

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 MEMORANDUM
IN OPPOSITION TO THE DEPARTMENT OF JUSTICE'S
MOTION TO TERMINATE THE PARAMOUNT CONSENT DECREES**

G. Kendrick Macdowell
Counsel, Independent Cinema Alliance
D.C. Bar No. 436375
(214) 782-9985
kendrick27@yahoo.com

James J. Mahon
Becker & Poliakoff LLP
Local Counsel for ICA
45 Broadway
17th Floor
New York, New York 10006
(212) 599-3322
Jmahon@beckerlawyers.com

TABLE OF CONTENTS

Table of Authorities.....	iii
INTERESTS OF AMICI.....	1
INTRODUCTION.....	3
ARGUMENT.....	4
I. The DOJ Suggests a Standard of Review Contrary to Case Law and Common Sense.....	4
II. The DOJ Project Concerning “Legacy” Consent Decrees Sweeps Too Far in Targeting the Paramount Consent Decrees, Which Have Brilliantly Served the Motion Picture Industry.....	6
A. The DOJ’s Inadequate Inquiry Conspicuously Ignored the “Theatre-By-Theatre” Mandate, Identified by This Court as the Heart of the Paramount Consent Decrees.....	7
B. The DOJ’s Mere Incantation of “Change” in the Motion Picture Industry Is No Substitute for a Factual Inquiry Into Whether Such Change Materially Eliminates the Inclination to Antitrust Abuse.....	11
C. The Paramount Consent Decrees Call for None of the Scrutiny Sometimes Associated With Collusive and Other Problematic Consent Decrees.....	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Admiral Theatre Corp. v. Douglas Theatre Co.</i> , 585 F.2d 877 (8th Cir. 1978).....	16
<i>Cobb Theatres III, LLC v. AMC Entmt. Holdings, Inc.</i> , 101 F.Supp.3d 1319, 1331 (N.D. Ga. 2015).....	16
<i>Don George, Inc. v. Paramount Pictures</i> , 111 F. Supp. 458 (W.D. La. 1951).....	18
<i>Patterson v. Newspaper & Mail Deliverers Union</i> , 797 F. Supp. 1174 (S.D.N.Y. 1992).....	5
<i>Regal Entm't Grp. v. Iplic-Gold Class Entm't, LLC</i> , 507 S.W.3d 337 (Tex. App. 2016).....	16
<i>Rufo v. Inmates of Suffolk Cty. Jail</i> , 502 U.S. 367 (1992).....	5
<i>United States v. American Cyanamid Co.</i> , 719 F.2d 558 (2d Cir. 1983).....	6
<i>United States v. District Council of NYC and Vicinity of the United Brotherhood of Carpenters and Joiners of America</i> , 571 F. Supp. 2d 555, 557, 563 (S.D.N.Y. 2008).....	5
<i>United States v. International Business Machines Corp.</i> , 163 F.3d 737 (2d Cir. 1998).....	4, 5
<i>United States v. Loew's Inc.</i> , 705 F. Supp. 878 (S.D.N.Y. 1988).....	7, 9, 17
<i>United States v. Paramount Pictures, Inc.</i> , 1940-1943 Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940).....	19
<i>United States v. Paramount Pictures, Inc.</i> , 334 U.S. 131 (1948).....	1, 17
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932).....	4

Other Authorities

H. Alexander and R. Blakely, "The Triumph of Digital Will Be the Death of Many Movies," <i>The New Republic</i> (Sep. 12, 2014).....	15
K. Fox, <i>Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry</i> , 21 Hofstra L.R. 505 (1992).....	19
Comments of Harkins Theatres (Oct. 4, 2018), available at https://www.justice.gov/atr/page/file/1102441/download	11
M. Conant, <i>Antitrust in the Motion Picture Industry: Economic and Legal Analysis</i> (Univ. of Cal. Press 1960).....	14, 16
M. Conant, <i>The Paramount Decrees Reconsidered</i> , 44 LAW & CONTEMP. PROBS. 79 (1981).....	12

Deadline Hollywood, “Distribs & Exhibs Hold Line On Clearances Despite Fox’s Position Change” (Mar. 31, 2016).....	8
“Department of Justice Announces Initiative to Terminate ‘Legacy’ Antitrust Judgments” (April 25, 2018).....	6
W.A. Galston & C. Hendrickson, <i>A policy at peace with itself: Antitrust remedies for our concentrated, uncompetitive economy</i> , Brookings Institute (Jan. 5, 2018).....	13
A. Grossman, Former Visiting Fellow, American Heritage Foundation, <i>Use and Abuse of Consent Decrees in Federal Rulemaking</i> , Testimony before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives (February 3, 2012).....	18
<i>The Hollywood Reporter</i> , “Cobb Theatres Argues Jury Should Decide Antitrust Case Against AMC” (Nov. 7, 2016).....	8
Independent Cinema Alliance https://www.cinemaalliance.org/	1
J. Shapiro, “The DOJ, Exhibition, And That Terrible, Horrible, No Good, Very Bad Day” (BirthMoviesDeath.com Nov. 21, 2019).....	2
Open Markets newsletter, “Lights, Camera, Monopoly: DOJ Could Revive the Studio System” (Aug. 24, 2018).....	12-13
“The Paramount Decrees” https://www.justice.gov/atr/paramount-decree-review (updated October 20, 2018)	7
Wikipedia, the Free Encyclopedia, “Virtual Print Fee”	16

INTERESTS OF *AMICUS* INDEPENDENT CINEMA ALLIANCE

The Independent Cinema Alliance (“ICA”) is a non-profit corporation representing 236 independent cinema companies with 2,672 screens, and growing. The ICA’s stated mission is to promote the preservation and prosperity of independent cinemas¹ as an essential part of a healthy motion picture industry. As an advocacy group on behalf of independent cinemas, the ICA is uniquely positioned to urge preserving the Paramount Consent Decrees, which foremost seek to protect independent cinemas. The Paramount Consent Decrees happened because the Department of Justice (“DOJ”) seven decades ago stepped into an industry rife with antitrust abuse and on behalf of independents and their patrons. As the Supreme Court declared:

The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built.

United States v. Paramount Pictures, Inc., 334 U.S. 131, 162 (1948).

In stark contrast, the current DOJ treats independent cinemas as inconsequential players in an industry rightly dominated by Big Production, Big Exhibition, and increasingly, Big Streamers. But independents make unique and essential contributions to a healthy motion picture industry. They are not merely incidental miniatures of the big circuits and not small businesses

¹ For purposes of eligible membership in the ICA, “independent” means:

- not publicly owned or owned in whole or in part by a motion picture distributor, motion picture studio or other content supplier, including a supplier of electronic content;
- market share of domestic theatrical revenue does not exceed 2%;
- not owned in whole or in part by a national or regional circuit having a domestic theatrical revenue share of more than 2%; and
- consolidated screen count does not exceed 500 screens.

See generally Independent Cinema Alliance <https://www.cinemaalliance.org/>

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.