IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PARAMOUNT PICTURES, INC., Defendant.	Case 1:19-mc-00544-AT
UNITED STATES OF AMERICA, Plaintiff, v. LOEW'S INCORPORATED, ET AL., Defendants.	

AMICUS CURIAE INDEPENDENT CINEMA ALLIANCE'S REPLY TO THE DEPARTMENT OF JUSTICE'S RESPONSE TO _AMICI CURIAE_

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INTRODUCTION

The Department of Justice ("DOJ") argues that this Court, the creator of the Paramount Consent Decrees, should bless this installment of the DOJ's housekeeping operation concerning 1,300 "legacy consent decrees" because all the DOJ must do is suggest that a single element of one (among many) antitrust violations that occurred in the 1940s might not occur today. As sole "evidence" for that suggestion, the DOJ insists that the motion picture "industry is significantly changed," and still neglects to make any case that such "change" matters a whit to the original or continuing purposes of the Paramount Consent Decrees.

The DOJ's recommended standard of review is incorrect, for many reasons, and its assessment of the industry (1) bears little resemblance to the actual motion picture industry; (2) misunderstands the Paramount Consent Decrees; and (3) certainly fails to constitute an adequate inquiry into the "public interest."

ARGUMENT

I. The DOJ Insists Upon an Erroneous and Dangerous Standard of Review That Still Ignores the Actual "Public Interest."

The DOJ agrees that the "public interest" is the proper inquiry, but promotes a shriveled way of assessing it, which is to say, virtually no inquiry at all, and certainly no "factual"

inquiry.[1] The DOJ prefers that the Court merely consider whether the DOJ is lying or inept.[2] The ICA urges instead a proper inquiry into the historical purpose and effect of the Paramount Consent Decrees, the competitive impact of termination, and the impact upon the public. The ICA's proposed standard of review is supported by common sense, logic and statutory law.

The DOJ deeply wishes to make this case simple so that it can move on to the next "legacy consent decree," and so it grounds its entire case on the proposition that all it must show is that a single element of one antitrust violation (among several) is unlikely to recur. Such an indulgent standard ignores multiple aspects of the "public interest," and would make future public interest determinations essentially whatever the DOJ chose that day.

First, as an historical matter, the DOJ cannot get off the hook by focusing self-servingly on a single antitrust violation. The Paramount Consent Decrees arose out of massive antitrust abuse, including multiple *unilateral* anticompetitive acts by multiple defendants – *not* merely the horizontal conspiracy (the curiously exclusive focus of the current DOJ) – and the Supreme Court *twice* emphasized this industry's proclivity for antitrust abuse. *See United States v.*

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[1] *See, e.g.*, DOJ Opening Mem. at 14 n.15 ("the United States does not believe that it is necessary for this Court to make an extensive inquiry into the facts of these Decrees in order to terminate them"); DOJ Response at 3 ("This Court's role is to conduct a limited review to ensure that the government's judgment when moving to terminate is reasonable and that there is no showing of government bad faith or malfeasance.").

[2] Any "deference" to the DOJ presupposes that it has performed the rudiments of its job concerning the "public interest," which it has not in this proceeding. Indeed, as authority for this deference, the DOJ cites *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865 (S.D.N.Y. 1987) and *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y. 1997). DOJ Response at 3. *Columbia Artists Management* describes an extensive factual inquiry into the "public interest," and the court concludes that the DOJ "has offered a reasonable and persuasive explanation of why the termination of the judgment would serve the public interest in free and unfettered competition" and "also provided convincing responses to the small number of comments received by the Court opposing the termination." 662 F. Supp. at 870. In *Alex Brown & Sons*, a Tunney Act case involving a substantial factual inquiry into the public interest, *see* discussion *infra* at 4-5, the court specifically noted that "the Tunney Act was designed to prevent 'judicial rubber stamping' of proposed Government consent decrees." 963 F. Supp. at 238.

Paramount Pictures, Inc., 334 U.S. 131, 147-48 (1948) (noting studio defendants' "proclivity to unlawful conduct" and then noting that distributors had "shown such a marked proclivity for unlawful conduct"). Whether or not the DOJ can suggest that "one element" of a conspiracy might not happen in the future matters not a whit against the backdrop of multiple antitrust abuses.

For the same reason, the DOJ's odd suggestion that there is some dispositive difference, for standard of review purposes, "between consent decrees involving concerted conduct like that here and unilateral conduct," DOJ Response at 4, is a distraction. The DOJ cites no authority for such a "distinction," and it is difficult to imagine how there could be. There is no logical reason why the "public interest" should be conceived in fundamentally different ways by antitrust offenses involving concerted conduct versus unilateral conduct. And in any event, no matter how ardently the DOJ wishes to ignore the "unilateral" antitrust abuses by the Paramount defendants, they were plentiful.

Second, as a logical and common-sense matter, the DOJ contradicts its own transparently self-indulgent standard. Here is the DOJ contradiction laid bare:

- the DOJ wants this Court to inquire whether an antitrust violation might happen without the Paramount Consent Decrees;
- the DOJ urges this Court to avoid any "**factual inquiry**" (*see supra* note 1);
- the DOJ insists that all vertical restraints (including the multiple vertical restraints at issue in the Paramount litigation that led to the Paramount Consent Decrees) are today analyzed under the "rule of reason" (rather than the quasi-*per se* prohibitions of the Paramount Consent Decrees);
- "rule of reason" inquiries, as the DOJ well knows, require intensive "**factual inquiries**";
- so the DOJ urges this Court to avoid any **factual inquiry** into potential future antitrust violations that require, by their nature, intensive **factual inquiries.**

In fact, there is no way to determine whether the Paramount Consent Decrees should be terminated without conducting a proper *evidentiary* inquiry of the sort the DOJ deeply wishes to avoid. *See, e.g., United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,706 (N.D. Ill. 1975) (requiring the parties to place on the record reasons in support of the proposed modification since "[t]he Government has the continuing obligation to insure the pro-competitive effects of the modification"); *United States v. Yoder Bros., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,793 (N.D. Ohio 1986) (requesting "the government to file evidentiary proof in support of its conclusion that 'the proposed modifications would not harm competition in the chrysanthemum industry'").

Third, the proper standard of review (as the ICA proposes) is fully supported by the way Congress has directed that the DOJ handle antitrust consent decrees. Enacted in 1974, the Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. § 16(b)-(h), concerns procedures applicable to antitrust actions brought by the United States. It contains a detailed description about how the DOJ must make a "public interest" determination. By its terms, the Tunney Act applies to entry of consent decrees rather than termination proceedings, but the Second Circuit has held that the Tunney Act can provide "useful guidance" regarding consent decree terminations. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983). In its opening memorandum, the DOJ expressly admitted that the Tunney Act provides "useful guidance" in this proceeding, DOJ Opening Mem. at 14 n.15 – and then conspicuously ignores that guidance.

The Tunney Act (as agreed "useful guidance" for determining the "public interest") requires consideration in any "public interest determination" of:

> **(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
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> **(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)(1). Of particular significance here is Congress' direction that any "public interest" determination consider "the impact … upon the public generally and individuals alleging specific injury from the violations set forth in the complaint," which is precisely to say, independent cinemas and their patrons. *Id.* In other words, a proper "public interest" determination requires consideration of those hundreds of thousands of small-market, small-town consumers of motion pictures and the independent cinemas who serve them. The DOJ wants this Court to ignore them. The ICA respectfully requests that this Court undertake a proper inquiry into the animating purpose and effect of its Paramount Consent Decrees, whereupon it will find that the Decrees need not and should not be disturbed.

II. The DOJ's Repetition of the "Change" Mantra Still Fails to Identify How or Why Any Such Change Dictates Disturbing the Paramount Consent Decrees.

The DOJ parades as its chief justifications for terminating the Decrees that "the industry has changed." DOJ Opening Mem. at 18-21. It failed entirely to make any showing that the type or degree of industry change has any rational relation whatever to termination of the Paramount Consent Decrees. The ICA responded with full acknowledgment of abundant industry change – beginning shortly after entry of the Paramount Consent Decrees (*e.g.*, television!) – and argued in detail that all of that industry "change" in fact strengthened the case for preserving the Decrees, as they constitute a continuing and critical civilizing influence in an increasingly concentrated and consolidated motion picture industry inclined to antitrust abuse. ICA Amicus

Br. at 11-17. The DOJ now responds thinly as follows: "The undisputed facts and the case record establish that the industry is significantly changed." DOJ Response at 7. Seriously. The DOJ *again* makes no effort whatever to show that "change" necessitates termination of the Decrees. The DOJ does not challenge the increasing concentration and consolidation of the motion picture industry. The DOJ does not challenge the proposition that vertical integration (the only antitrust issue the DOJ seems to notice in this proceeding) is *not* the chief motivation for antitrust abuse, but rather the peculiar uncertainties of serially unique products. The DOJ does not challenge the proposition that adding "Big Streaming" to the Ever Bigger Distribution Oligopoly and the Ever Bigger Exhibition Oligopoly actually poses *more* incentive and opportunity for the kind of antitrust abuse fairly addressed by the Paramount Consent Decrees.

Instead, inexplicably, the DOJ simply (simplistically) claims that "the industry has changed." That demonstrably irrelevant claim comes nowhere near carrying the DOJ's burden to persuade this Court to disturb the Paramount Consent Decrees.

A. DOJ Ideological "Change" Is Not Contemplated in the "Public Interest" and Certainly Cannot Justify Ignoring "the Heart of the Paramount Consent Decrees."

The most relevant "change" motivating this DOJ abandonment of small business is the kind of change that should occasion this Court's skepticism: the ideological shift into full embrace of the outer regions of the Chicago School. At its heart, the Chicago School privileges above all an abstract version of "consumer welfare." It has no concern at all for small business. Robert Bork was admirably candid about it:

> A consideration of the virtues appropriate to law as law demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare. Current law lacks these virtues precisely because the Supreme Court has introduced conflicting goals, the primary one being the survival or comfort of small business.

R. Bork, *The Antitrust Paradox* (1978), at 7. As an academic, Bork had the luxury of criticizing the Supreme Court's solicitude for small business. The DOJ does not.

The DOJ's hostility to small business, and its consequent distortion of both the Paramount Consent Decrees and the industry these Decrees assist, is evident in multiple ways. In fact, the DOJ has effectively declared open season on independents. **(1)** Most remarkably, the DOJ *still* refuses even to meaningfully acknowledge, much less engage, "the heart of the Paramount Consent Decrees," the film-by-film theatre-by-theatre mandate, the single most consequential protection of small business in cinema history. **(2)** The DOJ ignored scores of comments to the DOJ from independent cinemas (in violation of the "useful guidance" of the Tunney Act), some of which contained detailed descriptions of market power predations currently occurring and that would occur if the Decrees were terminated.[3] **(3)** The DOJ incredibly declared that anti-competitive practices (such as "block booking") have no bearing on the "public interest,"[4] and just in case its open hostility toward independent cinemas were not sufficiently apparent, it blesses all vertical restraints as "on balance procompetitive or competitively neutral," DOJ Response at 6, **when it knows better**.

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[3] Should this Court order a factual inquiry that includes public comment, many ICA members, who are watching this proceeding closely, stand ready to share their experiences with anticompetitive conduct. Note that some independents submitted comments to the DOJ (and all comments from independents were ignored) but asked that their comments not be posted publicly because the comments "named names" and independents feared retaliation. In other words, the DOJ ignored not only all of the comments listed publicly, but comments as well that were *very* specific about anticompetitive conduct, but not public.

[4] "In reaching its public interest determination, the United States was required to, and did, assess the probability that, absent the decrees, defendants would horizontally collude to impose the same licensing terms on the market. Whether the unilateral imposition of block booking or other banned licensing restriction on any particular theatre would result in anticompetitive harm is irrelevant to the public interest analysis." DOJ Response at 5.

The single most striking feature of this proceeding is the DOJ's steadfast refusal to grapple with the "film-by-film, theatre-by-theatre" mandate – identified by this Court as the "heart of the Paramount Consent Decrees." *United States v. Loew's Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988); *see* ICA Amicus Br. at 7-11. In all of its administrative[5] and judicial flurry concerning the Paramount Consent Decrees, the DOJ once (and only once) mentions the mandate,[6] so it is not blindness (other than willful), but instead a stubborn misreading of the Decrees. This steadfast misreading is inexplicable *unless* it is motivated by the ideological "change" referenced above. Then all of this strangeness begins to make sense. Then we can all see that the only thing *this* DOJ sees is a horizontal conspiracy – which is why it otherwise curiously insists upon a standard of review focused exclusively on the horizontal conspiracy. It does not see any vertical restraints because it believes vertical restraints are virtually *per se* procompetitive! It does not see any predations abusing small businesses because it believes the Supreme Court is misdirected in its solicitude for small business. In sum, this DOJ does not see small business *at all*. For *this* DOJ, the intersection of law and economics is all about, and only about, the Big Players.

Perhaps in the academies, reasonable minds may differ on the virtues of these outer limits of the Chicago School. But this Court must examine the actual "public interest," not an academic abstraction about "consumer welfare" that never sees the contribution of small business to that

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[5] In its solicitation of public comments, the DOJ discussed the various anticompetitive practices at issue in the Paramount Consent Decrees, but never once even mentioned, much less discussed, the "theatre-by-theatre" mandate.

[6] In its opening memorandum, the DOJ notes in passing that its "two-year sunset period" for block booking and circuit dealing would help theatres "adjust" to the new regime without the "theatre-by-theatre" mandate, DOJ Opening Mem. at 28, thus conceding the disruptive effect of its termination initiative.

welfare.[7] In making that *actual* public interest determination, it is critical to recall that the ICA has never once urged that any specific independent cinema is entitled to stay in business, nor does any independent cinema shrink from competition. Independents are a resilient lot. They must be. At every stage of this proceeding, the ICA has carefully argued that independent cinemas, in the aggregate, are essential to a healthy motion picture industry, and that unleashing market power predations on independents does not merely threaten the livelihood of independent cinema owners. It imperils the health of the industry as a whole, threatens to deny to movie patrons the many unique contributions that independent cinemas make, and potentially denies access to the Big Screen to hundreds of thousands of movie patrons in small markets where the Big Players *will never go*. In sum, the ICA is focused on the actual "public interest" comprised of actual human beings in actual markets. *See, e.g.,* ICA Amicus Br. at 1-3. For the DOJ, the "public interest" is an ideological abstraction that should be dispatched without any actual inquiry. *Cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U. S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law").

B. Neither the Greater Receptivity to Some Vertical Restraints Nor the Termination of One Consent Decree as to an Exhibitor Constitutes Justification to Terminate All of the Paramount Consent Decrees in Their Entirety.

It warrants note, again, that the DOJ has parachuted into the motion picture industry repeatedly in the years since entry of the Paramount Consent Decrees. It has done *real*

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[7] *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U. S. 717, 725 (1988) (noting the adoption of "rule of reason" analysis for vertical restraints, precisely in part because "the per se illegality of vertical restraints would create a perverse incentive for manufacturers to integrate vertically into distribution, an outcome hardly conducive to **fostering the creation and maintenance of small businesses**.") (emphasis added) (*citing Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 57 n.26 (1977). Small business is a fact of American antitrust jurisprudence. This DOJ cannot undo that fact.

investigations and *real* conversations with actual industry players. Never once, until now, has there ever been any interest in disturbing the Paramount Consent Decrees. Even in the brief and only window until now when the DOJ seriously contemplated terminating the Paramount Consent Decrees (just after Ronald Reagan was elected), it gave up when it was clear there was no interest among the Paramount litigation parties to do so. **There is a reason for that.** It warrants exploration. This DOJ is doing someone's bidding that would not survive a proper inquiry into the "public interest."

As for this DOJ's ideological enchantment with vertical restraints, it is misrepresenting their consequence to competition. It is certainly true, and the ICA readily acknowledged, that most vertical restraints are today analyzed under the "rule of reason." *See generally Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U. S. 877 (2007). The Paramount Consent Decrees have not affected that natural evolution of antitrust law.[8] But it is *not* true that vertical restraints are, as the DOJ contends, generally procompetitive or competitively neutral. They work multiple anticompetitive mischiefs on markets – which is exactly why they were once *per se* violations – but because they *might sometimes* have a competitive justification, they are now analyzed under the rule of reason. Consistent with its ideological motivation here, the DOJ never strays from the abstract. It never discusses or explores how *specific* vertical restraints in the *actual* motion picture industry might be procompetitive. It contents itself with singing the

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[8] *See, e.g., Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1371 (3rd Cir. 1996) (clearances are vertical, nonprice restraints evaluated under rule of reason); *General Cinema Corporation v. Buena Vista Distribution Inc.*, 681 F.2d 594 (9th Cir. 1982) (finding under rule of reason analysis, despite per capita requirement resemblance to "vertical price restraints," that a distributor's per capita requirements are not "vertical price fixing"); *Regal Entm't Grp. v. Ipic-Gold Class Entm't, LLC*, 507 S.W.3d 337, 346-47 (Tex. App. 2016) (alleged clearance analyzed under rule of reason); *Cobb Theatres III, LLC v. AMC Entmt. Holdings, Inc.*, 101 F.Supp.3d 1319, 1332 (N.D. Ga. 2015) (alleged clearance agreement between premium theater and distributor is vertical agreement scrutinized under rule of reason).

abstract praises of some vertical restraints in economic theory and does not even explore that narrow matter convincingly.

As alleged "precedent" for terminating a Paramount-related consent decree, the DOJ relies exclusively, and frequently, on *United States v. Loew's Inc.*, 783 F. Supp. 211 (S.D.N.Y. 1992). *See* DOJ Response at 3, 4, 7. The case is assertedly significant because it shows this Court "terminating" a Paramount Consent Decree with respect to Loew's (an exhibitor). The case does not support the DOJ's housekeeping operation here with respect to the Paramount Consent Decrees.

First, Loew's was an exhibitor! Many new exhibitors, large and small, had emerged, and the Court noted that "Loews is one of only two of the many large exhibition circuits that remain subject to the Paramount decrees." *Id.* at 214. In other words, the thrust of the Decrees concerned (and *still* concern) distribution practices, not exhibition practices. Yet the DOJ here proposes that *everyone* be relieved of the Paramount Consent Decrees, without any investigation or inquiry even remotely approaching that which accompanied the rational release of Loew's.

Second, conspicuously *unlike* problematic distribution practices, the anticompetitive practice prohibitions *on exhibitors* made less and less sense once vertical integration declined.

Third, Loew's had repeatedly demonstrated good behavior when, in 1980, as a condition for being permitted to enter into motion picture distribution, Loews was required to accept the distributor conduct restrictions to which Loew's Incorporated (MGM) was subject, and in 1987, as a condition for being permitted to acquire the Loews theatre circuit, Tri-Star, then a recent entrant into production and distribution of motion pictures, was required in its dealings with Loews to abide by the conduct restrictions imposed on the Paramount defendants. *Id.* at 213.

Fourth, and most importantly for what appears to be the DOJ's only argument for termination – "industry change" -- the *government itself* (*i.e.*, the DOJ at the time) expressly questioned "whether such developments necessarily render anticompetitive conduct by exhibitors less likely," *id.* at 214, which is to say, the DOJ then viewed "change," by itself, as irrelevant to *precisely* the question posed today by the DOJ: whether anticompetitive conduct is likely. Which is to say, the DOJ *then* agreed with the ICA *today*. And that healthy skepticism from the DOJ concerned *exhibitor* conduct. *A fortiori*, the DOJ would have been skeptical that industry "change" by itself would render anticompetitive conduct by distributors less likely.

It doubtless sounds strange to say that the DOJ is trying to pull a fast one, but it is literally true. The DOJ wants this proceeding to be over quickly. With so many legacy consent decrees to dispatch, the DOJ does not want the vexation of the kind of factual inquiry clearly appropriate to a "public interest" determination. Perhaps mindful of its record deficiency, the DOJ adds almost as an afterthought, literally at the end of its response brief, a sheepish footnote purporting to describe something resembling a "public interest" inquiry. DOJ Response at 8, n.4. The ICA has no basis for assessing the content or quality of this alleged "investigation," but if the DOJ has been investigating the motion picture industry "in the past few years," and conducting "interviews and meetings with industry participants," then shame on the DOJ for refusing to create a public record. The entire point of a "public interest" inquiry is a public inquiry that can be assessed by industry participants *and* reviewing courts. The DOJ's "public interest" afterthought about some alleged private investigations deserves no deference whatever – and in fact should be taken as an admission that the absence of a fair and meaningful factual inquiry weakens any claim the DOJ makes in this proceeding.

CONCLUSION

Had the DOJ conducted a legitimate and proper investigation into the "public interest," it would have known so much more about this industry and the civilizing influence of the Paramount Consent Decrees. Instead, the DOJ embarked upon a housekeeping operation, augmented here by ideological hostility to small business, and failed entirely to make the showing it was required to make to justify disturbing the Paramount Consent Decrees.

The ICA therefore respectfully requests that the Court maintain its Paramount Consent Decrees in place, deny the DOJ's motion to terminate them, and either terminate this proceeding for failure to make the requisite public interest showing (or even assert the correct standard of review), or at a minimum, order a fuller factual inquiry and require the DOJ to make the serious evidentiary showing it has plainly failed to do.

February 19, 2020 Respectfully submitted,

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