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UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and STATE OF NEW YORK, by and through its Attorney General Dennis C. Vacco, and STATE OF ILLINOIS, by and through its Attorney General Jim Ryan, PLAINTIFFS, v. SONY CORPORATION OF AMERICA and LTM HOLDINGS, INC. d/b/a LOEWS THEATRES, and CINEPLEX ODEON CORPORATION, and J. E. SEAGRAM CORP. DEFENDANTS.	Case No. 98-CIV-2716 (Judge Pollack) Filed: April 17, 1998

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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

Plaintiffs the United States, the State of New York, and the State of Illinois filed a civil antitrust Complaint on April 16, 1998, alleging that a proposed merger of LTM Holdings, Inc. ("Loews") and Cineplex Odeon Corp. ("Cineplex") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Loews and Cineplex both operate motion picture theatres throughout the United States, and that they each operate first-run motion picture theatres in Manhattan and Chicago. The merger would combine the two leading theatre circuits in both Manhattan and Chicago and give the newly merged firm a dominant position in both localities: in Manhattan, the newly merged firm would have a 67% market share (by revenue) and in Chicago, the newly merged firm would have a 77% market share (by revenue). As a result, the combination would substantially lessen competition and tend to create a monopoly in the markets for theatrical exhibition of first-run films in both Manhattan and Chicago.

The prayer for relief seeks: (a) an adjudication that the proposed merger described in the Complaint would violate Section

7 of the Clayton Act; (b) permanent injunctive relief preventing the consummation of the transaction; (c) an award to each plaintiff of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits Loews to complete its merger with Cineplex, yet preserves competition in the markets in which the transactions would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.

The proposed Final Judgment orders Loews and Cineplex to divest 14 theatres in Manhattan and 11 theatres in the Chicago area to an acquirer acceptable to the United States. Unless the United States grants a time extension, the divestitures must be completed within one-hundred and eighty (180) calendar days after the filing of the Complaint in this matter or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later.

If the divestitures are not completed within the divestiture period, the Court, upon application of the United States, is to appoint a trustee selected by the United States to sell the assets. The proposed Final Judgment also requires that, until the divestitures mandated by the Final Judgment have been accomplished, the defendants must maintain and operate the 25 theatres to be divested as active competitors, maintain the management, staffing, sales, and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. Further, the proposed Final Judgment requires defendants to give the United States prior notice regarding future motion picture theatre acquisitions in Manhattan or Cook County, Illinois.

The plaintiffs and the 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. THE ALLEGED VIOLATIONS

A. The Defendants

Sony Corporation of America is a New York corporation with its headquarters in New York, New York.

LTM Holdings, Inc. is a Delaware corporation which does business under the name Loews Theatres and has its principal executive offices in New York, New York. Loews is an indirect wholly owned subsidiary of Sony Pictures Entertainment Inc., itself an indirect wholly owned subsidiary of Sony Corporation of America, which in turn is an indirect wholly owned subsidiary of Sony Corporation, a Japanese company. Loews currently operates 139 theatres with 1,035 screens in 16 states. Its annual revenues for the fiscal year ending February 28, 1997 were approximately $375 million.

Cineplex is a Canadian corporation headquartered in Toronto, Ontario. It currently operates a total of 312 theatres with 1,723 screens in the United States, Canada and Hungary. Its United States operations consist of 911 screens at 175 locations in 13 states and the District of Columbia. Cineplex had annual revenues of approximately $500 million in 1996.

J. E. Seagram Corp. is a Delaware corporation headquartered in New York, New York. Its subsidiary, Universal Studios, Inc., is the largest shareholder of Cineplex.

B. <u>Description of the Events Giving Rise to the Alleged Violations</u>

On September 30, 1997, Sony Pictures Entertainment Inc., LTM Holdings, Inc. and Cineplex entered into a merger agreement. Pursuant to the agreement, Cineplex will become a wholly owned subsidiary of LTM Holdings, Inc., and Sony Pictures Entertainment will transfer all of its U.S. theatre assets not owned by LTM

Holdings, Inc. to LTM Holdings, Inc. or its subsidiaries. LTM Holdings, Inc. will then be renamed Loews Cineplex Entertainment Corporation ("LCE"). Following the merger, Sony Pictures Entertainment Inc. will own approximately 51% of LCE and Universal Studios, Inc. will own approximately 26% of LCE.

Loews and Cineplex compete in the theatrical exhibition of first-run films in Manhattan and Chicago: they compete to obtain films from film distributors and to attract movie-goers to their theatres. The proposed merger, and the threatened loss of competition that would be caused thereby, precipitated the government's suit.

C. Anticompetitive Consequences of the Proposed Transaction

The Complaint alleges that the theatrical exhibition of first-run films in Manhattan and Chicago each constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. First-run films differ significantly from other forms of entertainment. The experience of viewing a film in a theatre is an inherently different experience from a live show, a sporting event, or viewing a videotape in the home. Ticket prices for first-run films are also generally very different than for other forms of entertainment. A small but significant increase in the price of tickets for first-run films would not cause a sufficient shift to other forms of entertainment to make the increase unprofitable.

From a movie-goer's standpoint, theatres outside Manhattan and Chicago are not acceptable substitutes for theatres within those areas. A small but significant increase in the price of tickets for first-run films would not cause a sufficient shift to theatres outside Manhattan or Chicago to make the increase unprofitable.

From a distributor's standpoint, there is no alternative to screening its first-run films in first-run theatres. Given the high population densities and number of significant critics in both Manhattan and Chicago, "passing" (i.e., not playing a film in) Manhattan and Chicago is not a viable option. From the distributor standpoint as well, a small but significant decrease in prices (i.e., a decrease in film rental fees) would not cause a sufficient shift by distributors to other locations to make the decrease unprofitable to exhibitors.

The Complaint alleges that the merger of Loews and Cineplex would lessen competition substantially and tend to create a monopoly in the markets for exhibition of first-run films in Manhattan and Chicago. The proposed transaction would create further market concentration in already highly concentrated markets, and the merged firm would control a majority of box office revenues in those markets. In Manhattan, the market share possessed by the largest theatre circuit would rise from 46% percent to 67% percent of box office revenues after the proposed transaction. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Appendix A, the merged firm's post-transaction HHI in Manhattan would be 4815, representing an increase of 1911 points. In Chicago, the market share possessed by the largest theatre circuit would rise from 47% percent to 77% percent of box office revenues after the proposed transaction. The post-transaction HHI would equal 6438, representing an increase of 2874 points. These substantial increases in concentration would likely lead the merged firm to raise ticket prices.

Distributors and exhibitors often break the Manhattan and Chicago markets into "zones" that reflect various neighborhoods--such as, in Manhattan, the Upper East Side, the East Side, the West Side, Broadway-Times Square, Chelsea, and Greenwich Village, and in Chicago, Downtown, Near North, North, Far North, West, South, and Far South. Movies typically will open and play at only one theatre within a zone. The merger would convert a number of film zones in which Loews and Cineplex compete with each other into zones in which there would be no competition. For instance, in the downtown Chicago zone, the combined entity would control all seven theatres. The same is true in the north zone (Old Orchard/Orchard Gardens), the west zone (Bricktown Square/Norridge) and the far south zone (River Run/River Oaks).

By reducing non-price competition, the merger would also likely lead to lower quality theatres by reducing the incentive to maintain, upgrade and renovate theatres in Manhattan and Chicago, thus reducing the quality of the viewing experience for a movie-goer. It also may allow the merged entity to reduce the number of shows as there no longer would be competitive pressure to continue early and late shows.

Finally, the merger would also likely lead to distributors receiving less in revenue for the exhibition of their pictures, either in the form of reduced (or eliminated) guarantees, higher overhead allowances for the exhibitors, or a less favorable percentage of the box office receipts. The reduced revenue remitted to the distributors could lead to fewer films being produced, or less money being expended on high quality films, to the ultimate detriment of movie-goers.

New entry into the Manhattan and Chicago markets for exhibition of first-run films would be highly unlikely to eliminate the anticompetitive effects of this transaction. Manhattan and Chicago are two of the most difficult markets in the country to enter: available theatre sites are scarce, real estate and construction costs are among the highest in the nation, and acquiring the necessary permits and approvals can be difficult and time-consuming. Identifying a site, planning the development, and constructing a theatre in Manhattan or Chicago takes several years.

For all of these reasons, plaintiff has concluded that the proposed transaction would lessen competition substantially in the exhibition of first-run films in Manhattan and Chicago, eliminate actual and potential competition between Loews and Cineplex, and likely result in increased ticket prices and lower quality theatres in both Manhattan and Chicago. The merger would also likely reduce the rental fees paid to distributors for films. The proposed merger therefore violates of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve existing competition in the theatrical exhibition of first-run films in both Manhattan and Chicago. It requires the divestiture of 14 theatres in Manhattan: 13 Cineplex theatres (Chelsea, Chelsea

West, 1st and 62nd, Ziegfeld, Park & 86th Street, Waverly Twin, Olympia, Art Greenwich, Metro Twin, Beekman, Regency, 62nd & Broadway, and 59th Street East) and one Loews theatre (34th Street Showplace); and 11 theatres in the Chicago area: 8 Cineplex Odeon theatres (600 North Michigan, 900 North Michigan, Biograph, Bricktown, Watertower 1-4, Watertower 5-7, Burnham Plaza, and Broadway) and 3 Loews theatres (Hyde Park Quad, River Run Eightplex, and Old Orchard Quad). The divested theatres constitute slightly more in box office revenue in Manhattan and in Chicago than the leading firm is acquiring in each market and, as a result, will reduce the leading firm's share back to (or actually slightly less than) pre-merger levels in both markets. The divestitures will preserve choices for distributors and movie-goers and make it less likely that ticket prices will increase, rental fees paid to distributors will decrease, and theatre quality will decline in Manhattan and Chicago as a result of the transaction.

Two of the divestitures in the Chicago area are outside of the city limits: Old Orchard Quad and the River Run Eightplex. In a case like this, where theatres are geographically differentiated and consumers' willingness to travel is varied, some movie-goers near the border have options outside the city limits. Accordingly, we have negotiated relief that includes two theatres outside of Chicago. Both of these theatres are in close proximity to the city, are near major highways, and are in zones that would be rendered non-competitive by the merger.

Unless the United States grants an extension of time, the divestitures must be completed within one-hundred and eighty (180) calendar days after the filing of the Complaint in this matter or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. Until the divestitures take place, Loews and Cineplex must maintain and operate the 25 theatres to be divested as active competitors, maintain the management, staffing, sales, and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations.

The divestitures must be to a purchaser or purchasers acceptable to the United States in its sole discretion, after consultation with the State of New York or the State of Illinois as appropriate. Unless the United States otherwise consents in writing, the divestitures shall include all the assets of the theatres being divested, and shall be accomplished in such a way as to satisfy the United States that such assets can and will be used as viable, ongoing first-run theatres.

If defendants fail to divest these theatres within the time periods specified in the Final Judgment, the Court, upon application of the United States, is to appoint a trustee nominated by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Loews and Cineplex will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of the theatres remaining to be divested, 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 they are accomplished. After appointment, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee has not accomplished the divestitures within six (6) 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. At the same time the trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment also prohibits the defendants from acquiring any other theatres in Manhattan or Cook County, Illinois without providing at least thirty (30) days' notice to the U.S. Department of Justice. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise 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 attorneys' 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 <u>prima facie</u> effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that plaintiff 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 plaintiff 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. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division

United States Department of Justice
1401 H Street, NW; Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that 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

Plaintiff United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. Plaintiff is satisfied, however, that the divestiture of the Manhattan theatre assets and the Chicago theatre assets and other relief contained in the proposed Final Judgment will preserve viable competition in the first-run exhibition of motion pictures in Manhattan and Chicago. Thus, the proposed Final Judgment would achieve the relief the government might 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 PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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).

As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, 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 United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[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."[1] Rather,

> [a]bsent 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

> the 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.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for 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.' "[3]

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[2] Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (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'") (citations omitted).

[3] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United

This is strong and effective relief that should fully address the competitive harm posed by the proposed transaction.

VIII. DETERMINATIVE DOCUMENTS

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

Dated: April 16, 1998

Respectfully submitted,

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States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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.

Certificate of Service

I, Allen P. Grunes, hereby certify that on April 16, 1998, I caused the foregoing document to be served on defendants by having a copy mailed, first-class, postage prepaid, to:

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