settlement through the consent decree process.'' [3] Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*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), *quoting United States* v. *Bechtel Corp.*, 648 F. 2d 660, 666 (9th Cir.), *cert denied*, 454 U.S. 1083 (1981). Precedent requires 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.[4]

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.' (citations omitted).'' [5]

## VIII. Determinative Documents

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

For Plaintiff United States of America:

Dated: October 21, 1998.

Respectfully submitted,

**Angela L. Hughes,**

*Trial Attorney, U.S.C. Department of Justice, Antitrust Division, 325 Seventh Street, N.W., Suite 500, Washington, DC 20530, Telephone: (202) 307–6410 or (202) 307–6351, Facsimile: (202) 307–2784.*

## Certificate of Service

I hereby certify that on this 21st day of October, 1998, I have caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendants in this matter by first class mail, postage prepared, and by facsimile.

Counsel for Defendant Halliburton Company:

Ky P. Ewing, Jr., Esquire, Vinson & Elkins, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004–1008, Telephone (202) 639–6580, Facsimile: (202) 639–6604

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Angela L. Hughes,

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**BILLING CODE 4410–11–M**

[3] 119 Cong. Rec. 24598 (1973). *See also 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. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[4] *United States v. Bechtel*, 648 F.2d at 666 (internal citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 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 United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

[5] *United States v. American Tel & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716; *United States v. Alcan Aluminium, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Public Comments and Response of the United States

*United States of America, State of New York and State of Illinois* v. *Sony Corporation of America, LTM Holdings, Inc. d/b/a Loews Theatres, Cineplex Odeon Corporation, and J.E. Seagram Corp.*

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that Public Comments and the Response of the United States have been filed with the United States District Court for the Southern District of New York in *United States of America, State of New York and State of Illinois* v. *Sony Corporation of America, LTM Holdings, Inc. d/b/a Loews Theatres, Cineplex Odeon Corporation, and J.E. Seagram Corp.*, Case No. 98–CIV–2716.

On April 16, 1998, plaintiffs United States, State of New York and State of Illinois filed a Complaint seeking to enjoin a proposed merger of LTM Holdings, Inc. (''Loews'') and Cineplex are the two largest exhibitors of first-run films in Manhattan and the City of Chicago. The Complaint alleged that the proposed merger would substantially lessen competition and tend to create a monopoly in the theatrical exhibition of first-run films in both of these markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

Public comment was invited within the statutory 60-day comment period. Such comments, and the responses thereto, are hereby published in the **Federal Register** and filed with the Court. Copies of the Complaint, Stipulation, proposed Final Judgment, Competitive Impact Statement, Public Comments and the Response of the United States are available for inspection in Room 215 of the Antitrust Division, Department of Justice, 325 7th Street, N.W., Washington, D.C. 20530 (telephone: 202–514–2581) and at the office of the Clerk of the United States District Court for the Southern District of New York, 500 Pearl Street, New York, NY 10007.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

**Constance K. Robinson,**

*Director of Operations, Antitrust Division*

### Response of the United States to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the ''Tunney

Act''), the United States responds to the public comments received regarding the proposed Final Judgment in this case.

## I. Background

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.

At the same time the Complaint was filed, plaintiffs also filed a proposed settlement that would permit Loews to complete its merger with Cineplex, but would require divestitures that would preserve competition in the two markets where the transaction would otherwise raise significant competitive concerns: Manhattan and Chicago.

The settlement consists of a Stipulation and a proposed Final Judgment. The proposed Final Judgment orders Loews and Cineplex to divest 14 theatres in Manhattan and 11 theatres in the Chicago area to an acquirer or acquirers acceptable to the United States. Unless the United States grants a time extension, the divestitures must be completed within one-hundred and eighty calendar days after the filing of the Complaint or five days after notice of the entry of the Final Judgment by the Court, whichever is later. The proposed Final Judgment also requires that, until the divestitures have been accomplished, the defendants must maintain and operate the 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 any future motion picture theatre acquisitions in Manhattan or Cook County, Illinois.

A Competitive Impact Statement (''CIS''), explaining the bases for both the Complaint and the proposed Final Judgment, was filed on April 17, 1998, and subsequently published for comment, along with the Stipulation and proposed Final Judgment, in the Federal Register on May 6, 1998 (63 FR 25071 through 25080), as required by the Tunney Act. Notice was also published in the *New York Times* and the *Washington Post*, as required by the Tunney Act. The CIS explains in detail the proposed merger, the provisions of the proposed Final Judgment, and the nature and purpose of this proceeding.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. The United States and the defendants have now, with the exception of publishing the comments and this response in the Federal Register, completed the procedures the Tunney Act requires before the proposed Final Judgment can be entered.[1]

The United States received three comments, copies of which are attached hereto. One comment, from a resident of Manhattan, suggests that the United States should have required additional theatres be divested in Manhattan. (*See* Tab A.)

The second comment, from a labor organization, opposes the settlement on the grounds that the United States should also have required divestitures in the Washington, D.C. area. This commenter also raises a concern about vertical integration as a result of the merger, noting that Sony Pictures and Universal Studios will have a significant ownership interest in the merged company. (*See* Tab B.)

The third comment, from the New York City Human Rights Commission, takes no position on the merits of the settlement but rather places on the record the agency's belief that many of the Cineplex Odeon theatres being divested in Manhattan are not adequately accessible to disabled individuals and should be brought into compliance with applicable laws before being sold. (*See* Tab C.)

This response addresses the antitrust issues that are raised in the public comments.[2]

## II. Response to Comments

### *A. The Proposed Divestitures Solve the Anticompetitive Problems Alleged in the Complaint*

The Complaint alleges that Loews and Cineplex are the two largest exhibitors of first-run films in Manhattan and the City of Chicago. They compete against each other both to attract movie-goers and to secure first-run films from distributors.

The Complaint further alleges that movie-goers do not want to travel far from their homes to attend movies, particularly in urban areas. Thus, geographic markets for first-run movies are generally local. From the standpoint of distributors, it is vitally important that their newly released movies be released in Manhattan and Chicago. In addition to the large populations in these markets, both cities are home to influential critics whose review of a movie can substantially affect the movie's performance nationwide. The Complaint also alleges that entry into the market for first-run film exhibition in New York and Chicago is particularly difficult, time-consuming and expensive, making new entry unlikely to significantly reduce the market strength of the combined firm.

As previously stated, the proposed Final Judgment requires substantial divestiture of theatres in both the New York and Chicago markets. In Manhattan, Loews and Cineplex together account for about 67% of the box office revenues for theatres showing first-run movies. Under the proposed Final Judgment, Loews and Cineplex have agreed to divest all but one of the Cineplex first-run theatres being acquired through the merger. Given that one Cineplex theatre is not being divested (the Coronet, which has two screens and had about $1.5 million in box office revenue last year), defendants have agreed to divest the Loews 34th Street Showplace (which has 3 screens and had over $2 million in box office revenue last year). Thus, defendants have agreed to divestiture that for all practical purposes restore the status quo ante. They have agreed to divest 13 Cineplex theatres and one Loews theatre in Manhattan.

In the city of Chicago, Cineplex and Loews together account for about 77% of the box office revenues for theatres showing first-run movies. Without the divestitures, the merger would have resulted in the leading firm (Cineplex) adding 5 first-run Loews theatres with 26 screens representing about $13 million in box office revenue in 1997. Under the settlement, Loews and Cineplex will divest 9 theatres with 37 screens in the city, including all of the downtown first-run Cineplex theatres except the McClurg Court. The theatres they are selling represent slightly over $13 million in box office revenue in 1997. In addition to the theatres in the city, defendants have agreed to divest two suburban theatres close to the city limits: The Old Orchard Quad in Skokie, just north of the city limits, and the River Run in Lansing, just south of the city limits. These theatres represent 12 additional screens and almost $5 million in 1997 box office revenues. In

[1] The United States will publish the comments and this response promptly in the Federal Register. It will provide the Court with a certificate of compliance with the requirements of the Tunney Act and file a motion for entry of the Final Judgment once publication takes place.

[2] Because the New York City Civil Rights Commission does not raise any antitrust issues in its comment, we will not respond except to state that the United States does not believe that the approval process should be delayed. The fact that the Commission's comment is of record should help to assure that the theatres to be divested are brought into compliance with applicable laws, either by the present owner or by a new owner. We understand that the Commission's investigation is ongoing.

total, defendants have agreed to divest 11 theatres in Chicago and its immediate vicinity, including 8 Cineplex theatres and 3 Loews theatres.

The United States received no public comments questioning the adequacy of the divestitures in Chicago. The United States received only one comment from an individual questioning the adequacy of the divestitures in Manhattan.

*B. Response to Comment of Frances J. Elfenbein*

Frances J. Elfenbein, a resident of Manhattan, notes that Loews currently has under construction two large multiplex theatres in Manhattan. The commenter states that almost as many screens are being added through this new construction as are being divested, and concludes that the divestiture of 14 theatres will not be sufficient to ''curb the monopolistic power'' of the company post-merger.

In response, the United States notes that the comment does not address the sufficiency of the settlement as a remedy to the anticompetitive effects *flowing from the merger*. The commenter does not suggest that, following the required divestitures, the merger with Cineplex will add to Loews' market share. This is in keeping with the facts, given that Loews is divesting as much as it is acquiring through the merger. The commenter does not articulate any other anticompetitive consequences of the merger.

Section 7 of the Clayton Act prohibits mergers and acquisitions the effect of which is to substantially lessen competition or tend to create a monopoly. Section 7 does not prohibit growth through internal expansion. Such growth generally increases consumer choice and is procompetitive. (Parenthetically, we note that Loews' decision to construct these new theatres predates, and was unaffected by, the merger. Cineplex had no plans to construct new theatres in Manhattan.)

If the United States had filed suit to block the merger under Section 7, and had prevailed, Loews would still have a high percentage of the screens in Manhattan and would have been free to continue its construction of new theatres. Thus, from the perspective of Manhattan movie-goers, the settlement achieves substantially the same result as a successful trial on the merits.

As discussed more fully below, the Court's function in analyzing the proposed Final Judgment ''is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993) (emphasis in original, internal quotation and citation omitted). The United States submits that this standard is easily met with respect to the Manhattan divestitures.

*C. Response to Comment of the Hotel Employees and Restaurant Employees International Union*

The Hotel and Restaurant Employees International Union praises the settlement as serving the interests of movie-going consumers in Manhattan and Chicago but argues that the United States also should have required divestitures in the Washington, D.C. area. The Union expresses the further concern that Sony Pictures' and Universal Studios' significant ownership interest in Loews Cineplex Entertainment, the merged company, will harm independent exhibitors and potentially lead to a loss of choice for consumers. For these reasons, the Union urges the Court to reject the settlement, and replace it with a different one.[3]

As noted below, the critical portion of the Union's comment in inapposite—in essence, it suggests that the government should have brought a different case (i.e. a case alleging a Clayton Act violation in the Washington, D.C. geographic market). Such a criticism is not the type contemplated in a Tunney Act proceeding. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995).[4]

[3] The Union, it should be noted, offers it comments on behalf of its members as movie-going consumers, not because it represents employees of Loews or Cineplex.

[4] The United States examined the effects of the merger on competition in the Washington, D.C. area and in Houston. The United States concluded that there were substantial factual and legal reasons not to bring a case charging a violation in these geographic areas. In addition, the United States also considered and determined not to allege that the change in ownership structure will result in vertical foreclosre. In any event, the divestitutres in Manhattan and Chicago will assure that competiting distributors have outlets for their movies in the markets of concern. Moreover, any future violation by Sony Pictures or Universal Studios of the *Paramount* decrees is not an issue before the Court in this proceeding. These decrees prevent distributors bound by the decrees from improperly favoring affiliated circuits. The 1938 *Paramount* litigation involved a conspiracy among the eight leading motion picture distributors who, among other things, used their market power to fix admission prices for the exhibition of first-run motion pictures in local theatres. The *Paramount* decrees which grew out of the litigation generally require that movies be licensed on a nondiscriminatory theatre-by-theatre basis. Both Sony Pictures (as a successor to Columbia Pictures) and Universal Studios are bound by the *Paramount* decrees. *See United States* v. *Loew's Inc.*, 1950–51 Trade Cas. (CCH) § 62,573 at pp. 63,681–82 (S.D.N.Y. 1050).

## II. The Legal Standard Governing the Court's Public Interest Determination

Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e). In making that determination, ''the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.) *cert. denied*, 510 U.S. 984 (1993) (emphasis in original, internal quotation and citation omitted).[5] The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, (D.C. Cir. 1995); *accord United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113. 117–18 (8th Cir.) *cert. denied*, 429 U.S. 940 (1976). The Court is not ''to make *de novo* determination of facts and issues.'' *Western Elec.*, 993 F.2d at 1577. Rather, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *Id.* (internal quotation and citation omitted throughout). In particular, the Court must defer to the United States' assessment of likely competitive consequences, which it may reject ''only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'' *Id.*[6]

The Court may not reject a decree simply ''because a third party claims it could be better treated.'' *Microsoft*, 56 F.3d at 1461 n.9. The Tunney Act does not empower the Court to reject the remedies in the proposed Final

[5] The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

[6] The Tunney Act does not give a Court authority to impose different terms upon the parties. *See, e.g., United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n.95 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Mem); accord, H.R. Rep. No. 1463, 93rd Cong., 2d Sess. 8 (1974). Of course the Court can condition the entry of a decree to the parties' agreement to a different bargain, but if the parties do not agree to such terms, the Court's only choices are to enter the decree the parties proposed or to leave the parties to litigate.

Judgment based on the belief that ''other remedies were preferable.'' *Id.* at 1460. As Judge Green has observed:

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the courts would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

*United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (Mem.).

Moreover, the entry of a governmental antitrust decree forecloses no private party from seeking and obtaining appropriate antitrust remedies. Defendants will remain liable for any illegal acts, and any private party may challenge such conduct if and when appropriate. The single issue before the Court here is whether entry of this particular proposed Final Judgment, agreed to by the parties as settlement of this case, is in the public interest.

As pointed out above, the Tunney Act does not contemplate judicial reevaluation of the wisdom of the government's determination of which violations to allege in the Complaint. The government's decision not to bring a particular case on the facts and law before it at a particular time, like any other decision not to prosecute, ''involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise.'' *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Thus, the Court should not look beyond the Complaint ''to evaluate claims that the government did *not* make and to inquire as to why they were not made.'' *Microsoft*, 56 F.3d at 1459 (emphasis in original).

The government has wide discretion within the reaches of the public interest to resolve potential litigation. *E.g.*, *Western Elec. Co.*, 993 F.2d at 1577; *AT&T*, 552 F. Supp. at 151. The Supreme Court has recognized that a government antitrust consent decree amounts to an agreement between the parties to settle their disputes and differences, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235–38 (1975), and ''normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation,'' *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). This judgment has the virtue of bringing the public certain benefits and protection without the uncertainty and expense of protracted litigation. *Armour*, 402 U.S. at 681.

## III. Conclusion

After careful consideration of these comments, the United States concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is in the public interest. In the two important markets where the merger would have made it more likely that ticket prices would increase, rental fees paid to distributors would decrease, and theatre quality would decline (New York and Chicago), the divestitures will fully restore the status quo ante. The United States will therefore move the Court to enter the proposed Final Judgment after the public comments and this response have been published in the **Federal Register**, at 15 U.S.C. § 16(d) requires.

Dated: October 14, 1998.

Respectfully submitted,

Allen P. Grunes,

*(AG 4775) U.S. Department of Justice, Antitrust Division, 1401 H Street, N.W.; Suite 4000, Washington, D.C. 20530, (202) 307–0001, Attorney for Plaintiff the United States.*

*Certificate of Service*

I, Allen P. Grunes, hereby certify that on October 14, 1998, I caused the foregoing document to be served on defendants by having a copy mailed, first-class, postage prepaid, to:

Ira S. Sacks, Fried, Frank, Harris, Shriver & Jacobson, One New York Plaza, New York, NY 10004, (212) 859–8000

Attorney for defendants Sony Corporation of America and LTM Holdings, Inc.

Alan J. Weinschel, Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, (212) 310–8000

Attorney for defendant Cineplex Odeon Corporation

Kenneth R. Logan, Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, NY 10017, (212) 455–2000

Attorney for defendant J. E. Seagram Corp.

Allen P. Grunes

**Department of Justice**

*Merger Task Force, Antitrust Division, 1401 H Street, Suite 4000, Washington, DC 230530,*

Attention: Craig W. Conrath, Chief

May 1, 1998.

Dear Mr. Conrath: The proposed final judgment of the United States District Court in the Southern District of New York requiring that SONY/LOEWS/CINEPLEX et al (the merged) divest themselves of 14 theaters (36 screens) in Manhattan is no cause for joy.

The court is requiring the divestiture to ensure competition, prevent price gouging and price fixing, and to encourage fairer distribution of first-run movies.

Give me a break.

LOEWS is currently building a 13 screen multiplex as part of the E-Walk development at 8th avenue and 42nd street. It is also in the process of destroying my residential neighborhood with a 15 screen multiplex on 2nd avenue between 30th and 32nd streets.

The divestiture will close 14 theaters for a total of 36 screens. The constructions will create 28 screens. The 55 screens that LOEWS will be left with after divesting will grow to 85 when the new multiplexes are added. Do you really think the loss of 8 screens is going to curb the monopolistic power the merged entity will have in the market, I don't. No wonder they were so agreeable.

Cordially,

Frances J. Elfenbein

## Comments

The Hotel Employees and Restaurant Employees International Union, which represents nearly 300,000 individuals, many of whom are avid moviegoers, first opposed this merger in March 1998 with a letter to antitrust officials. Shortly thereafter, we met with Justice Department staff and we spoke to staff of several State Attorneys General, meanwhile encouraging other interested parties to do the same. Our opposition to this merger is grounded in our firm belief that the merger is not in the best interests of American consumers. As we have stated previously, we do not represent, nor have we recently represented, workers at the merging entities, Cineplex Odeon and Loews Theatres.

In our opinion, the proposed settlement between the U.S. Department of Justice and the merging entities known as Loews Cineplex (hereafter referred to as ''the company'') serves the interests of moviegoing consumers in Manhattan and Chicago well. However, on behalf of our moviegoing members throughout the United States, we remain concerned that the settlement does not address very high concentration levels in other markets. In addition, we find the inter-connectedness of leading movie producers, distributors and exhibitors—which is greatly increased as a result of this merger—very disturbing.

*High Concentration Despite Divestitures*

Upon completion of the merger, the company controls about 9% of the overall film exhibition market in the U.S., and enjoys very high market share in several crucial urban markets,

including New York and Chicago (in spite of the divestitures), the Washington, DC metropolitan area, and Houston, Texas.

In the Maryland suburbs of Washington, DC, Loews Cineplex controls over 49% of the screens in an already ''highly concentrated'' market. The increase in the Herfindahl-Hirschmann Index (HHI), a measure of market concentration, is over 1,056 points—more than 10 times the increase that the Justice Department deems ''likely to create or enhance market power or facilitate its exercise.'' [1]

In the District of Columbia proper, Cineplex Odeon already controlled over 81% of all movie screens before the merger. And in the Virginia suburbs of Washington, the company now controls nearly 29% of all screens, pushing the classification of this market from ''moderately concentrated'' to ''highly concentrated,'' as per guidelines set by the Justice Department and Federal Trade Commission. Each of these cases is a glaring example of extreme market concentration, and each is completely ignored in the proposed settlement.

*Vertical Integration Neglected in Settlement*

The issue of vertical integration in the movie industry also remains unmitigated by the proposed settlement. In an era of increasing corporate control and homogeneity of entertainment products available to the American public, this is especially troubling. For example, the much-hyped recent Sony picture ''Godzilla'' opened on 7,000 screens, or more than one out of every five movie screens in the U.S.

To refer to movies as mere ''entertainment products'' does not fully account for their true social value. The industry itself would be the first to admit that movies occupy a truly mythic place in the American psyche. Movies have the power to inspire and educate, entertain and inform. Is it right that control of these cultural products should be concentrated in the hands of a few giant corporations? We think not. Yet this merger represents another nail driven into the coffin of cultural diversity.

This merger could create a real life Godzilla, an enormous beast which will be virtually unstoppable if it is allowed to be born. Sony Pictures and Universal Pictures together distributed over 30% of all commercially released films in North America last year. Together, the parents of these companies and their affiliates own over 86% of Loews Cineplex's outstanding stock. Loews Cineplex will have approximately 2,700 screens in 22 states, making it the third largest exhibitor in the nation.

In addition, issues of vertical integration impact another criterion for determining whether a merger may be anti-competitive, in that vertically integrated companies are in a better position to exert market power against exhibitors through higher rental fees and stricter payment terms.

*Barriers to Entry May Worsen, Preventing New Competition*

Vertical integration also could have the effect of raising the barriers to entry that a potential competitor would face. After all, size does matter when it comes to leveraging a favorable contract with a distributor, or negotiating advertising rates in a local newspaper. Anecdotal evidence in the form of conversations with independent exhibitors indicates that small, local operations are an endangered species that are disappearing rapidly. And in the context of such extreme market concentration, the hope of starting up new theatre is just a pipe dream.

Barriers to entry are indeed significant in the movie industry. The trends in new theater construction are towards bigger multiplexes, with 20–30 screens per site, digital sound systems, and more spacious stadium seating, meaning fewer seats per theater. All of these mean that in order to compete, a theater must be well-stocked with capital-intensive amenities. In addition, the trend in film distribution is towards higher fees, as evidenced by Sony's headline-grabbing demand for an 80% cut of first-week ''Godzilla'' receipts from exhibitors (distributors' normal take is 60–70%).

We are attaching an e-mail letter we received in support of our efforts to block this merger. The writer is the daughter of a recently deceased independent exhibitor. In the letter, the writer makes the point that behemoth multinational corporations are not as sensitive to the needs and concerns of local markets as small independent businesses can be. Unfortunately, the reality of diminishing competition and consumer choice is rarely reflected in the narratives that the movie industry thrusts upon us. This merger, if it is not significantly altered, is a stark illustration of the fact that in life, Godzilla often wins.

We would like to commend Justice Department staff for their willingness to listen to our concerns, and for taking decisive action in two markets. We strongly recommend that in cases such as this one, antitrust officials take a pro-active role in educating consumers about the potential effect of high market concentration on prices and selection. Since a study of the correlation between prices/selection and market concentration could easily be based on public information, it would not be a breach of the confidentiality to which these officials are pledged. Rather, it would provide consumers the tools and information needed to fully understand the potential implications of major corporate mergers.

As consolidation continues in this industry, we believe that the effects of increasing market concentration will begin to take their toll on the quality and cost of the consumer's movie going experience. While the proposed settlement may stave off higher ticket prices and decreased selection in two cities for the time being, we suspect that the greater good of American moviegoers has not been fully served. Therefore, we urge the court to reject the proposed settlement in favor of one which would impose more extensive divestitures, especially in the Washington, D.C.-area market, and would address the increasing problem of vertical integration in the motion picture industry.

Subj: Re: Sony/Cineplex Odeon Merger
Date: 98–04–21 11:17:15 EDT
From: jennison@email.msn.com (beverly jennison)
To: LNegstad@aol.com (LNegstad)

Dear Mr. Negstad: It would be fine with me if you included my letter, or any of the information from it. I'm sure that it is an accurate reflection of what my father would have said, and I know that he would have wanted to weigh in on this issue.

Thank you for your interest in the movie industry.

Beverly Petersen Jennison,

*Silver Spring, Md.*

Subj: Sony/Cineplex Odeon Merger
Date: 98–04–20 11:32:36 EDT
From: jennisons@email.msn.com (beverly jennison)
To: Lnegstad@aol.com

Mr. Negstad: You recently sent a letter to my father, Paul Petersen, of the Clairidge Triple Cinema in Montclair N.J. regarding the proposed Sony/Cineplex merger. My father passed away in late March, but because he was such a strong advocate of independent theatre exhibitors, my mother asked that I send you a short reply to your letter. My father worked over 50 years in the movie industry, and for much of that time, he was an independent exhibitor. (His other experience involved working for independents and for small local chains.) He very much objected to the merger of large organizations, because they essentially forced out the little operators. In fact, as President of the National Association of Theatre Owners (N.J.), he worked very hard to ensure

[1] Department of Justice and Federal Trade Commission Horizontal Merger Guidelines. April 2, 1992.

that distributors of pictures would recognize the independents, and funnel top films their way. At one point in his career, he sued several of the large distributors because they refused to exhibit in independent theatres, seeking out the chains instead. That matter was settled prior to the trial with the large distributors, afraid of the antitrust noises that my father was making, settling with him so that the independents would get access to the top films.

Unfortunately, the belief that my father had that independent exhibitors would be more receptive to the public sentiment in their communities is not shared by the larger chains. My father, and others like him, felt that their businesses were a part of the community, and that they not only had to be responsive in what they showed, but they had to be responsible to the community for the content of the pictures. In addition, my father and other independents have closer ties to the community, and always tried to provide support in the community for fundraisers, etc. The big chains simply do not do this.

I saw in the Washington Post over the weekend that the merger had been okayed by the Justice Department, and so I guess that it's too late to do much else about this particular merger. However, I felt that I should respond to your letter on my father's behalf, as I am sure he would have if he were still alive. Good luck to you in your endeavors.

Beverly Petersen Jennison,

*13408 Bingham Court, Silver Spring, Md. 20906, jennisons@msn.com, 301–871–7949.*

June 12, 1998.

**Allen P. Grunes,**

*United States Department of Justice, Anti-Trust Division, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530*

Re: United States of America et al v. Sony Corporation et al 98 Civ. 2716

Dear Mr. Grunes: The New York City Commission on Human Rights (''Commission'') is the principal local civil rights law enforcement agency in New York City committed to ensuring that people with disabilities have access to and enjoy the facilities of New York City's movie theaters. The Commission has an interest in insuring that all theaters in New York City—including those covered by the above Final Judgement and Consent Decree—are accessible to disabled persons. We submit these comments accordingly and for the record.

Under New York City's Human Rights law, owners and operators of places of public accommodation may not ''refuse, withhold from or deny'' to a disabled person ''any of the accommodations, advantages, facilities or privileges thereof.'' [1] ''Reasonable Accommodation'' to the needs of persons with disabilities is required to be made when such accommodation ''shall not cause undue hardship in the covered entity's business.'' (Administrative Code, Title 8, Chapter 1, §§ 8–107.4(a), 8–107.15(a), 8–102.18).

In the past few years, the Commission has received complaints about inaccessible movie theaters. Most of these theaters are in Manhattan and most were owned and operated by Cineplex Odeon. In response to these complaints, we initiated an informal survey of Cineplex Odeon's movie theaters in Manhattan to ascertain whether the theaters were in compliance with the local and federal laws.[2] In November 1996, we contacted Cineplex Odeon and informed them about the complaints.[3]

In December 1996, the New York City Council published a study which confirmed that many of the city's existing movie theaters were not accessible to the disabled.[4] It was apparent to us that this was an industry-wide issue. We subsequently contacted all the major movie theater companies operating in New York City, including Sony Loews.

As a result of the recent merger between Cineplex Odeon and Sony Loews, we are aware that the newly formed corporation—Loews Cineplex—must divest itself of most of the former Cineplex Odeon Theaters in Manhattan. The theaters being divested are all sites for first-run movies in Manhattan. Moviegoers, as mentioned in the federal complaint, ''do not want to travel far from their homes to attend a movie, particularly in urban areas.'' Moreover, moviegoers expect to view first-run movies in top quality facilities. Disabled moviegoers are no exception. However, we believe that these theaters are not in full compliance with all applicable codes. The accessibility issues include, but are not limited to, the following:

1. Inadequate number of wheelchair seats;
2. Inadequate number of companion seats;
3. Inadequate or improper wheelchair seat dispersal;
4. Barriers to access (no ramps, lifts, elevators);
5. Excessive door pressure;
6. Inaccessible or improperly designed bathrooms;
7. Inaccessible or improperly designed service counters;
8. Inaccessible or improperly designed amenities (e.g. public telephones, drinking fountains, etc.);
9. Lack of hand rails;
10. Improperly designed ticket counters.

We understand there is a time frame during which Loews Cineplex is to divest itself of most of the Manhattan theaters previously owned by Cineplex Odeon. We recommend that prior to the sale of these theaters to a third party, Loews Cineplex be required to allocate the necessary resources to bring the theaters into full compliance with the applicable local and federal codes and civil rights laws. It would be an unfortunate and unintended effect of the above consent decree if these theaters—which as a group are highly visible first-run theaters—are not given the priority and attention they deserve.

Very truly yours,

Randolph Wills,

*Deputy Commissioner, Law Enforcement Bureau.*

By:

Rockwell J. Chin,

*Supervising Attorney, Law Enforcement Bureau, (212) 306–7455 (tel), (212) 306–7514 (fax).*

[1] It shall be an unlawful discriminary practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation because of the . . . disability . . . of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof. . . . [New York City Human Rights Law, Administrative Code, Title 8, Chapter 1, § 8–107.4(a)].

[2] In New York City, theaters must comply with the federal ADAAG Standards and the Local Law 58 of the New York City Building Code. Local Law Number 58 of 1987 was enacted to amend New York City's Administrative Code in relation to providing facilities for people having physical disabilities. (Administrative Code, Title 27, Chapter 1, § 27–123.1 et seq.). Incorporated into the New York City Building Code, Local Law 58's provisions apply to buildings constructed, altered or changed in occupancy or use since September 1, 1987. Where there are differences between ADAAG and ANSI, the Commission will adopt the stricter of the two standards. ANSI generally requires a greater number of wheelchair spaces and dispersal of those spaces for all auditoriums, regardless of capacity.

[3] We have since been working with attorneys from the Department of Justice (United States Attorney's Office, Southern District of New York) in an effort to co-ordinate federal and local law enforcement efforts regarding movie theater companies in New York City.

[4] See *Admit Some: An Examination of Movie Theater Accessibility in New York City for Persons Who Are Disabled*, a report and survey published by the Council of the City of New York, Committee on Consumer Affairs in co-operation with students from Columbia University's School of International and Public Affairs/Graduate Program in Public Policy and Administration (December 1996).

[FR Doc. 98–29223 Filed 10–30–98; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice pursuant to the National Cooperative Research and Production Act of 1993—Bell Communications Research, Inc. (''Bellcore'')

Notice is hereby given that, on December 18, 1997, purusant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Bell Communications Research, Inc. (''Bellcore'') has filed written notifications on behalf of Bellcore and Siliscape, Inc. (''Siliscape'') simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are Bell Communications Research, Inc., Morristown, NJ; and Siliscape, Inc., Palo Alto, CA. The nature and objectives of the venture are to engage in cooperative research related to virtual imaging