UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PARAMOUNT PICTURES, INC., Defendant.	Case No. 1:19-mc-00544-AT
UNITED STATES OF AMERICA, Plaintiff, v. LOEW'S INCORPORATED, ET AL., Defendants.	

RESPONSE OF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF THEATRE OWNERS
TO PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO TERMINATE

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Pursuant to this Court's January 21, 2020 Order (ECF No. 47) and further to its initial brief (ECF No. 45, "NATO's Brief"), *Amicus Curiae* the National Association of Theatre Owners ("NATO") submits this response to the Government's reply in support of the motion to terminate the *Paramount* Decrees (ECF No. 49, the "Government's Reply").[1]

I. INTRODUCTION

The public interest standard that applies to the termination of antitrust consent decrees requires an analysis—based on evidence—of the resulting impacts on competition. Where the evidence shows that the benefits of termination would outweigh its negative consequences, the moving party meets its burden to show that termination would serve the public interest. But in the absence of sufficient evidence on the essential question of competitive impacts, a decree that has settled expectations for decades must remain in force. *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 & n.3 (2d Cir. 1995) ("[A] party seeking to . . . terminate a consent decree 'bears the burden of establishing that a significant change in circumstances warrants [its] revision'" because, for example, "enforcement . . . would be detrimental to the public interest") (citation omitted).

The Government here diverges from that standard dramatically, and as NATO previously explained, the stakes are larger even than this case. That is no small feat, given that the Government here seeks to remove regulatory architecture that has governed Hollywood for the better part of a century. But the Government's Motion concerning the *Paramount* Decrees is part of a larger deregulatory assault on all "legacy" consent decrees, which bears consequences for the national economy as a whole. *See* NATO's Brief at 2. In its analysis of the public interest standard, this Court should be aware of the precedential implications of this case for that broader agenda, and for all defendants who may seek to release their obligations under an antitrust consent decree.

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[1] Capitalized terms not defined herein have the meaning ascribed to them in NATO's Brief.

The standard the Government proposes in this case is a moving target. In its Motion, the Government suggested that termination serves the public interest as long as the specific practices by which the antitrust offense historically manifested will not resume. That standard was blatantly wrong under Second Circuit law—most notably, *United States v. American Cyanamid*, 719 F.2d 558, 566-67 (2d Cir. 1983)—and the Government's Reply has abandoned it. The Government now argues that this Court is powerless to maintain the *Paramount* Decrees unless its Motion is shown to be the product of governmental "malfeasance" or "corruption." Alternatively, it argues that termination is proper, even though it may lead to the *Paramount* defendants' resumption of banned practices, because the Government has concluded that they have no desire to resume them *in coordination* with each other. That conclusion does not have the backing of any evidence at all; yet according to the Government, this Court has no power to question it.

The Government is wrong. This Court does not "serve merely as a rubber stamp of modifications [or terminations] agreed to by the parties." *American Cyanamid*, 719 F.2d at 565. To fulfill the supervisory duty of the judicial branch, it should require the Government to follow the path consistently taken by the Department of Justice and other moving parties in this posture, by developing and citing evidence that engages with the real-world consequences of termination. Such evidence must, at a minimum, address the specific positive and negative effects termination is expected to have on competition and consumer welfare.

II. BY OFFERING NO EVIDENCE ON THE LIKELY COMPETITIVE IMPACTS OF TERMINATION, THE GOVERNMENT FAILED TO MEET ITS BURDEN

A. The Government Has Offered No Evidence Bearing on the Public Interest, or Any of the Real-World Consequences of Termination

As explained in NATO's opening brief, the Government bears the burden of satisfying the public interest standard here. *See* NATO's Brief at 7. The Government does not dispute that point.

As NATO also explained, the Government has not offered any evidence addressing the market realities, likely pro- and anticompetitive impacts, or any of the other real-world effects that termination is likely to engender. *See id.* at 7-9. The Government's Reply confirms that it has followed a "no evidence" approach here. Its only response on this point is in a footnote sheepishly asserting that "the United States did investigate whether termination . . . was in the public interest," by soliciting public comments (with 60 days' turnaround time) and conducting "interviews and meetings with [unspecified] industry participants"—about which the Government offers no detail. *See* Government's Reply at 8 n.4. A vague reference to indeterminate "interviews and meetings," buried in a footnote at the end of a reply brief, is obviously insufficient to meet the Government's burden. The predicate for a significant deregulation of the film industries cannot rest on an unknown number of conversations with unknown persons, the substance of which is not even summarized in any of the Government's filings.

Nor does the Government's footnote address the factual question that actually matters under the public interest standard—namely, whether resumption of the banned practices will have a net positive impact on competition and consumer welfare. That is an economic question, and it requires economic analysis, not just "meetings with industry participants." *Id.*

But the Government's Reply remains indifferent to that heartland antitrust inquiry. Indeed, it contains a sentence that is shocking to read in a brief filed by the Department of Justice: "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." *See* Government's Reply at 5. The Government offers no support for its eye-popping conclusion that anticompetitive harm is "irrelevant" to the public interest standard, which is the exact opposite of the law. *See, e.g.*, *United States v. Loew's, Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992) ("[T]he

words 'public interest' . . . 'take meaning from the purposes of the regulatory legislation[,]" and "[t]he purpose of the antitrust laws . . . is to protect competition.") (internal citations omitted).[2] As NATO's opening brief explained, resumption of block booking risks a number of significant harms to competition. *E.g.*, NATO's Brief at 13-15. The Government's Reply does not address them.

The same flaws color the Government's approach to the potential procompetitive benefits of terminating the *Paramount* Decrees. As NATO explained in its opening brief, the Government does not even argue that termination *will* yield any specific benefit to competition and consumer welfare, only that it *might* do so. *See* NATO's Brief at 8-9. Far from disputing the point, the Government's Reply doubles down on that agnosticism, again asserting that "lifting these restrictions *may* incent and enhance competition." *See* Government's Reply at 6 (emphasis added). Its sole basis for that speculative claim remains a *non sequitur—i.e.*, that because some vertical restraints in some industries have been upheld under the rule of reason, all the vertical restraints in the *Paramount* Decrees should now be legal. But it is no defense to a restraint of trade merely to observe that a different practice, in a different time and place, was found to be procompetitive. *See, e.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999) ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."); NATO's Brief at 9. Yet the Government has not engaged in those specifics, because the only "benefit" in which it has any interest is an ideological one—the elimination of "perpetual decrees"

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[2] Nor do the Government's references to "unilateral" conduct and "any particular theatre" make its indifference less problematic. The Government's error does not lie in its failure to analyze the competitive impacts of termination on each individual theatre, but in its failure to analyze them for *any theatres at all*. And the Government's assumption that the practices banned by the Decrees will be resumed only through "unilateral" conduct is naïve. *See* Section II.C., *infra*.

as an end in itself. *See* NATO's Brief at 2; *see also* Government's Reply at 6. But the Second Circuit has consistently reaffirmed the validity of perpetual decrees, which is why the moving party bears the burden of demonstrating not merely the passage of time, but significant changes in the underlying factual and legal circumstances. *See Eastman Kodak*, 63 F.3d at 102.[3]

B. The Government's Unprecedented "No Evidence" Approach Is Wrong

As explained in NATO's opening brief, district courts are required to give thorough consideration to the real-world consequences of terminating a consent decree. *See* NATO's Brief at 5. That is why every case cited by the Government involving termination or modification of a consent decree (and every such case of which NATO is aware) involved the presentation of evidence on the likely competitive impacts. *See id.* at 5-6.[4]

In response, the Government contends that NATO "erroneously rel[ies] on contested decree termination proceedings involving violations of a different provision of the Sherman Act." *See* Government's Reply at 2. In essence, the Government argues that the precedents cited in NATO's Brief are inapposite, and no evidentiary showing is required where (a) the Government supports termination, or (b) the decrees arise from multi-firm (as opposed to single-firm) conduct. *See id.* at 2, 5. That argument has four principal flaws.

First, the Government's claim that NATO relies on the wrong precedents is self-defeating. NATO did not pick those precedents at random—they are the same cases the Government cited in

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[3] The Government places heavy reliance on the Department of Justice's implementation, in 1979, of a policy to embed expiration dates in consent decrees entered after that date. *See* Government's Reply at 6. But that policy does not trump Second Circuit law.

[4] The lone exception is *American Cyanamid*, 719 F.2d at 566-67, where the absence of an evidentiary record was the Second Circuit's reason for *reversing* the district court's order terminating a consent decree. *See* NATO's Brief at 3. The Government's Reply (at 3) also continues to cite the district courts in *Loew's* and *Columbia Artists* without acknowledging the dozens of pages in detailed affidavits submitted in those cases. *See* NATO's Brief at 5 & n.5 (Friedberg and Klein); *see also* Affidavits of Ronald Wilford and Thomas Thompson, *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865 (S.D.N.Y. 1987) (No. 104-165 WCC).

its opening motion, and they show that no consent decree has been modified or terminated in the absence of an economist's report, an industry expert's affidavit, and/or other evidence establishing that the effects on competition and consumer welfare will be net positive. *See* NATO's Brief at 5-6. The Government cannot credibly contend that its own cited cases do not apply, and its effort to do so merely demonstrates its lack of any cogent position on the correct standard of review.

Second, circuit-level authority shows that the Government's proffered rationales for distinguishing this case are simply wrong. Most strikingly, the Government ignores *United States v. Loew's, Inc.*, 882 F.2d 29 (2d Cir. 1989)—the only Second Circuit decision cited to this Court that addresses changes to the *Paramount* Decrees specifically. Because that case arose from the same decrees that are at issue here, the Government's "single-firm versus multi-firm" distinction does not apply, and the Department of Justice also supported termination (albeit a partial one) in that case, as here. *See Loew's*, 882 F.2d at 30. Unlike this case, however, the evidentiary record was substantial, and included affidavits from "the government attorney [formerly] responsible for the enforcement of the various *Paramount Pictures* consent judgments," as well as an economist and two industry executives. *Id.* at 31. The Second Circuit found it necessary to examine that evidence "with great care," both in the district court and on appeal, and did not approve the defendant's acquisition of a theater chain until it determined that market conditions, evidence of "Warner's motive" for the acquisition, and the continuing validity and enforcement of the Decrees' "licensing features" rendered the outcomes unlikely to harm competition. *Id.* at 33-34.[5]

If the Government's support for wholesale termination of all *Paramount* Decrees were sufficient in itself, the Second Circuit would not have carefully parsed the record in order to

[5] The Second Circuit's *Loew's* decision also noted several changes in the film industry since the 1940s. *See Loew's*, 882 F.2d at 33. The Government makes much of those findings (*see* Motion at 19), but ignores the other factors that impacted the decision—most critically, the continued enforcement of the other aspects of the Decrees. *See id.*

determine whether only one part of one Decree was properly terminable in *Loew's*. Indeed, if the assent of the Government were all that mattered, they would not be criminal-law consent decrees *at all*, but the equivalent of civil settlements, which the parties can make, unmake, and rearrange upon agreement, without any involvement from the judiciary. Second Circuit law requires more, which is why the *American Cyanamid* court rejected a termination that relied on "the judgment of the Department of Justice" instead of an evidentiary record, and remanded for fact finding and the development of "record data." *See American Cyanamid*, 719 F.2d 558, 566-67. The Government's response to that case—that it "cannot be read as rejecting deference to the United States when there is no continuing controversy between the United States and the defendants"—is incoherent. *See* Government's Reply at 4. Of course *American Cyanamid*'s limits on deference apply when there is no live controversy between the Government and the defendants. That is the only situation in which the Government would take (and a court could defer to) a position in support of terminating a consent decree.[6]

Third, the Government's purported distinctions are not only foreclosed by Second Circuit precedent, they are also not affirmatively supported by any case law. The Second Circuit cites freely from cases where termination or modification had the Department of Justice's support, and where they had its opposition, without ever suggesting that those two circumstances evince distinct legal standards. For example, in *United States v. IBM Corp.*, 163 F.3d 737 (2d Cir. 1998), the court cited to cases where the Department of Justice supported termination (*American Cyanamid*) and opposed it (*Eastman Kodak*), without any discussion of that difference in posture—because it was immaterial. *See IBM*, 163 F.3d at 740-41.

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[6] The Government also asserts that *American Cyanamid* does not apply "where . . . the United States has thoroughly analyzed the public interest in light of the governing legal standard." *See* Government's Reply at 4. That is circular reasoning in its purest form.

The same goes for the Government's attempt to create a distinction between single-firm and multi-firm conduct. The Government does not cite a single case in which such a distinction was found to be relevant (much less, controlling) in a consent decree termination proceeding. Significantly, though, the Government does cite a case in which that distinction existed: the *Western Electric* cases, which originated in a consent decree that broke up the "Bell System" telephone monopoly (an archetype of single-firm conduct), but involved modifications to those decrees impacting the multi-firm conduct of Bell's post-breakup successor companies. *See United States v. Western Electric Co.*, 993 F.2d 1572, 1575 (D.C. Cir. 1993); *United States v. Western Electric Co.*, 900 F.2d 283, 289-90 (D.C. Cir. 1990). Each of the two *Western Electric* opinions contains a lengthy discussion of the standard of review for terminating consent decrees; yet neither contains any mention of a distinction between single-firm and multi-firm conduct, even though the factual backgrounds of the cases straddle those purported paradigms. *See Western Electric*, 993 F.2d at 1576-78; *see also Western Electric*, 900 F.2d at 293-94. That is because there is no reason why the distinction between single-firm and multi-firm cases would affect a matter so basic as whether evidence—the lifeblood of judicial decision making—should be required before major regulation is dismantled. At bottom, the Government's single-firm versus multi-firm argument "rest[s] on formalistic distinctions rather than actual market realities," an approach "disfavored in antitrust law." *Eastman Kodak Co. v. Image Tech Servs.*, 504 U.S. 451, 466-67 (1992).[7]

Fourth, the Government's approach here diverges sharply from its own rules and past practices. As explained in NATO's opening brief, the Antitrust Division Manual states that the Government should conduct "a full investigation into possible changes in the market" before

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[7] *See also American Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties . . . actually operate."); *Bon-Ton Stores v. May Dep't Stores Co.*, 881 F. Supp. 860, 869 (W.D.N.Y. 1994) ("[P]aradigms are less important in this sphere than concrete economic realities.").

supporting termination of a consent decree, which typically should entail the preparation of a report "by an outside consultant analyzing the economic consequences" of the proposed action. *See* NATO's Brief at 6-7 (quoting U.S. DEPT. OF JUSTICE, ANTITRUST DIV. MANUAL III-149 and IV-51 (5th Ed. Mar. 2014) and *United States v. ABA*, 118 F.3d 776, 784 (D.C. Cir. 1997)). The very reason for these requirements is to address Congress's desire (as reflected in the Tunney Act) to end the judiciary's perceived rubber-stamping of consent decrees that were inadequate to protect the public. *See, e.g.*, *In re IBM Corp.*, 687 F.2d 591, 600 (2d Cir. 1982). Remarkably, the Government does not address these points *at all*—effectively conceding that its approach in this case does not even meet the standards it has prescribed for itself.

C. Because It Developed No Evidence of Termination's Real-World Impacts, the Government Reduces the Public Interest Test to a Rubber Stamp

Because the Government has chosen not to develop or offer any evidence on termination's real-world impacts, it asks this Court to endorse watered down versions of the public interest standard (a "malfeasance" test and a version of the "elements test" centered on concerted action). *See* Government's Reply at 3, 4-5. This Court should reject that request, which is legally baseless and would vitiate the judiciary's ability (and responsibility) to safeguard the public interest.

In the first of its false standards, the Government argues that courts must defer to the Department of Justice's decision to support termination, unless there is a "showing of government bad faith or malfeasance" or a "corrupt failure of the government to discharge its duty." *See* Government's Reply at 3. On its face, that standard is obviously wrong: if the only limit on courts' deference to the Department of Justice were evidence of corrupt and collusive prosecution, then as a practical matter, there would be no limit at all, and deference would be absolute. The law of this circuit does not set the bar that low. *See, e.g.*, *American Cyanamid*, 719 F.2d 566-67.[8]

[8] *American Cyanamid* involved no corruption, but demanded evidence on consumer welfare.

To support its incorrect "malfeasance" and "corruption" standard, the Government quotes two decisions addressing entirely different issues from the present case. *See* Government's Reply at 3. The first is *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), a Warren Court case addressing intervention as of right under a version of Rule 24 of the Federal Rules of Civil Procedure that, after numerous amendments, no longer exists. *Compare Sam Fox*, 566 U.S. at 685 & n.2 *with* Fed. R. Civ. P. 24(a)(2). *Sam Fox* offers the Government no support.

The Government's second "malfeasance" case is *United States v. Mid-America Dairymen, Inc.*, No. 73 CV 681, 1977 WL 4352 (W.D. Mo. 1977), an unpublished opinion from the Western District of Missouri in 1977 that the Government embeds in a block quote from the Southern District of New York's *Loew's* case in 1992, without attribution. Not only does the Government obscure the provenance of that quotation, it also uses ellipses to omit key words that show *Mid-America Dairymen* arose in the materially different posture of *entering* a consent decree rather than *terminating* one.[9] That difference matters because the Tunney Act sets forth extensive prerequisites to the entry of a consent decree—including the filing of a competitive impact statement detailing "the anticipated effects on competition" and potential alternative remedies. *E.g.*, 15 U.S.C. § 16(b)(3), (b)(6). The support for those documents typically includes an outside economist's expert report, the record developed in the Department of Justice's litigation with the antitrust defendants, the testimony of other experts or public officials, and any other evidence the court or a special master may require. *See* U.S. DEPT. OF JUSTICE, ANTITRUST DIV. MANUAL IV-51 (5th Ed. Mar. 2014); *see also ABA*, 118 F.3d at 784; 15 U.S.C. § 16(f)(1), (f)(2).[10]

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[9] *Mid-America Dairymen* stated that a court should "carefully consider the explanations of the government *in the competitive impact statement*." 1977 WL 4352, at *9 (emphasis added). The Government omits the italicized words.

[10] *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997), another case involving *entry* of a decree, is inapposite for the same reason. *See* Government's Reply at 3.

Accordingly, the point of the quoted language from *Mid-America Dairymen* is to encourage deference to the Department of Justice *when it has built a thorough record in compliance with the Tunney Act*, and there are no indicia of government corruption. But as NATO previously explained (in a point that is now undisputed), the Government has fallen far short of the Tunney Act's standards here. *See* NATO's Brief at 6-7; *see also* Section II.B., *supra*. Indeed, the Government's efforts here pale in comparison to the *Mid-America Dairymen* competitive impact statement.[11] And even were that not the case, the standard of deference contemplated by *Mid-America Dairymen* is far from absolute—"careful[] consider[ation]" is still required—and could not contravene the standard set by the Second Circuit in *American Cyanamid* in any event. *See* 1977 WL 4352, at *9. The Government's effort to craft a "malfeasance" or "corruption" standard fails.

In its second false standard, the Government argues that as long as the "concerted action" element of the underlying *Paramount* offenses is "not present," then "termination is appropriate." *See* Government's Reply at 5. NATO's opening brief identified two of the core flaws in that purported "elements test." *See* NATO's Brief at 4. Specifically, there is no "elements test" *per se* (because an analysis of the elements is just one potential part of the broader public interest inquiry), and the Government offered no evidence to negate any element. *Id.* Both flaws remain uncured—and are completely unaddressed—in the Government's Reply.

Instead, the Government doubles down on a version of the "elements test" that is remarkably toothless, and dangerous to the stability of consent decrees in general. In a troubling passage, the Government acknowledges that termination will allow—or more accurately, invite—the *Paramount* defendants "to employ block booking or other licensing restriction in a particular

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[11] *See United States v. Mid-America Dairymen, Inc.*, No. 73 CV 631-W-1 (W.D. Mo. filed Dec. 27, 1973), Proposed Consent Judgment and Competitive Impact Statement, 41 Fed. Reg. 21799 (May 28, 1976); *see id.* at 21804-07 (summarizing detailed investigation), 21807-11 (detailing competitive effects, alternative remedies considered, and third-party remedies).

market, small or large." *See* Government's Reply at 5. One would expect that before encouraging the resumption of conduct that has been subject to criminal sanctions for more than half a century, the Department of Justice would analyze the anticipated impacts on competition and consumer welfare, and attempt to show them to be beneficial (or at least not harmful). But the Government did not do so here. Rather, it hastens the return of long-banned practices based on the assumption that the defendants will "make a unilateral decision" (not a concerted one) to re-impose them. *Id.*

Again, the Government offers no evidence to suggest that banned practices such as block booking will result from unilateral decision making. Such inattentiveness to the industry realities and underlying facts sits poorly with the case law of this circuit—most notably *Loew's*, where the Second Circuit found it necessary to scrutinize "with great care" a proposed modification by a single *Paramount* defendant (acting unilaterally). *Loew's*, 882 F.2d at 30. It also sits poorly with the Supreme Court's holding, in the original *Paramount* case, that concerted action "inferred from the . . . record" was no less actionable than a brazen and "express agreement" to restrain trade. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948).

In other words, the origins of the *Paramount* Decrees themselves lie, at least in part, in acts of tacit collusion. *See id.* It is therefore naïve to assume without evidence that the resumption of the banned conduct will come only from unilateral, non-collusive, and fully independent decisions. To the contrary, following termination of a consent decree, concerted action could resume immediately, and undetectably. No phone calls, e-mails, or secret meetings would be necessary for the conspiracy to take effect; the playbook for collusion is already written in the underlying litigation itself. To emulate history and resume concerted action, the defendants would need only to read from the same page in the records of their prosecution, literally. That is why the Government's singular focus on concerted action is the worst possible version of the "elements

test." A test that considers only the concerted action element is virtually guaranteed to lead to termination, while also creating optimum grounds for collusion to resume *sub silentio*.

The Government's approach here contrasts markedly with *IBM* (the sole case the Government cites in support of the existence of an "elements test"). *See* Government's Reply at 5. *IBM* was a tying case, and the element at issue was the "actual tying" together of two distinct products. *IBM*, 163 F.3d at 741. There, the Department of Justice believed that element was unlikely to recur (*see id.*), but if that belief turned out to be wrong, it would have been no secret: consumers on the receiving end of a tying arrangement would be the first to know. This case has no such tripwire; the direct consumer impact in *IBM* is not comparable to a tacit conspiracy. Accordingly, even *IBM* shows the Government's proffered standard here is uniquely extreme.

In defense of its "elements test," the Government would perhaps argue that in the decades since *Paramount*, the law has raised the burden on claims of tacit collusion. But in this circuit, tacit collusion remains one of several factors from which an illegal conspiracy can be inferred—especially where a parallel criminal case already established an agreement. *E.g.*, *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 62, 64 (2d Cir. 2012). More fundamentally, there is no reason to conclude that recent barriers to tacit collusion claims would apply in this posture. Defendants who are tried and convicted of a criminal antitrust conspiracy are not entitled to the same inferences against tacit collusion as a private antitrust defendant at the pleading stage under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 & n.4 (2007). If anything, the pleading barriers imposed by *Twombly* and its progeny counsel against termination, because they undermine the Government's argument that "[a]bsent the Decrees, injured . . . theatres could sue" as private plaintiffs. *See* Motion at 27.[12]

[12] It would not serve the public interest to replace a universally applicable consent decree with costly and piecemeal private litigation. *See* NATO's Brief at 9 & n.11. But post-*Twombly* pleading standards may suggest such a replacement is not possible *at all*.

D. The Government's Mischaracterizations of NATO's Arguments Cannot Distract from Its Own Failure to Apply the Proper Standard

Throughout its Reply, the Government mischaracterizes NATO's position, in a transparent effort to make its own rubber-stamp standard seem more reasonable by painting NATO as extreme.

First, the Government states that NATO requires "the government or defendants [to] prove that no anticompetitive effect will result from the termination." *See* Government's Reply at 5. That caricature of "utter certainty . . . is a straw man." *Western Electric*, 993 F.2d at 1576. NATO's position is not that the Government must rule out *all* anticompetitive effects to an absolute certainty; it is that the Government must identify and balance the likely pro- and anticompetitive outcomes as it typically would in any rule-of-reason case. *See* NATO's Brief at 8-9.

Next, the Government states that "NATO's argument would require that licensing restrictions such as block booking are forever banned, but only for the *Paramount* defendants[.]" *See* Government's Reply at 5-6. It is disingenuous to suggest that the stakes of this deregulatory effort extend only to the specific defendants in this case. The head of the Government's Antitrust Division recently gave an interview to the Hollywood Reporter suggesting that Disney—which is not a *Paramount* Defendant—is regulated by the Decrees.[13] Consent decrees serve as a yardstick of acceptable behavior, exerting a normative effect on industry actors who are not parties to them, as ICA showed in its brief (in a point which the Government fails to address). *See* ECF No. 41 ("ICA's Brief") at 12-13.[14]

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[13] *See* Wesley Mann, *Trump's Enforcer*, THE HOLLYWOOD REPORTER (Feb. 12, 2020), *available at* https://www.hollywoodreporter.com/features/man-who-holds-hollywood-silicon-valleys-future-his-hands-1278759 ("For example, he imagines that Disney could bundle its animation library and work with theaters to screen classics 24/7" in the absence of the Decrees).

[14] *E.g.*, Giovanna Massarotto, *The Deterrent and Enunciating Effects of Consent Decrees*, 11 J. COMP. L. & ECON. 493, 499 (2015) ("Consent decrees" are "de facto regulation"); Andrea Berger Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277, 279 (1978) (describing the "'follow-the-leader' effect"); Philip Marcus, *The Impact on Business of Antitrust Decrees*, 11 VAND. L. REV. 303, 303-04 (1958) (same, analyzing *Paramount* Decrees).

Lastly, the Government repeatedly accuses NATO of trying to preserve the *Paramount* Decrees in order "to protect [its members] from market forces." *See* Government's Reply at 8; *see also id.* at 2. The unstated and unproven premise of that accusation is that the *Paramount* Decrees, originally put in place to end undue *interference* with market forces, are now a barrier to "the working of the market," and that terminating them will unleash new competitive benefits. The Government has not done the work necessary to reach that conclusion. *See* Section II.A., *supra*.

Given those failures, the Government's pejorative tone toward the concerns raised by NATO is remarkable. NATO is not a confederacy against capitalism; it is an organization representing large and small movie theatres that are concerned with what happens to their industry when longstanding guardrails are removed. It is reasonable for them to hold the Government to its obligation, embodied in the standard of proof, to answer that question by showing how termination of the *Paramount* Decrees will impact and *improve* competition and consumer welfare.

III. CONCLUSION

NATO respectfully submits that this Court should not terminate the block-booking provisions of the *Paramount* Decrees until the Government shows with evidence that termination is likely to benefit consumer welfare in a way that overcomes its anticompetitive effects.

Dated: February 19, 2020

Respectfully submitted,

SEIFERT LAW FIRM

/s/ Mark J. Seifert
Mark J. Seifert (*pro hac vice*)
50 California Street, Suite 1500
San Francisco, California 94111
Telephone: (415) 999-0901
Email: mseifert@seifertfirm.com

Attorney for Amicus Curiae
The National Association of Theatre Owners

THE NATIONAL ASSOCIATION OF THEATRE OWNERS

*/s/ Jacqueline E. Brenneman**
Jacqueline E. Brenneman (*pro hac vice*)
3450 Cahuenga Blvd W, Suite 410
Los Angeles, California 90068
Telephone: (818) 506-1778
Email: jeb@natoca.com

General Counsel
The National Association of Theatre Owners

*Electronic signature used with consent in accordance with Rule 8.5(b) of the Court's ECF Rules and Instructions.