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:

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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

---

[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.

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

---

[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).

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.

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 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*

---

[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.

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 in 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 Commc'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]

---

[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 movie-goers 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.

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 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.

---

[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.

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,

_____/s/_____
Gregg I. Malawer (DC Bar No. 481685)
Anne Newton McFadden
U.S. Department of Justice Antitrust Division
450 5th Street, N.W., Suite 4000
Washington, DC 20530
(202) 514-0230
Attorneys for Plaintiff the United States