

BOW TIE CINEMAS
641 DANBURY ROAD
RIDGEFIELD, CT 06877

October 3, 2018

To Whom It May Concern:

This letter provides a public comment on behalf of Bow Tie Cinemas, LLC (“Bow Tie”) in response to the Antitrust Division of the Department of Justice’s (the “Department”) request for comment regarding a potential modification or outright termination of various consent decrees entered against various movie studios between 1949 and 1952 following *United States v. Paramount*, 334 U.S. 131 (1948) (collectively, the “Decrees”).

Bow Tie is a family-owned company that has been owned and managed by the Moss family for four generations and over one hundred years. In each of its 38 locations and 245 screens, Bow Tie provides the best possible presentation and service to its patrons, continuing in the tradition of its founder, B.S. Moss. Bow Tie Cinemas dates back to 1900¹ and has maintained its presence from the Nickelodeon era through Vaudeville and into the modern multiplexes of today. As a reflection of its history and dedication to the traditional moviegoing experience, Bow Tie currently rehabilitates classic and unused old buildings in urban, regional markets to restore them as modern movie theatres. This model provides a unique viewing experience for patrons in underserved or traditionally concentrated markets and improves consumer choice.

By way of example, Bow Tie brought Richmond, Virginia its first new movie theater in more than forty years when Movieland at Boulevard Square opened in early 2009. Featuring seventeen stadium-seated auditoriums, Movieland is a themed adaptive reuse of a 19th Century former locomotive assembly plant. Later, Bow Tie debuted new or completely rebuilt theatres in similar circumstances in Trumbull, CT, Reston, VA, and Saratoga Springs, NY, the latter marking the first time a first-run movie theater has operated in the downtown area of Saratoga Springs in nearly forty years.

This comment focuses on the deleterious effect that modification or termination of the Decrees would have on smaller chain theatres such as Bow Tie and the consumers they service. Put simply, Bow Tie believes that any reduction or termination of the existing decrees will reduce consumer choice, increase consumer cost, and significantly harm smaller regional chains that have limited negotiating power against large studios and distributors. Therefore, Bow Tie strongly opposes any change to the existing Paramount Decrees.

¹ The cartoon that launched Mickey Mouse to the world, *Steamboat Willie*, had its first showing at one of Bow Tie’s initial owner’s first theatres.

I. BOW TIE CINEMAS WILL BE HARMED OR PUSHED OUT OF THE INDUSTRY IF THE DECREES ARE LIFTED.

A. The Prohibition on Block Booking is Necessary to Maintain Competition.

Bow Tie agrees with and incorporates by reference the public comment letter prepared and submitted by the National Association of Theatre Owners (“NATO”), of which Bow Tie is a member. Bow Tie believes that the prohibition on block booking is a critical component of the Decrees and that NATO has appropriately assessed the issues and ill effects that would occur should the prohibition on block booking be lifted.

However, there are specific effects that Bow Tie would experience beyond the more general concerns outlined in the NATO comment. Due to Bow Tie’s regional presence, it only captures a small percentage of the national market for first run films. This is due to the significant concentration of the industry with the top five exhibitor chains capturing over half of the market.² For that reason, chains of Bow Tie’s size (and smaller) would be disproportionately affected by the removal of block booking prohibitions, as we do not have as many screens to potentially spread out the major studio films we would be required to book in order to have access to the films our customers desire.

This would affect Bow Tie’s smaller markets even more disproportionately, where any imposition of block booking would monopolize the limited number of screens a particular theatre displays. This could effectively force a Bow Tie theatre to become captive to a particular studio’s content. For instance, if Paramount were to require that a Bow Tie location display all of its additional films for the right to display a summer blockbuster, it is plausible that at times a specific location would be running Paramount pictures exclusively. Thus, in addition to the concerns surrounding customer choice and cost, the prohibition on block booking is necessary to uphold other aspects of the Decrees and to prevent theatre chains such as Bow Tie from becoming *de facto* exclusive exhibitors of a particular studio’s content.

B. The Prohibition on Overbroad Clearances is Necessary to Maintain Consumer Choice.

Beyond block booking, the Decrees also prohibit overbroad (or unreasonable) clearances, the prohibition on which has served to foster competition and an even playing field across markets since the Decrees were entered. “A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.”³ In many instances, such a clearance results in a particular theatre in a given market receiving the exclusive right to show a particular film, to consumers’ detriment, and to maximize the gains of a particular theatre.⁴ Under *Paramount*, clearances are permitted under

² See Redwood Capital, North American Cinema Exhibitor Report 2016, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwjbr9_zt uPdAhVBmlkKHeYsAv0QFjADegQICRAC&url=https%3A%2F%2Fwww.vipcinemaseating.com%2Fcontent%2F uploads%2F2016%2F08%2FNorth-American-Cinema-Exhibitor-Report-Redwood-Capital.pdf&usg=AOvVaw2qrFD2RP3h4qE1oWokxNDD.

³ *United States v. Paramount Pictures*, 334 U.S. 131, 144, n. 6 (1948).

⁴ *Id.*; see also *Cobb Theatres III, LLC v. AMC Entertainment Holdings, Inc.*, 101 F. Supp. 3d 1319 (N.D. Ga. 2015).

limited circumstances, “when the theatres are in substantial competition, and the clearances are used to assure the exhibitor that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor’s expected income will be greatly diminished.”⁵ Specifically, the decrees prohibit clearances that are “unduly extended as to area or duration.”⁶

Forcing theatres or theatre chains through overbroad clearances to exhaust the earning potential of a particular film is especially problematic in smaller or more specialized markets, where the earning potential of a particular film may be exhausted in a matter of weeks, and being forced to run a film for an extended period ignores local market concerns. The existing prohibition on overbroad clearances serves to protect competition across exhibitors, and creates opportunities or regional chains to exist. Indeed, the Decrees’ requirement that “each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others”⁷ actually serves to create and support the diverse and varied regional chain markets that exist today.⁸ Any changes to this system would undermine the markets as they exist and make competition by regional chains such as Bow Tie difficult if not impossible.

Furthermore, testing of the limits of the Decrees by the large studios clearly demonstrates the potential for abuse of overbroad clearances.⁹ The Supreme Court understood as much, in explaining that overbroad clearances are “too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked.”¹⁰ This has proved prophetic, as distributors have continually tested the limits of the Decrees and antitrust law in using clearances to depress competition. As recently as this year, an alleged overbroad clearance was examined in the *Viva Theaters* case, wherein a chain with an exclusive clearance of first run films from large distributors in the Houston market was accused of leveraging that clearance to shut out competitors, including Viva Cinemas, which ran Spanish dubbed first run films in the same market.¹¹ In that case, the judge allowed the case to trial despite the fact that the geographic area only spanned five miles.¹²

⁵ *Three Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987) (citing *Paramount*, 334 U.S. at 145–46).

⁶ *Paramount*, 334 U.S. at 145.

⁷ *United States v. Paramount Pictures*, 85 F. Supp. 881, 898 (S.D.N.Y. 1949), *aff’d sub nom. Loew’s, Inc. v. United States*, 339 U.S. 974, 70 S. Ct. 1031 (1950), *United States v. Loew’s, Inc.*, 339 U.S. 974, 70 S. Ct. 1032 (1950), *Twentieth Century-Fox Film Corp v. U S*, 339 U.S. 974, 70 S. Ct. 1032 (1950), and *Warner Bros Pictures, Inc. v. United States*, 339 U.S. 974, 70 S. Ct. 1032 (1950).

⁸ *United States v. Loew’s Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988) (“Moreover, important producers and distributors have come into existence since the judgments were entered, and large national and regional circuits of theatres have developed, due in large measure to the effect of the licensing injunctions in the *Paramount* judgments.”).

⁹ See *Cobb Theatres III, LLC v. AMC Entertainment Holdings, Inc.*, 101 F. Supp. 3d 1319 (N.D. Ga. 2015); *Three Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987); see also *Viva Cinemas Theaters and Entertainment, LLC v. AMC Entertainment Holdings, Inc.*, 4:15-cv-1015, S.D. Tex. Aug. 21, 2018 (ECF 109) (denying motion for summary judgment and sending case to trial on Viva’s claim that AMC used clearances with distributors for first runs and geographic exclusivity to put Viva Cinemas out of business).

¹⁰ *Paramount*, 334 U.S. at 147.

¹¹ See *Viva Cinemas Theaters and Entertainment, LLC v. AMC Entertainment Holdings, Inc.*, 4:15-cv-1015, S.D. Tex. Aug. 21, 2018; Eriq Gardner, *AMC Theater Chain Headed to Trial Over Alleged Conspiracy with Movie Studio Giants*, THE HOLLYWOOD REPORTER (Aug. 21, 2018), <https://www.hollywoodreporter.com/thr-esq/amc-theater-chain-headed-trial-alleged-conspiracy-movie-studio-giants-1136535>.

¹² *Id.* (notably, that case settled prior to trial).

That distributors continue to push the limits of reasonableness with clearances is a good indicator that if the overbroad clearance prohibition is lifted, more attempts will be made, resulting in increased litigation. And any litigation that ensues will be long and expensive, given that clearances are analyzed under a rule of reason standard. A company such as ours would be challenged to marshal the resources needed to engage in the litigation that would be required to clarify and define the new parameters of the law. Consequently, a regime in which the Decrees no longer exist could force a theater or theater chain out of business—if not due to the overbroad clearance itself, then while attempting to challenge the behavior through drawn-out litigation—thus, victories in this space are (and if the Decrees are lifted will become more often) pyrrhic.¹³

It does not take much to imagine a similar scenario occurring in one of Bow Tie’s markets. In the Richmond market, for instance, there are two Regal theaters within a reasonable proximity to the Bow Tie location. If one or both of the Regal theaters is provided a first run exclusivity from a distributor and a long clearance time for certain pictures, it could serve to put the Richmond area Bow Tie theater out of business. It would result in moviegoers in the downtown Richmond area having to drive much farther to see certain first run films (neither Regal is in or near downtown Richmond) or simply forcing them to miss the films entirely. Thus, any reduction in the existing limits on clearances would serve not only to harm Bow Tie, but also consumers.

C. The Prohibition of Fixed Minimum Pricing Remains Necessary.

In addition to the prohibitions above, prohibiting producers and distributors from setting minimum fixed pricing is a necessary component to Bow Tie’s ability to compete. Under the Decrees, distributors are prohibited from mandating “fixed minimum admission prices” for film licensing by exhibitors.¹⁴ This prohibition not only extended to horizontal price fixing, but also to minimum prices set by distributors and their licensees.¹⁵ As explained by the Court, “[t]he total effect [of this top-down price maintenance] is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees’ ability to compete against one another in admission prices.”¹⁶

Notably, many smaller theatre chains can only compete through pricing options, such as discount days and other unique and innovative pricing structures. Without maintenance of price at the resale level (either by itself or in combination with the other prohibitions), many smaller chains or independent theatres would be pushed to lower margins or potentially out of business. The introduction of new models of purchasing movie tickets (such as Moviepass) have instituted unique ways of pricing and innovation not seen in the industry in many years. Any reduction in the ways in which studios can control downstream prices of ticket sales will inhibit this growth, and prevent consumers from gaining access to new forms of pricing and enhanced choice.

¹³ Eriq Gardner, *AMC Theater Chain Headed to Trial Over Alleged Conspiracy with Movie Studio Giants*, THE HOLLYWOOD REPORTER (Aug. 21, 2018), <https://www.hollywoodreporter.com/thr-esq/amc-theater-chain-headed-trial-alleged-conspiracy-movie-studio-giants-1136535>. (reporting that Viva Cinemas was shuttered by the alleged clearance system and filed suit after it went out of business).

¹⁴ *Paramount*, 334 U.S. at 141.

¹⁵ *Id.* at 143–144.

¹⁶ *Id.*

D. Modifying or Terminating the Decrees Will Require Private Enforcement.

Given Bow Tie's smaller market share, it could be a target for anticompetitive activity by large producers and distributors if the Decrees are modified or terminated. Also given its smaller market share and size, it lacks the financial and negotiating strength to be able to mitigate or offset the impact of the anticompetitive dealings that would occur following any modification or termination of the Decrees.

Bow Tie would be forced to either accept that anticompetitive behavior or take on the significant expense of becoming a private antitrust enforcer as studios and distributors begin to test the fences of antitrust law in the wake of such changes. The standard as it exists for analyzing overbroad clearances is convoluted and uncertain, but the fact that it has not been tested extensively is likely due to the fact that the Decrees have been in place, which has prevented more egregious examples from occurring. The vagaries of antitrust law that would arise in the Decrees' absence would render smaller exhibitors and chains vulnerable to anticompetitive harms and shutter many while they, and the courts, struggle to catch up to the anticompetitive practices wrought by modification or termination of the Decrees. Studios and distributors have consistently shown a willingness to push the limits of antitrust law even in spite of the Decrees,¹⁷ and to remove them would result in boundary pushing behavior that would require independent lawsuits from those most strongly affected, but those with limited resources to challenge the behavior—small and independent chains of movie theatres.

The converse is not true as well, insofar as the studios, producers and distributors do not appear to be as dissuaded from litigation. This was acknowledged by the *Loew's* court, which, in addressing arguments that the threat of litigation would deter behavior observed:

It is almost a leitmotif running through the affidavits and memoranda that the threat of prosecution under the antitrust laws and the fear of litigation by other parties involved in the motion picture industry will be sufficient to assure that no anti-competitive behavior will ensue from this acquisition. That line of reasoning is specious. These consent judgments were fashioned after years of litigation in which this industry was shown to have a proclivity for anti-competitive behavior. If the specter of criminal prosecution and civil litigation were a sufficient prophylactic for antitrust violations, the consent judgments in this and many other cases would never have been necessary.¹⁸

Despite the Decrees, many players in the industry have pushed the limits of compliance, as noted by courts and other observers.¹⁹ It is readily apparent that in the absence of the Decrees, this would only be more pronounced, and Bow Tie, and similarly situated chains, should not be forced into

¹⁷ See *supra* note 9.

¹⁸ *United States v. Loew's Inc.*, 705 F. Supp. 878, 884 (S.D.N.Y. 1988)

¹⁹ *Id.* at 885 (“There [] appears to be a climate of non-compliance with the heart of the consent judgments—that films be licenced theatre by theatre, solely on the merits and without discrimination.”).

litigation to define the parameters of the law, when the existing structure promotes healthy competition.

II. CONCLUSION

Failing to maintain the status quo under the Decrees will negatively impact Bow Tie and its consumers by limiting Bow Tie's ability to manage its showings, prices, and runs independently and without undue influence by studios and distributors. Furthermore, any adjustment to the Decrees will incentivize fence testing behavior and lead to increased litigation, and cost, for Bow tie and other regional chains.

Thus, Bow Tie urges the Department to maintain the Decrees in every way, so that small and middle market theatre chains can continue to compete and provide customer choice and options in an increasingly concentrated market.

Thank you for your consideration of the foregoing.

Sincerely,



Charles Benjamin Moss III
Chief Executive Officer