control of the only two theatres in this area. Therefore, the market share of the combined entity would be 100% of screens and 100% of 2007 box office revenues, which totaled $3.5 million. The merger would yield the highest post-merger HHI number possible—10,000, representing an increase of 3,167 points.

33. In Asheville, after the completion of the Biltmore Grand 15, the proposed merger would give the newly merged entity control of four of the six first-run, commercial theatres with 41 of 53 total screens. As measured by total screens only (since Consolidated does not yet have box office revenues in Asheville), the combined entity would have a market share of approximately 77% in Asheville. The merger would yield a post-merger HHI of roughly 6,355, representing an increase of 2,777 points.

Today, were Regal or Consolidated to increase ticket prices in any of the four geographic markets at issue and the others were not to follow, the exhibitor that increased price would likely suffer financially as a substantial number of its patrons would patronize the other exhibitor. After the merger, the newly combined entity would re-capture such losses, making price increases profitable that would have been unprofitable pre-merger. Thus, the merger is likely to lead to higher ticket prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting, e.g., for matinees, children, seniors, and students.

35. The proposed merger would also eliminate competition between Regal and Consolidated over the quality of the viewing experience in each of the geographic markets at issue. If no longer required to compete, Regal and Consolidated would have reduced incentives to maintain, upgrade, and renovate their theatres in the relevant markets, to improve those theatres' amenities and services, and to license the highest revenue movies, thus reducing the quality of the viewing experience for a moviegoer.

36. The presence of the other theatres offering first-run, commercial movies in certain of the relevant geographic markets would be insufficient to replace the competition lost due to the merger, and thus render unprofitable post-merger increases in ticket prices or decreases in quality by the newly merged entity. For various reasons, the other theatres in the relevant geographic markets offer less attractive options for the moviegoers that are served by the Regal and Consolidated theatres. For example, they are located further away from these moviegoers than are the Regal and Consolidated theatres, they are relatively smaller size or have fewer screens than the Regal and Consolidated theatres, or they offer a lower quality viewing experience than do the Regal and Consolidated theatres.

VI. Entry

37. The entry of a first-run, commercial movie theatre is unlikely in all of the relevant markets. Exhibitors are reluctant to locate new theatres near existing theatres unless the population density and demographics make new entry viable or the existing theatres do not have stadium seating. That is not the case here. Over the next two years, the demand for more movie theatres in the areas at issue is not likely to support entry of a new theatre. And all of these markets have or will soon have theatres with stadium seating. Thus, no new first-run, commercial theatres with the capability to reduce significantly the newly merged entity's market power are likely to open within the next two years in Southern Charlotte, Northern Raleigh, Southern Raleigh, or Asheville in response to an increase in movie ticket prices or a decline in theatre quality.

VII. Violation Alleged

38. The United States hereby reincorporates paragraphs 1 through 37.

39. The effect of the proposed merger would be to lessen competition substantially in Southern Charlotte, Northern Raleigh, Southern Raleigh and Asheville in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

40. The transaction would likely have the following effects, among others: (a) Prices for first-run, commercial movie tickets would likely increase to levels above those that would prevail absent the merger, and (b) quality of theatres and the theatre viewing experience in the geographic area would likely decrease absent the merger.

VIII. Requested Relief

41. The plaintiffs request: (a) Adjudication that the proposed merger would violate Section 7 of the Clayton Act; (b) permanent injunctive relief to prevent the consummation of the proposed merger and to prevent the defendants from entering into or carrying out any agreement, understanding or plan, the effect of which would be to combine the businesses or assets of defendants; (c) an award of the plaintiff of its costs in this action; and (d) such other relief as is proper.

Dated: April 29, 2008.

For Plaintiff United States of America.

David L. Meyer (DC Bar No. 414420), Acting Assistant Attorney General, Antitrust Division.

Patricia A. Brink, Deputy Director of Operations.

John R. Read, Chief, Litigation III.

Nina B. Hale, Assistant Chief, Litigation III.

Gregg I. Malawer (DC Bar No. 481685), Jennifer Wamsley (DC Bar No. 486540), Anne Newton Mcfadden.

Attorneys for the United States, United States Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 4000, Washington, DC 20530.

Exhibit A—Definition of HHI and Calculations for Market

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See Merger Guidelines § 1.51.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. Regal Cinemas, Inc. and Consolidated Theatres Holdings, GP, Defendants.

Civil Action No:
Judge:
Filed:

Final Judgment

Whereas, Plaintiff, United States of America filed its Complaint on April 29, 2008, the United States and Defendants, Regal Cinemas, Inc. ("Regal") and Consolidated Theatres Holdings, GP ("Consolidated"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

And whereas, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered. Adjudged and decreed*:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may he granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Theatre Assets.

B. "Regal" means Defendant Regal Cinemas Eric., a Tennessee corporation with its headquarters in Knoxville. Tennessee, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Consolidated" means defendant Consolidated Theatres Holdings, GP, a North Carolina Partnership, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Landlord Consent" means any contractual approval or consent that the landlord or owner of one or more of the Theatre Assets, or the property on which one or more of the Theatre Assets is situated, must grant prior to the transfer of one of the Theatre Assets to an Acquirer.

E. "Theatre Assets" means the first-run, commercial motion picture theatre businesses operated by Regal or Consolidated, under the following names and at the following locations:

Theatre name	Theatre address
i. Crown Point 12	9630 Monroe Road, Charlotte, NC 28270.
ii. Raleigh Grand 16 ..	4840 Grove Barton Road, Raleigh, NC 27613.
iii. Town Square 10 ...	2600 Timber Dr., Garner, NC 27529.
iv. Hollywood 14	1640 Hendersonville Rd, Asheville, NC 28803.

The term "Theatre Assets" includes:

1. All tangible assets that comprise the first-run, commercial motion picture theatre business including 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 Theatre Assets: All licenses, permits and authorizations issued by any governmental organization relating to the Theatre Assets; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the Theatre Assets, including supply agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to the Theatre Assets;

2. All intangible assets used in the development, production, servicing and sale of Theatre Assets, including, but not limited to all patents, licenses and sublicenses, intellectual property, technical information, computer software (except Defendants' proprietary software) and related documentation, know how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the Theatre Assets, provided, however, that this term does not include any right to use or interests in defendants' trademarks, trade names, service marks or service names, or copyrighted advertising materials.

III. Applicability

A. This Final Judgment applies to Regal and Consolidated, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Theatre Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment Defendants need not obtain such an agreement from the acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Theatre Assets in a manner consistent with this Final Judgment to an Acquirer(s) acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed ninety (90) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Theatre Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Theatre Assets. Defendants shall inform any person making inquiry regarding a possible purchase of the Theatre Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Theatre Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirers and the United States information relating to the personnel involved in the operation of the Theatre Assets to enable the Acquirers to make offers of employment. Defendants will not interfere with any negotiations by the Acquirers to employ any Defendant employee whose primary responsibility is the operation of the Theatre Assets.

D. Defendants shall permit prospective Acquirers of the Theatre Assets to have reasonable access to personnel and to make inspections of

the physical facilities of the Theatre Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to all Acquirers of the Theatre Assets that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation. or divestitures of the Theatre Assets. At the option of the Acquirers, Defendants shall enter into an agreement for products and services, such as computer support services, that are reasonably necessary for the Acquirer(s) to effectively operate the Theatre Assets during a transition period. The terms and conditions of any contractual arrangements meant to satisfy this provision must be commercially reasonable for those products and services for which the agreement is entered and shall remain in effect for no more than three months, absent approval of the United States, in its sole discretion.

G. Defendants shall warrant to the Acquirers that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Theatre Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Theatre Assets.

H. Unless the United States otherwise consents in writing, the divestitures made pursuant to Section IV, or by trustee appointed pursuant to Section V. of this Final Judgment, shall include the entire Theatre Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion that the Theatre Assets can and will be used by the Acquirers as part of a viable, ongoing business of first-run, commercial motion picture theatres. Divestitures of the Theatre Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Theatre Assets will remain viable and the divestitures of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) Shall be made to an Acquirer(s) that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of first-run, commercial motion picture theatres; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to compete effectively.

V. Appointment of Trustee

A. If Defendants have not divested the Theatre Assets within the time period specified in Section IV(A), Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestitures of the Theatre Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Theatre Assets. The trustee shall have the power and authority to accomplish the divestitures to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VII.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Theatre Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Theatre Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Theatre Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final

Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Landlord Consent

A. If Defendants are unable to effect the divestitures required herein due to the inability to obtain the Landlord Consent for any of the Theatre Assets, Defendants shall divest alternative Theatre Assets that compete effectively with the theatre for which the Landlord Consent was not obtained. The United States shall, in its sole discretion, determine whether such theatre competes effectively with the theatre for which landlord consent was not obtained.

B. Within five (5) business days following a determination that Landlord Consent cannot be obtained for one of the Theatre Assets, Defendants shall notify the United States and propose an alternative divestiture pursuant to Section VI(A). The United States shall have then ten (10) business days in which to determine whether such theatre is a suitable alternative pursuant to Section VI(A). If the Defendants' selection is deemed not to be a suitable alternative, the United States shall in its sole discretion select the theatre to be divested.

C. If the trustee is responsible for effecting the divestitures, it shall notify both the United States and the Defendants within five (5) business days following a determination that Landlord Consent can not be obtained for one of the Theatre Assets. Defendants shall thereafter have five (5) business days to propose an alternative divestiture pursuant to Section VI(a). The United States shall have then ten (10) business days in which to determine whether such theatre is a suitable alternative pursuant to Section VI(A). If the Defendants' selection is deemed not to be a suitable competitive alternative, the United States shall in its sole discretion select the theatre to be divested.

VII. Notice of Proposed Divestitures

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States of any proposed divestitures required by Sections IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Theatre Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures may be consummated, subject only to Defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VIII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

IX. Hold Separate

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

X. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Sections IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Theatre Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Theatre Assets, and to provide required information to prospective purchasers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Theatre Assets until one year after such divestitures have been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents

in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States, to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. Notification

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), defendants, without providing advance notification to the Department of Justice, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in the business of first-run, commercial theatres in Mecklenburg County, North Carolina; Wake County, North Carolina; and Buncombe County, North Carolina during a ten-year period. This notification requirement shall apply only to the acquisition of any assets or any interest in the business of first-run, commercial motion picture theatres at the time of the acquisition and shall not be construed to require notification of acquisition of interest in new theatre developments or of assets not being operated as first-run commercial motion picture theatre businesses, provided, that this notification requirement shall apply to first-run, commercial theatres under construction at the time of the entering of this Final Judgment.

Such notification shall be provided to the Department of Justice in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested iii Items 5 through 9 of the instructions must be provided only about first-run, commercial theatres. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until thirty (30) days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XIII. No Reacquisition

Defendants may not reacquire any part of the theatre assets divested under this Final Judgment during the term of this Final Judgment.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. Regal Cinemas, Inc., and Consolidated Theatres Holdings, GP, Defendants.

Civil Action No: 1:08–cv–00746.
Judge: Leon, Richard J.
Filed: April 30, 2008.

Competitive Impact Statement

Plaintiff, the United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On January 14, 2008, Defendant Regal Cinemas, Inc. ("Regal") agreed to acquire Defendant Consolidated Theatres Holdings, GP ("Consolidated") for approximately $210 million. The United States filed a civil antitrust complaint on April 29, 2008, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, 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 likely effect of this acquisition 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. 18.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Regal and Consolidated are required to divest four theatres located in Charlotte, Raleigh and Asheville to acquirers acceptable to the United States.

Under the terms of the Hold Separate, Defendants will take certain steps to ensure that four theatres to be divested will be maintained and operated as economically viable and ongoing business concerns.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Regal, a Tennessee corporation, is currently the nation's largest movie theatre operator. Regal operates more than 6,400 screens at approximately 540 theatres in 39 states and the District of Columbia under the Regal, United Artists, Edwards, and Hoyts names, with revenues of approximately $2.6 billion in 2007.

Consolidated, a North Carolina partnership, operates 400 screens at 28 theatres in Georgia, Maryland, North Carolina, South Carolina, Tennessee, and Virginia, with additional theatres projected to open in the next few years, including the Biltmore Grande 15 in Asheville, which will open about August 2008. For fiscal year 2007, Consolidated generated revenues of approximately $144 million.

On January 14, 2008, Regal and Consolidated signed a purchase and sale agreement. The deal is structured as an asset purchase, with Regal acquiring Consolidated for approximately $210 million.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies

The Complaint alleges that the theatrical exhibition of first-run, commercial films in each of Southern Charlotte, Northern and Southern Raleigh, and Asheville, North Carolina constitutes a line of commerce and a relevant market for antitrust purposes.

1. The Relevant Product and Geographic Markets

The Complaint alleges that the relevant product market within which to assess the competitive effects of this merger is the exhibition of first-run, commercial movies. According to the Complaint, the experience of viewing a film in a theatre is an inherently different experience from other forms of entertainment, such as a live show, a sporting event, or viewing a movie in the home (e.g., on a DVD or via pay-per-view). Reflecting the significant differences of viewing a movie in a theatre, ticket prices for movies are generally very different from prices for other forms of entertainment: Live entertainment is typically significantly more expensive than a movie ticket, whereas renting a DVD for home viewing is usually significantly cheaper than viewing a movie in a theatre. The Complaint also alleges that a small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run commercial movies would not cause a sufficient number of customers to shift to other forms of entertainment to make such a price increase unprofitable.

The Complaint alleges that moviegoers generally do not regard sub-run movies, art movies, or foreign language movies as an adequate substitute for first-run movies and would not switch to sub-run movies, art movies, or foreign language movies if the price of viewing first-run movies was increased by a small but significant amount. Although sub-run, art and foreign language movies appeal to some viewers of commercial movies, potential audience and demand conditions are quite distinct. Exhibitors consider sub-run, art, and foreign language theatre operations as distinct from the operations of theatres that exhibit commercial movies. A small but significant post-acquisition increase in ticket prices, or reduction in discounts, for first-run commercial movies would not cause a sufficient number of customers to switch to theatres exhibiting sub-run, art, or foreign language movies to make such a price increase unprofitable. The Complaint alleges that the relevant geographic markets in which to measure the competitive effects of this merger are the parts of metropolitan areas identified as Southern Charlotte, Northern Raleigh, Southern Raleigh and Asheville.

According to the Complaint, the Southern Charlotte area encompasses Consolidated's Philips Place 10 theatre, Consolidated's Arboretum 12, Regal's Crown Point 12 and Regal's Stonecrest 22 theatre. In this area, the only other theatres showing first-run, commercial movies are an independent five-plex stadium theatre and the AMC Carolina Pavilion 22, a stadium theatre.

The Northern Raleigh area encompasses Regal's Brier Creek 14, Regal's North Hills 14, and Consolidated's Raleigh Grand. The only other theatres showing first-run, commercial movies in the Northern Raleigh area are the sloped-floor, six screen Six Forks and the 15-screen Carmike theatre with stadium seating.

The Southern Raleigh area consists of the suburb of Garner to the south of Raleigh and encompasses Regal's Garner Towne Square 10 and Consolidated's White Oak 14. There are no other theatres showing first-run, commercial movies in Southern Raleigh.

The Asheville area encompasses Regal's Hollywood 14 and the developing site of Consolidated's Biltmore Grande 15, which is scheduled to open in August of 2008. There are only two other non-Regal theatres showing first-run, commercial movies in Asheville—a Carmike theatre with 10 screens and a Fine Arts theatre with two screens.

According to the Complaint, moviegoers who reside in each of these areas are reluctant to travel significant distances out of that area to attend a movie except in unusual circumstances and would not do so in sufficient numbers to make a small but significant price increase unprofitable. As a consequence, each of these areas is a relevant geographic market in which to assess the competitive effects of the merger.

2. Competitive Effects in the Relevant Markets

The Complaint alleges that companies that operate first-run, commercial movie theatres (known as exhibitors) compete on multiple dimensions. They compete over the quality of the viewing experience. They compete to offer the most sophisticated sound systems, best picture clarity, nicest seats with best views, and cleanest floors and lobbies for moviegoers. Exhibitors also seek to license the first-run movies that are likely to attract the largest numbers of moviegoers. Exhibitors also compete on price,[1] knowing that if they charge too

[1] An example of such price competition occurred in 2006 in Southern Raleigh when Consolidated opened the White Oak 14, a stadium theatre. Regal's

much (or do not offer sufficient discounted tickets for matinees, seniors, children, etc.), moviegoers will choose to view movies at rival theatres.

According to the Complaint, the proposed merger is likely to lead to higher ticket prices for moviegoers in each of the relevant markets. The merger would also 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 revenues movies, thus reducing the quality of the viewing experience. The Complaint alleges these outcomes are likely because, in each of the relevant markets, Regal and Consolidated are each other's most significant competitor, given their close proximity to one another and to moviegoers.

In Southern Charlotte, the proposed merger would give the newly merged entity control of four of the six first-run, commercial theatres in that area, with 56 out of 83 total screens and a 75% share of 2007 box office revenues, which totaled approximately $17.1 million. Using a measure of market concentration called the Herfmdahl-Hirschman Index ("HHI"), explained in Appendix A, the merger would yield a post-merger HHI of approximately 6058, representing an increase of roughly 2535 points.

In Northern Raleigh, the proposed merger would give the newly merged entity control of three of the five first-run, commercial theatres in that area, with 44 of 65 total screens and 79% of 2007 box office revenues, which totaled approximately $11.6 million. The merger would yield a post-merger HHI of roughly 6523, representing an increase of around 2315 points.

In Southern Raleigh, the proposed merger would give the newly merged entity control of the only two theatres in this area. Therefore, the market share of the combined entity would be 100% of screens and 100% of 2007 box office revenues, which totaled $3.5 million. The merger would yield the highest post-merger HHI number possible, 10,000, representing an increase of 3167 points.

In Asheville, after the completion of the Biltmore Grand 15, the proposed merger would give the newly merged entity control of four of the six first-run, commercial theatres with 41 of 53 total screens. As measured by total screens only (since Consolidated does not yet have box office revenues in Asheville), the combined entity would have a market share of approximately 77% in Asheville. The merger would yield a post-merger HHI of roughly 6,355, representing an increase of 2,777 points.

In each of these markets today, were Regal or Consolidated to increase ticket prices and the other were not to follow, the exhibitor that increased price would likely suffer financially as a substantial number of its patrons would patronize the other exhibitor's theatre. After the merger, the newly combined entity would re-capture such losses, making price increases profitable that would have been unprofitable pre-merger. Likewise, the proposed merger would also eliminate competition between Regal and Consolidated over the quality of the viewing experience at their theatres in each of the geographic markets at issue.

The Complaint explains that the presence of the other theatres offering first-run, commercial movies in certain of the relevant geographic markets would be insufficient to replace the competition lost due to the merger, and thus render unprofitable post-merger increases in ticket prices or decreases in quality by the newly merged entity. For various reasons, the other theatres in the relevant geographic markets offer less attractive options for the moviegoers that are served by the Regal and Consolidated theatres. For example, they are located further away from these moviegoers than are the Regal and Consolidated theatres, they are a relatively smaller size or have fewer screens than the Regal and Consolidated theatres, or they offer a lower quality a viewing experience than do the Regal and Consolidated theatres.

Finally, the Complaint alleges that the entry of a first-run, commercial movie theatre in response to an increase in movie ticket prices or a decline in theatre quality is unlikely in all of the relevant markets. Exhibitors are reluctant to locate new theatres near existing theatres unless the population density and demographics makes new entry viable or the existing theatres do not have stadium seating. That is not the case in any of the relevant markets. Over the next two years, the demand for more movie theatres in the areas at issue is not likely to support entry of a new theatre. And all of these markets have or will soon have theatres with stadium seating.

For all of these reasons, the United States has concluded that the proposed transaction would lessen competition substantially in the exhibition of first-run, commercial films in Southern Charlotte, Northern and Southern Raleigh, and Asheville, eliminate actual and potential competition between Regal and Consolidated, and likely result in increased ticket prices and lower quality theatres in those markets. The proposed merger therefore violates of Section 7 of the Clayton Act.

III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisitions in Southern Charlotte, Northern and Southern Raleigh, and Asheville by establishing new, independent, and economically viable competitors. The proposed Final Judgment requires Regal and Consolidated, within ninety (90) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the court, whichever is later, to divest, as viable ongoing businesses, a total of four theatres in three metropolitan areas: Crown Point 12 (Southern Charlotte); the Raleigh Grand 16 (Northern Raleigh); Town Square 10 (Southern Raleigh); and Hollywood 14 (Asheville). Sale of these theatres will thus preserve existing competition between the defendants' theatres that are or would have been each others' most significant competitor in the theatrical exhibition of first-run films in Southern Charlotte, Northern and Southern Raleigh, and Asheville. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the theatres can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively as first-run commercial theatres. Defendants must use their best efforts to accomplish the divestiture quickly and shall cooperate with prospective purchasers. Until the divestitures take place, Regal and Consolidated must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. Until the divestitures take place, Regal and Consolidated must not transfer or reassign to other areas within the company their employees with primary responsibility for the operation of the Theatre Assets, except for transfer bids initiated by employees pursuant to Defendants' regular, established job posting policy.

In the event that Defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is

Towne Square theatre in Southern Raleigh is an older sloped-floor theatre located approximately five miles away. After the White Oak 14 opened, the Towne Square theatre decreased its adult admission price substantially.

appointed, the proposed Final Judgment provides that Regal and Consolidated will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States, setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

If Defendants or trustee are not able to obtain a landlord's consent to sell one of the theatres to be divested, Section VI of the proposed Final Judgment permits Defendants to propose an alternative theatre to be divested. The United States shall determine whether the theatre offered competes effectively with the theatre that could not be divested due to a failure to obtain landlord consent. This provision will insure that any failure by Defendants to obtain landlord consent by Defendants does not thwart the relief obtained in the proposed Final Judgment.

The proposed Final Judgment also prohibits Defendants from acquiring any other theatres in Mecklenburg County, North Carolina; Wake County, North Carolina; and Buncombe County, North Carolina without providing at least thirty (30) days notice to the United States Department of Justice. Such acquisitions could raise competitive concerns but might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Antitrust Division/Litigation III, United States Department of Justice, 450 5th Street, NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Regal's merger with Consolidated. The United States is satisfied, however, that the divestiture of assets and other relief described in the proposed Final Judgment will preserve competition for the exhibition of first-run, commercial films in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(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)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.C. 2007) (assessing public interest standard under the Tunney Act).[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

[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); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review.

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 145862. 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; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). 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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, 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." *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).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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 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, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[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 Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney 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). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.[4]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 30, 2008.

Respectfully submitted,

Gregg I. Malawer (DC Bar No. 481685), Jennifer A. Warnsley (DC Bar No. 486540), Anne Newton McFadden, U.S. Department of Justice Antitrust, Division 450 S Street, NW., Suite 4000, Washington, DC 20530, (202) 514–0230, Attorneys for Plaintiff the United States.

Exhibit A—Definition of HHI and Calculations for Market

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in

[3] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the IAPPA] 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'").

[4] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) section 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. *See Merger Guidelines* 1.51.

[FR Doc. E8–10415 Filed 5–14–08; 8:45 am]
BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of April 28 through May 2, 2008.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. *Section (a)(2)(A) all of the following must be satisfied:*

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. *Section (a)(2)(B) both of the following must be satisfied:*

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. *One of the following must be satisfied:*

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–62,987; Mahle Clevite, Inc., Muskegon, MI: March 7, 2007.

TA–W–63,143; Powermate Corporation, Kearney, NE: April 4, 2007.

TA–W–63,199; Air Products and Chemicals, Inc., Morrisville, PA: April 10, 2007.

TA–W–62,762; Pembrook Chair Corporation, Claremont, NC: May 2, 2010.

TA–W–63,034; Phoenix Sewing, Equity Management Group Division, Fort Wayne, IN: March 18, 2007.

TA–W–63,035; Summit Productions, Equity Management Group Division, Fort Wayne, IN: March 18, 2007.

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),

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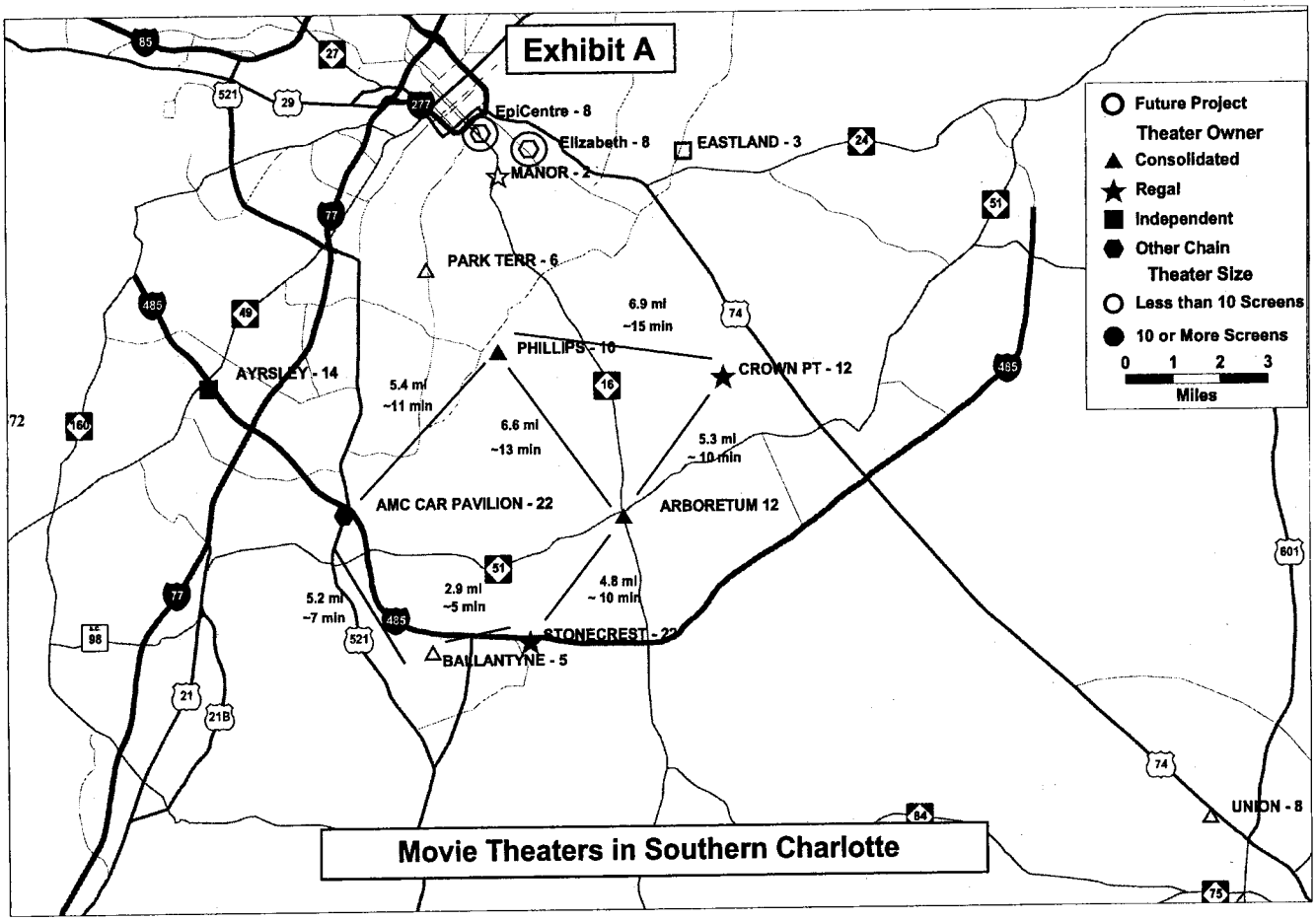

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Appendix

A

June 26, 2008

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

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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B

Sent: Tuesday, July 22, 2008 12:01 PM

To: Malawer, Gregg
Cc: Wamsley, Jennifer
Subject: Regal—Consolidated Merger

July 22, 2008
Delivery Via E-mail & Overnight
John R. Read, Chief,

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,

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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.

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.

[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.

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,

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