Comments from Harkins Theatres to Department of Justice Antitrust Division ("DOJ") With Respect to Paramount Decrees

INTRODUCTION

Harkins Theatres ("Harkins") is an independent movie theater company headquartered in Scottsdale, Arizona. Harkins submits the following in response to DOJ's request for comments regarding potential termination or modification of the Paramount Decrees that have applied to prevent certain anticompetitive practices challenged by DOJ in critical movie industry antitrust litigation cases. Harkins is aware of separate comments in this matter submitted by Marcus Theatres and endorses those comments. Harkins also is aware of comments submitted by the National Association of Theatre Owners (" NATO") and supports those comments.

The key legal principles on which the Paramount Decrees are based arise from Supreme Court case law[1] that has been cited and relied upon extensively in private movie industry antitrust litigation since that time. Litigation of these Supreme Court cases also led to consent decrees with leading movie industry companies Paramount Pictures, Inc., Twentieth Century-Fox Corporation, Columbia Pictures Corporation (Sony), Universal Pictures, United Artists, Warner Brothers Pictures, and Loew's (MGM) ("Decrees"). These Decrees established a federal court supervised process for enforcing certain standards designed to prevent anticompetitive conduct in the business of licensing movies for play in theaters. The Decrees of course did not overrule, replace, or modify the related Supreme Court case law.

The issue now being explored by DOJ, and the related questions being asked involve the issue of whether the Decrees continue to serve any useful purpose in the movie distribution and

[1] *See, e.g., United States v. Paramount*, 334 U.S. 131(1948); *Schine v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948).

exhibition industry to deter anticompetitive practices. Harkins submits that the answer is emphatically "yes." The Decrees do still serve a vital and necessary purpose in addressing continued anticompetitive practices of the sort that led to the critical Supreme Court decisions. These anticompetitive practices addressed by the Decrees are made more threatening to Harkins and its moviegoers by the increased concentration at the distribution level of the theatrical movie business.

The discussion below presents four key conclusions relating to questions DOJ is asking:

- The core anticompetitive problems addressed by the Decrees have become more serious because of increased concentration and accompanying antitrust conduct issues at the distribution level. These continuing anticompetitive problems require enforcement of the provisions in the Decrees restricting vertical integration and prohibiting circuit dealing, resale price maintenance and block booking.

- The brunt of attempted enforcement of the principles set forth in Supreme Court case law in recent years has fallen primarily to private plaintiffs who lack the vastly greater combined litigation resources of the three dominant theater circuits and the major distributors, which are now enormous media conglomerates.

- Termination of the Paramount Decrees would make the anticompetitive problems in the theatrical movie business worse. Harkins therefore urges DOJ not to take steps to terminate the Decrees.

- If despite the comments and recommendations from NATO, Harkins, and other independent exhibitors DOJ does act to terminate the Decrees, Harkins urges DOJ to make clear that any such action is not intended to express any reservations regarding the legal principles expressed in the Supreme Court movie industry antitrust cases.

DISCUSSION

Harkins' Unique Antitrust History

This matter is of special relevance and importance to Harkins Theatres, as the very existence and rapid growth of this fifth largest United States movie theater circuit arises from enforcement of the antitrust laws. In the mid-1970's the Harkins chain, then limited to only eight screens at five theatres in the Phoenix area, was insolvent and nearly out of business as a result of discrimination by the major studios in favor of the dominant theater circuits. In 1977, Harkins

sued all the major studios and the largest theater circuits for violation of the antitrust laws through the discriminatory distribution of films in a manner systematically and unlawfully favoring the largest circuits over independent theatre operators.

One of the reasons this case succeeded was that the prohibitions set forth in the Paramount Decrees were in effect, including the requirement that each film license be offered ". . . solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others." U.S. v. Paramount Pictures Inc., et al., Trade Reg., Rep. (CCH) ¶62,377, No. 158-75 (S.D.N.Y. 1949) (emphasis added).

By the early 1990s, after decisions affirming Harkins' right to proceed to trial, see e.g. Harkins Amusement Enterprises, Inc. v. General Cinemas Corp., et al., 850 F.2d 477 (9th Cir. 1988) (reversing dismissals and remanding claims including bid rigging and market splitting), Harkins reached successful settlements with all the defendants. This was approximately fifteen years after the litigation commenced. These settlements provided proper access to film product, as well as seed money to develop the modern chain, which now has grown to 515 screens at 34 locations in five states. Nevertheless, Harkins still encounters instances where studio distributors provide exclusive opportunities for first run of desirable new releases to a dominant circuit to the great detriment of smaller theater circuits like Harkins that are entirely frozen out. This of course is an anticompetitive practice that violates the theater-by-theater, film-by-film principle at the heart of both the Decrees and Supreme Court precedent.

As successful as this private antitrust enforcement litigation by Harkins was, it is doubtful it could very often be duplicated in today's market. Harkins was able to wage this long and

costly legal battle against the studios because its principal antitrust counsel agreed to work on a contingent fee basis, an option that is rarely available now.

Concentration at the Distribution Level

Approximately 80% of the film exhibition value of first-run commercial films, as measured by domestic gross ticket sales, is generated currently by the seven major distributors (Disney, Fox, Lionsgate, Paramount, Sony, Universal, and Warner Bros.) ("Majors"). This concentration of control at the film distribution level will become much greater with Disney acquiring Fox's theatrical distribution business - - raising the anticipated domestic gross share of the combined Disney/Fox to 50%.

Effects of this concentration at the distribution level are felt by Harkins and by other independent exhibitors, i.e., exhibitors other than the three dominant circuits. These effects include increasing pressure by Majors to exercise control over theater ticket prices, i.e. resale price maintenance. These effects also include circuit dealing and film licensing decisions based on block booking. These anticompetitive practices if continued or increased would result in less choice for the moviegoers and detrimental effects on independent exhibitors and smaller content providers.

The market power of the soon to be smaller number of Majors cannot be underestimated. This goes back to certain fundamental characteristics of the movie business. The first and foremost requirement for the economic success of a movie theater is access to films that its audience wants to see. This in turn traces back to the data, i.e., data showing that 80% of the movie ticket sales revenue traces to the seven major Hollywood studio distributors - - soon to be six with an estimated 50% of the money from ticket sales coming from a combined Disney/Fox.

Effects of Concentration at the Distribution Level

Commentators on behalf of the major film distributors no doubt will contend that the theatrical film distribution and exhibition business has become much more competitive. However, the reality for independent theaters has been increased anticompetitive pressures of the sort declared unlawful by the seminal Supreme Court decisions.

Resale Price Maintenance and Trailer Placement

Harkins is increasingly faced with film rental licensing terms that aim at controlling ticket pricing and that inevitably will result in higher movie theater ticket prices. These higher ticket prices of course are ultimately paid by consumers.

At present the most common term of this sort is the per capita film licensing term. Per capita terms essentially require the exhibitor to pay film rental on a scaled percentage for each movie ticket sold at the exhibitors' posted rates, irrespective of the ticket price charged. This of course exerts pressure on the exhibitors to avoid ticket price discounting, which of course is detrimental to movie goers. This pressure to avoid discounting is accompanied by increasingly aggressive per capita audits by agents for the distributors. Termination of the resale price maintenance terms in the Decrees would likely lead to even more direct methods by distributors to control theater ticket prices.

Anticompetitive pressure from Majors also is seen with respect to trailer placement, i.e. brief film clips that advertise a distributor's "coming attractions." Priority access demanded by Majors for screen time for trailers advertising their films has the effect of limiting or barring advertising for the films of competing independent distributors.

Block Booking

Consolidation of market power at the distribution level has additional anticompetitive effects as well. In theory at least, market power of the Majors could be countered if there were a viable alternative source for the all-important films that theater audiences want to see. However, small, independent first-run film producer/distributors are in no position to provide the quantity of high-grossing films that would substitute for loss of blockbuster films from the Majors.

The packaging by major distributors of blockbuster films along with lesser value films, accompanied by demands for more screens and longer play time, have the effect of denying access to exhibition screens for their films from independent film distributors that otherwise would have the audience attraction, good artistic content, and solid grossing potential to merit play time in independent theaters. Avoidance of this effect from a law enforcement perspective is dependent on active enforcement of the block booking prohibition feature of the Decrees and private antitrust litigation.

Circuit Dealing

Evidence of the persistence of circuit dealing practices going beyond block booking, and the connection of circuit dealing to vertical integration, comes from at least three sources. First, the experiences of Harkins and other smaller theater companies in their everyday efforts to license the films needed for their theaters to succeed. Second, the market data showing the extent of concentration of market power with the Majors as measured by grossing potential of the films they distribute. Third, the evidence from private movie industry antitrust cases seeking to challenge circuit dealing condemned by the Decrees and the Supreme Court movie industry antitrust cases.

These recent private antitrust cases of this kind include the following. *Flagship v. Century Theatres*, 198 Cal. App. 4th 1366 (2011) (long running movie industry antitrust case under California's primary antitrust statute, the Cartwright Act in which a jury verdict and judgment on circuit dealing were entered in 2018); *Cobb Theatres v. AMC III, LLC v. AMC Entertainment Holdings, Inc.*101 F. Supp.3d 1319 (2015) (motion to dismiss by defendants denied and case settled after completion of extensive discovery and before ruling on then pending summary judgment motion); *Regal Entertainment Group v. iPic-Gold Class Entertainment, LLC*, Court of Appeals, First District of Texas, # 01-16-00102-CV (2016) (upholding temporary injunction against defendant Regal; case subsequently settled as against defendant Regal; summary judgment granted for defendant AMC); *Viva Cinemas & Entertainment, LLC v. American Multi-Cinema, Inc. (S.D. Tex., 2015) v. AMC* (summary judgment and Daubert motions denied in 2018; case settled on a confidential basis after long-running litigation and on the eve of jury trial, 9/14/18).

With the exception of the three dominant theater circuits, two of which are now owned by large non-U.S. theater companies, the exhibition industry is largely on the same page with respect to the need to retain the circuit dealing related prohibitions in the Decrees.

HARKINS RESPONSE TO DOJ QUESTIONS

The following are Harkins responses to the specific questions posed by DOJ.

Q: Do the Paramount Decrees continue to serve important competitive purposes today?

A: Yes. Provisions of the Decrees discussed above continue to support standards important today to independent theaters, and to competition generally in the theatrical film business

Q: Individually, or collectively, are the decree provisions relating to: (1) movie distributors owning movie theatres; (2) block booking; (3) circuit dealing; (4) resale price

maintenance; and (5) overbroad clearances necessary to protect competition? Are any of these provisions ineffective in protecting competition or inefficient? Do any of these provisions inhibit competition or cause anticompetitive effects?

A: As discussed above, the Decree provisions on which Harkins comments focuses as necessary to protect competition are four. The first are limits in the Decrees on vertical integration of distributors into exhibition, i.e., ownership of theaters. In the view of Harkins, the distribution level of the movie theater business is already too concentrated and anticompetitive. Facilitating further concentration would make an already anticompetitive situation worse. The second is the prohibition on resale price maintenance of ticket prices. The continued and sustained pressure from movie studios to limit discounting on theater tickets or face financial penalties leads to higher ticket prices for moviegoers. As noted above, Harkins is facing increasing pressure on this front and is not alone in this regard. The third is block booking that, in Harkins' view, has anticompetitive effects not only on independent exhibitors but also on independent distributors and consumer moviegoers as well. The fourth is circuit dealing, which has the anticompetitive effect of possibly freezing out smaller, independent theater operators.

Q: What if any modifications to the Paramount Decrees would enhance competition and efficiency?

A: Harkins does not comment in support of any modifications to the Decrees but does urge stronger enforcement by DOJ of those provisions of the Decrees discussed above.

Q: What effect, if any, would the termination of the Paramount Decrees have on the distribution and exhibition of motion pictures?

A: Termination of the Paramount Decrees would be argued by defendants in circuit dealing antitrust cases as strong precedent for the proposition that the legal principles from the Decrees and the key Supreme Court cases are no longer relevant to the theatrical movie business. In fact, a version of this argument already has been made in support of an unsuccessful defense motion

to overturn a jury verdict for plaintiff in the *Flagship* circuit dealing case -- even though no actual action to terminate the Decrees has yet taken place. Efforts to maintain fair and effective competition in the first-run movie theater business, including competition in content and pricing, would become even more difficult.

Q: Have changes to the motion picture industry since the 1940s, including but not limited to, digital production and distribution, multiplex theatres, new distribution and movie viewing platforms render any of the Consent Decree provisions unnecessary?

A: No. Theatrical distribution and exhibition of first run movies remains a valid antitrust market, which is still for most films shown in theaters, an exclusive distribution market during the time of the first run. Most importantly, violations of the principles established in the key Supreme Court cases and in the Decrees are critical to mitigate persistent attacks on, and damages to, competition in film licensing and exhibition markets.

Q: Are existing antitrust laws, including the precedent of *United States v. Paramount* and its progeny, sufficient or insufficient to protect competition in the motion picture industry?

A: Sufficient only if robustly enforced through both Government and private actions. While there have been some recent successes in private antitrust cases, the resources imbalance between industry forces attacking plaintiffs in private actions and the plaintiffs is great. Termination of the Decrees, or substantially weakening them, would add to that imbalance thereby damaging efforts to combat the anticompetitive effects discussed above.

CONCLUSION

In summary, Harkins urges that

- DOJ not act to terminate the Decrees;

- Any modification of the Decrees should leave in place: (1) limitations on distributor acquisition of theaters or theater circuits; (2) prohibition of resale price maintenance in the form of control over theater ticket prices; (3) prohibition of block booking; and (4) prohibition of circuit dealing; and
- DOJ make clear that it does not intend to express reservations regarding the law as stated in the Supreme Court movie industry antitrust cases through any termination or changes to the Decrees,.

Harkins respectfully submits these comments and is available to answer questions and provide additional materials in support of these comments if that would be helpful to DOJ in its review process.

[redacted]
Harkins Theatres
[redacted]