

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

BLOCKBUSTER INC.,

Defendant.

Civil Action No.: 1:05 CV 00463 (ESH)

**MEMORANDUM OF POINTS AND AUTHORITIES BY DEFENDANT  
IN OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER PURSUANT  
TO SECTION 7A(g)(2) OF THE CLAYTON ACT**

**Preliminary Statement**

As part of its review under the Hart-Scott-Rodino Act (“HSR Act”), 15 U.S.C. § 7A, of the contested hostile takeover effort by Blockbuster Inc. (“Blockbuster”) of Hollywood Entertainment Corp. (“Hollywood”), the Federal Trade Commission (“Commission” or “FTC”) on January 12, 2005, issued Blockbuster a request for additional information and documentary materials (commonly known as a “second request”). This request, which contained over 100 specifications and subspecifications, was one of the broadest second requests—if not the most comprehensive—ever issued by the FTC, especially in the amount and detail of electronic data demanded.

In response to this second request, Blockbuster produced on a “rolling basis” the equivalent of over 1900 boxes of responsive documents as well as a 116-page written response supported by a further 22 boxes of documents and 83 CDs containing responsive data and information. The preparation of the response involved almost 16,000 hours of work by outside

counsel and an untold number of hours by company personnel. The production was completed, and Blockbuster certified compliance, on February 4, 2005.

The instant action challenges Blockbuster's responses to two subspecifications requesting electronic data: Specification 17(a), which demanded data on list prices on video rentals over a period of four years for each of almost 6000 Blockbuster company-owned and franchised stores; and Specification 17(e), which demanded data on "late fees" on video rentals over the same time period by store. The data in these two specifications comprised less than one percent of all of the electronic data Blockbuster supplied in response to the second request.

As discussed in more detail below, motivated by the need to complete the regulatory process in order to ensure that its offer would be fairly considered by Hollywood's shareholders, Blockbuster has been extraordinarily cooperative with the FTC staff in its review of the Blockbuster/Hollywood transaction. Once the staff questioned the accuracy of the data Blockbuster originally supplied in response to Specification 17(a), Blockbuster immediately reviewed the submission and discovered that the program it had written to compile the 120,000 list price entries supplied in response to Specification 17(a) contained an inadvertent error. As soon as this error was discovered, Blockbuster immediately recompiled the data and supplied the FTC staff with a corrected response the same day. As to Specification 17(e), Blockbuster can only assume that some copying error occurred that corrupted the file provided to the FTC staff, because the file provided by Blockbuster to counsel was complete and not corrupted. Once notified that the FTC staff's difficulty in opening its copy of the file was not due to the particular computer program the staff was using, Blockbuster immediately responded to the problem by providing the staff with a further copy that the FTC staff said it could open and read all the entries.

In its complaint, the Commission alleges that these two inadvertent errors caused Blockbuster to fail to be in “substantial compliance” with the requirements of the second request within the meaning of Section 7A(g)(2) of the Clayton Act. When a court finds that a party is not in “substantial compliance” with its second request response, Section 7A(g)(2) authorizes the court to order the reporting party to come into substantial compliance, to extend the waiting period under the HSR Act “until there has been substantial compliance,” and to grant such other equitable relief as may be appropriate. 15 U.S.C. § 18a(g)(2). Here, there is no dispute before this Court that: (1) Blockbuster corrected the two errors immediately once they were brought to its attention; and (2) there is no additional information that the Commission seeks in order for Blockbuster to come into “substantial compliance” with the second request. Hence, the only question for relief before this Court is whether to extend the HSR Act waiting period applicable to this transaction, and if so for how long.

This case raises two questions of first impression:

1. What is the standard for determining whether a reporting party has “substantially complied” with the requirements of a second request?
2. Assuming that a party has not substantially complied, how should the Court exercise its discretion in fashioning an appropriate order to bring the party into substantial compliance and how long, if at all, should the order extend the HSR Act’s waiting period after the party has substantially complied?

For the reasons explained below, Blockbuster respectfully submits that the two inadvertent errors in question, taken in the context of the other documents, information, and data the FTC staff had in its possession from the remaining parts of Blockbuster’s response to the second request as well as materials and testimony from third parties and public sources, did not negate Blockbuster’s “substantial compliance” with the second request. Alternatively, if the Court finds that Blockbuster did not “substantially comply” with the second request because of the two errors, the Court should extend the waiting period by little if any time. Blockbuster corrected the

two inadvertent errors immediately upon discovery and, as explained below, in plenty of time for the FTC staff to complete its review of the transaction. Indeed, Blockbuster's own experts were able to perform a complete analysis of the data after the FTC staff received the corrected data. Finally, in the context of this transaction, which is a hostile and contested takeover offer of Hollywood, any significant delay in the Commission's investigation is likely to prejudice Blockbuster in its pursuit of Hollywood, as well as Hollywood's shareholders, who may be deprived of the higher Blockbuster bid.

### **Statement Of Facts**

#### **A. Pre-Filing Contacts with the FTC Staff**

Even though Blockbuster had not yet filed its Premerger Notification and Report Form under the HSR Act, on or about December 17, 2004, Blockbuster alerted the Director of the Bureau of Competition of the Federal Trade Commission of Blockbuster's intention to acquire Hollywood. Declaration of Lisl J. Dunlop, dated March 7, 2005 ("Dunlop Decl. ") ¶ 2. In light of the possibly hostile and certainly contested nature of the proposed acquisition and the severe time constraints imposed by the Hollywood shareholder vote, Blockbuster urged the Director immediately to seek clearance to review the transaction and to permit Blockbuster to make a presentation to FTC staff once clearance was obtained. *Id.* The Commission did seek and obtain clearance to review the transaction, and accepted Blockbuster's offer to make a complete presentation of its views of the competitive analysis of the transaction.

On December 21, 2004, Blockbuster made a three and one half hour presentation to the FTC staff. Dunlop Decl. ¶¶ 3-8 and Exhibit 1. Blockbuster's December 21 presentation provided background on Blockbuster and Hollywood, the history of bidding for Hollywood and likely timeline for the transaction, and the reasons for the acquisition. Dunlop Decl. ¶ 3. The presentation also provided an in-depth review of the enormous changes in the home video rental

business as new home entertainment alternatives have been introduced and have provided consumers with more options for home entertainment, the impact of these changes on Blockbuster's business and pricing practices and the broadened competitive landscape in which Blockbuster exists. *Id.*

Blockbuster's delegation was headed by John F. Antioco, Chairman of the Board of Directors and Chief Executive Officer of Blockbuster. Other representatives from Blockbuster were Frank G. Paci, Executive Vice President, Finance, Strategic Planning and Development, Edward B. Stead, Executive Vice President, General Counsel, and Executive Vice President, Business Development, and Judy Norris, Vice President and Senior Corporate Counsel. Dunlop Decl. ¶ 4. The Blockbuster economic analysis was presented by Drs. Chris Vellturo and Amy Almeida of Quantitative Economic Solutions, and Margaret E. Guerin-Calvert of Competition Policy Associates. ("Compass"). Wayne D. Collins and Lisl Dunlop of Shearman & Sterling attended the meeting as counsel to Blockbuster. *Id.*

Throughout the meeting, the Blockbuster executives and counsel stressed to the staff that, for the Hollywood shareholders to be able to consider the Blockbuster offer, any regulatory uncertainty over Blockbuster's offer needed to be resolved prior to the Hollywood shareholders' meeting at which the shareholders would vote on the competing transaction. Dunlop Decl. ¶ 5. At the time, the Hollywood shareholders were due to vote on accepting an executed merger agreement with Leonard Green & Partners as early as January 17, 2005. *Id.*

During the course of the December 21 meeting, Drs. Vellturo and Almeida presented the results of a detailed econometric analysis they had performed on Blockbuster data, which demonstrated that the estimated historical price-constraining effect of Hollywood on Blockbuster is zero to negligible for all but a small number of stores and that even for those few

stores where there was an estimated price-constraining effect, the effect is second order compared to other competitive forces constraining rental prices. Dunlop Decl. ¶ 6; Declaration of Dr. Christopher A. Velturo, dated March 7, 2005 ("Velturo Decl.") ¶¶ 13-14. At the conclusion of the December 21 meeting, Dr. Velturo provided the staff with a CD containing all of the data obtained from Blockbuster that was used in the econometrics analysis (the "QES data") and invited the staff to contact him with any questions they had regarding the QES data or in attempting to replicate the QES analysis. Dunlop Decl. ¶ 7; Velturo Decl. ¶ 15.

Also, at the end of the meeting, Mr. Antioco pledged Blockbuster's full cooperation with the staff's review. Mr. Antioco promised that Blockbuster would make its personnel available for interviews in person or by telephone, and that Blockbuster would expedite any request that the staff made for documents or data. Dunlop Decl. ¶ 8. To begin this process, on December 22, 2004, Blockbuster sent the FTC staff a copy of Blockbuster's draft HSR filing, including all "Item 4(c) documents" collected to that point,<sup>1</sup> as well as four boxes of key Blockbuster internal documents to assist the staff in its analysis. Dunlop Decl. ¶ 9.

Between December 22, 2004, and January 12, 2005, Blockbuster's counsel on numerous occasions reminded the staff of the enormous time pressures resulting from the hostile contested nature of the transaction and reiterated Mr. Antioco's pledge at the December 21 meeting to provide the staff, voluntarily and expeditiously, with access to Blockbuster personnel, documents, or data on a voluntary basis. Dunlop Decl. ¶ 10. Despite this offer, the staff made no significant data or document requests to Blockbuster outside of questions about the QES

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<sup>1</sup> Item 4(c) of the Notification and Report Form requires the reporting party to submit "[a]ll studies, surveys, analyses and reports prepared by or for an officer or director for the purpose of analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." Antitrust Improvements Act Notification Form Instruction, Item 4(c).

econometric analysis and data until the Commission issued its second request on January 12, 2005. *Id.*

**B. Blockbuster's Filing under the Hart-Scott-Rodino Act and the Second Request**

On December 28, 2004, Blockbuster filed a Premerger Notification and Report Form under the HSR Act for an all-cash tender offer for Hollywood.<sup>2</sup> Dunlop Decl. ¶ 13. This filing commenced a 15-day waiting period during which time the HSR Act prohibited Blockbuster from consummating the acquisition. 15 U.S.C. § 18a(b)(1)(B). Under the HSR Act, the waiting period can be extended only if FTC staff issues a second request prior to expiration of the initial waiting period. 15 U.S.C. § 18a(e)(2). The effect of the second request is to extend the waiting period until the expiration of 30 days following a sufficient response by the filing party with the second request. *Id.*

The Commission issued the second request on January 12, 2005. Dunlop Decl. ¶ 15. The request, which is 25 single-spaced pages, contains well over 100 specifications and subspecifications. *Id.* at Exhibit 7 to Dunlop Decl. The second request's demands included document requests, data requests, and interrogatories calling for narrative responses. The document requests required Blockbuster to produce *all* documents (hard copy or paper) prepared since January 1, 2001, in its possession or control that relate, for example, to:

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<sup>2</sup> Blockbuster originally announced that it would make an all cash tender offer for Hollywood at an exchange rate of \$11.50 in cash for each Hollywood share. Following the announcement of the Movie Gallery merger agreement, whereby Hollywood shareholders would receive \$13.25 in cash for each Hollywood share, Blockbuster replied with an offer of \$14.50 per Hollywood share, consisting of \$11.50 in cash and \$3.00 in Blockbuster common stock. Dunlop Decl. ¶ 22. This change to a mixed exchange offer implied a 30-day final waiting period under the HSR Act, not the 10-day period that would have applied if Blockbuster had remained with an all cash tender offer. *Id.*

- Business plans, short-term and long-range strategic plans, budgets and financial projections, expansion/retrenchment plans, R&D plans, presentations to management, executive committee, or the board of directors. Specification 10.
- Market share, draw or trade area, or competitive position of the company and/or any of its competitors. Specification 11(b).
- Effects of actual or projected opening of any competitive store (or service) on any store operated by Blockbuster in the United States, including sales volumes and prices. Specification 11(b).
- Attempts to win customers from competitors and prevent losses of sales to competitors. Specification 11(b).
- Losses of sales to other competitors (including estimated or actual loss of sales). Specification 11(b).
- Plans to reduce costs, improve products or services, introduce new products or services, integrate with other products or services, discontinue products, or otherwise become more competitive. Specification 11(b).
- Effect of competition from substitute products on supply, demand, cost, or price. Specification 11(b).
- Competition relating to improvements or innovations in features, functions, ease of operation, performance, cost, or other advantages. Specification 11(b).
- Evaluations/comparisons between any relevant product and any other product or service (including studies, surveys, reports, analyses, or other documents discussing or referring to any research by consultants, user groups, or third parties). Specification 11(b).
- Customer preferences / selection criteria relating to the purchase, license, or use of any relevant product. Specification 11(b).
- Customer demographics, and customer shopping characteristics, behaviors, patterns, or preferences, including frequency of shopping, transaction patterns, and customer types (e.g., loyalty customers, heavy shoppers), regarding the company's and competitors' stores or format(s) (including online retail, online subscription services, subscription programs, Video on Demand, Tivo). Specification 12.
- Competitive monitoring activities of any store owned or operated by Blockbuster, including pricing, advertising, selection, format, and frequency. Specification 14.
- Price lists, pricing plans, pricing policies, pricing forecasts, pricing strategies (including use of double and triple coupons and loyalty shopping cards). Specification 11(a).



- Pricing analyses, pricing programs or models (*e.g.*, price optimization software, pricing decisions, price-checks and data, promotion plans-excluding circulars, and price zones) of the company and/or any of its competitors. Specification 11(a).
- Maps or data that show demographic data for the trade or draw area (total population, population density, income levels, and documents explaining any other criteria used by Blockbuster in evaluating actual or potential sales). Specification 8.
- Maps and underlying data that identify the trade area, draw area, or other locations from which any store located in the United States draws its customers. Specification 8.
- Plans (except engineering and architectural plans and blueprints) for the construction of new stores, or the expansion, conversion, or modification (if modification has a planned or actual cost of more than \$500K) of current stores in the United States. Specification 9.
- Sales, marketing, licensing, redistribution, or other distribution agreement. Specification 9.
- Resources (*e.g.*, financial, human capital, hardware, software, and time) required to acquire, develop, maintain, update, and market any relevant product. Specification 9
- Advertising plans and strategies (drafts of selling aids, promotional materials, and press releases need not be included). Specification 9.
- Requirements for entry into the sale of each relevant product in each relevant area, including land acquisition, construction of facilities, zoning and other permits, planning and design, distribution systems, service requirements, patents, copyrights, or licenses, sales and marketing activities. Specification 16.
- The total costs required for entry, including recoverable costs for unsuccessful entry or exit, method and amount of time necessary to recover such costs, and sunk costs entailed in entry. Specification 16.
- Possible new entrants into and possible exits from each relevant area. Specification 16.
- Programs and/or models used to analyze possible new store locations or remodelings. Specification 16.

The second request's specifications requiring Blockbuster to submit data included, for example:

- Detailed description of products, sales data, names and contact information for suppliers and competitor information. Specification 2.

- Data on purchases from suppliers from 1999 and information on revenue-sharing agreements, and information on cooperative advertising payments and market development funds. Specification 3.
- Maps showing locations of company and franchise stores, trade areas, locations of other video rental stores, franchise development areas. Specification 9(a).
- Listings of quarterly sales in units and dollars from January 1, 1999 to date for each store broken down by zip code and separately by census tract, and demographic data used to make pricing or store opening or closing decisions since January 1, 1999. Specification 9(c) and (d).
- Detailed information for each company and other store identified in the Specification 9(a) maps, including trade name, full address, longitude and latitude, type of store, ultimate parent entity, estimated store size, estimated current average weekly sales, estimated number of titles and copies of VHS tapes, DVDs and games in stock for rental. Specification 9(e).
- Maps showing locations of company and franchise stores that also identify each video store that has closed since 1999, and for each closed store on a separate table the store number, date closed and trade name, address, longitude and latitude, age of store, ultimate parent entity, estimated store size and estimated annual average sales prior to closing. Specification 9(f)(i).
- Maps showing locations of company and franchise stores that also identify each retail store that the company contends competes or since 1999 has competed for any significant portion of the company store's sales, and for each retail store on a separate spreadsheet provide store number, trade name, full address, longitude and latitude, type of store, ultimate parent entity, the age of the store, the date closed (if closed), estimated store size, estimated current average weekly sales of all relevant products, estimated number of different movies and copies of VHS tapes, DVDs and games in stock in the company and identified store, percent of company store's estimated current average weekly sales the identical movie or game titles represent. Specification 9(f)(ii).
- Maps and tables showing demographic data, including population, population density, income levels and any other criteria used by the company in evaluating sales. Specification 9(h).
- Data on stores expected to be opened by the company or its franchisees in the next 12 months, including a list of zip codes that the company expects would comprise at least 90% of the store's revenue, and for each zip code any demographic variables used to make or evaluate the decision to open the store, and the same data broken down by census tract. Specification 10.
- Provide for each of the 18 relevant products and separately for company-operated stores and franchise stores a detailed description of the pricing practices implemented from January 1, 1999, including an identification and description of each pricing category,

price terms for each pricing category, non-price terms for each category, incentive programs, frequent renter programs, early return discounts or benefits, late fees, membership fees and a full description of how price terms are established and changed. Specification 16.

- For each company store and each of the 18 relevant products, information for every Saturday from January 1, 1999 to date on: price and non-price terms at which the store offered products; any incentive programs offered and the extent to which these programs were utilized by consumers; any frequent renter programs and extent of utilization by consumers; any early return discounts or benefits offered for early returns and extent of utilization by consumers; any late fees applied to late returns; any membership fees; and for each product and each pricing category within each product the total number of titles in stock and out of stock, the total number of physical units in stock, and of the ten titles that had the greatest number of units rented during that week, the number of titles that were out of stock at the close of business that Saturday. Specification 17.
- An identification and description of requirements for entry into the sale of each relevant product, total costs required for entry and the amount of such costs that would be recoverable if the entrant exited, possible new entrants and minimum viable scale. Specification 18.
- Detailed information concerning each electronic database maintained by the company that contains information relating to customers, demographics, prices and competition for any of the 18 relevant products including size and format, detailed description of data, date range of data, record layout and title and a description of each record or field contained in the database, a description of all regularly prepared and ad hoc reports generated using information in the databases (including name of report, distribution list, frequency report generated and person responsible for generating), and an identification of all databases and other spreadsheets linked to the database. Specification 19(a).
- All relevant variables, for each month from January 1, 1999 to date, used in making store location or pricing decisions or in determining the competitiveness or profitability of the store for any relevant product. Specification 25.
- Copies of and detailed information relating to all financial statements, budgets, profit and loss statements, cost center reports, profitability reports and any other regularly prepared financial statement. Specification 27.
- Detailed information concerning distribution facilities. Specification 28.
- Detailed information concerning prior mergers and acquisitions. Specification 32.
- Detailed information on each company store including: trade name; whether store leased or acquired or built by the company; date of opening or acquisition, length of time to open and estimated replacement cost and time; details on store lease; monthly data on wages, revenues, taxes and other financial data; estimated and actual gross sales revenue, cost of goods sold, annual gross margin from January 1, 1999, in total and separately for

each relevant product; estimated annual EBIT and EBITDA from January 1, 2002; square footage and selling space; weekly and yearly sales from January 1, 1999 by relevant product and in total; value and number of coupons redeemed each week from January 1, 1999; total number of members who have rented or purchased each week from January 1, 1999; and number of transactions each week from January 1, 1999. Specification 33.

*Notably, with the exception of the two errors that are the subject of this action, the FTC staff is not questioning Blockbuster's compliance with any of the remainder of the specifications and subspecifications.*

Pursuant to Blockbuster's promise to provide the staff with information as quickly as possible, Blockbuster immediately began a rolling production of documents and interrogatory answers responsive to the second request. Dunlop Decl. ¶ 24. Blockbuster made six substantial interim productions to the FTC staff between January 14, 2005, and February 2, 2005. On February 4, 2005, Blockbuster made its final production. *Id.* By the end of February 4, 2005, Blockbuster had produced to the Commission the equivalent of 1900 boxes of documents responsive to the document demands of the second request, as well as a 116-page written response to the interrogatory portions of the second request, Dunlop Decl. ¶ 15, supported by 22 additional boxes of documents and 83 CDs of data. Dunlop Decl. ¶ 26. The collection, review and production of materials responsive to the second request took nearly 16,000 hours of work by outside counsel and an untold number of hours by company personnel. *Id.*

**C. The Commission's Allegations of Deficiencies in Blockbuster's Production**

1. Specification 17(a)

On Wednesday, February 16, 2005, in a telephone conversation, a member of the FTC staff first alerted Blockbuster's counsel that the FTC staff economists had some questions concerning the data submitted in response to Specification 17(a) two weeks prior on February 2, 2005. Dunlop Decl. ¶ 16. In particular, the FTC staff economists had noted discrepancies between the Specification 17(a) list prices and price data that appeared in the Blockbuster

Ultimate Location Information Technology [“BULIT”] database, which Blockbuster had submitted to the staff on January 26, 2005. *Id.* During the call, the staff communicated little other information. Dunlop Decl. ¶¶ 39.

Immediately following this conversation, Blockbuster instructed COMPASS, an antitrust economics consulting firm retained by Blockbuster in this matter who had a copy of the second request responses, to compare the list price data in the Specification 17(a) response and the price data in the BULIT database. Dunlop Decl. ¶ 40. After further discussions with the FTC staff, Blockbuster learned on Thursday, February 17, 2005, the name of the BULIT database in question. *Id.* Late on Thursday, February 17, 2005, Blockbuster’s counsel initiated inquiries in the company to determine why the BULIT price data and Specification 17(a) response were different. Dunlop Decl. ¶ 41.

Throughout the day on Friday, February 18, Blockbuster’s counsel spoke to a number of Blockbuster employees, some of whom were out of the office on vacation in anticipation of the upcoming President’s Day long weekend. Dunlop Decl. ¶ 41. In particular, Jeff Gloor, the Blockbuster employee responsible for maintaining the price history data, sending price updates to the BULIT database manager for updating BULIT, and who also prepared the Blockbuster’s Specification 17(a) response, was in California on vacation and did not have access to his records. Dunlop Decl. ¶ 41; Declaration of Jeff A. Gloor, dated March 7, 2005 (“Gloor Decl.”) ¶ 11. By the end of the day on Friday, it appeared that the discrepancy likely was explained by the fact that BULIT was updated in the middle of a quarter, while the Specification 17(a) response was provided quarterly. Dunlop Decl. ¶ 41.

On Tuesday, February 22, 2005, the first business day following the President's Day weekend, Mr. Gloor returned to the office and was able to look at the files under Rule 803.10(e)(2), 16 C.F.R. § 803.10(e)(2). Dunlop Decl. ¶ 42; Gloor Decl. ¶ 15. Mr Gloor determined that the BULIT file referenced by the FTC staff was created in August, 2004, and was correct for that time period, and that the discrepancies between the BULIT file and the Specification 17(a) response was explainable to the differences in the dates for which the prices were being reported. Gloor Decl. ¶ 16.

Nonetheless, out of an abundance of caution Mr. Gloor decided to reexamine in detail the assembly of the Specification 17(a) response. Gloor Decl. ¶ 16. In the process Mr Gloor discovered that the merge process used to compile the Specification 17(a) response created an error on the data points. Gloor Decl. ¶ 8. The error was not readily identified and at first glance does not appear to be widespread. *Id.* Immediately after discovering the error Mr. Gloor recompiled the data and prepared an amended response, which he sent to Blockbuster's counsel. Gloor Decl. ¶ 16. Blockbuster's counsel, in turn, immediately forwarded the corrected Specification 17(a) response to the FTC staff by electronic mail, so that the FTC staff received the corrected response on February 22, 2005, the same day the error was discovered. Dunlop Decl. ¶ 41 and Exhibit 20. To date, the FTC staff has not informed Blockbuster of any concerns with the data in the February 22 corrected response.

On February 24, 2005, the FTC staff sent a letter formally notifying Blockbuster that it regarded Blockbuster's error with respect to Blockbuster's response to Specification 17(a) to be deficient. Dunlop Decl. ¶ 34 and Exhibit 17. On February 28, 2005, Blockbuster's counsel responded with a detailed letter setting forth the reasons why, under the circumstances present here, the error in the original response to Specification 17(a) did not mean that Blockbuster failed

to “substantially comply” with the request within the meaning of Section 17A(g)(2). Dunlop Decl. ¶ 50; Exhibit 21 to Dunlop Decl. Issue was joined when the FTC staff ultimately rejected Blockbuster’s reasons, and the question of substantial compliance is now before this Court.

2. Specification 17(e)

On February 23, 2005, at a meeting between Blockbuster and the FTC staff, the FTC staff handed Blockbuster’s counsel a letter detailing certain alleged deficiencies in Blockbuster’s response to the second request. Dunlop Decl. ¶ 33. One of the alleged deficiencies was that the electronic spreadsheet on which Blockbuster provided data on “late fees” for video rentals in response to Specification 17(e) of the second request contained data for only 400 stores, and not the approximately 6000 stores for which a response was required. *Id.* On February 24, the FTC staff sent Blockbuster’s counsel a formal deficiency notice under Rule 803.3(c)(2) with respect to Blockbuster’s response to Specification 17(e). Dunlop Decl. ¶ 36; Exhibit 19 to Dunlop Decl..

In investigating the alleged deficiencies noted in the staff’s letters of February 23 and 24, Blockbuster’s counsel checked the file in question on the master CD that Blockbuster had originally provided in response to Specification 17(e). Dunlop Decl. ¶ 49. Opening the file with Microsoft Excel, Blockbuster’s counsel also discovered that it could read data for only 400 stores. *Id.* Blockbuster’s counsel then immediately called Blockbuster, whereupon it was informed that the spreadsheet was too big for Microsoft Excel (which only displays a limited number of rows of data) and that the file needed to be opened in a database program such as Microsoft Access. *Id.* When Blockbuster’s counsel opened the master CD using Microsoft Access, the data for all stores was evident.

In its February 28 response to the staff's February 24 deficiency notice, Blockbuster informed the staff that it should use a database program and not a spreadsheet program to open the file in question. Dunlop Decl. ¶ 50. The next day, on March 1, 2005, Blockbuster received a letter from the FTC staff offering to forego pursuit of the alleged deficiencies if Blockbuster agreed to extend the waiting period to the earlier of March 24 or five business days prior to a scheduled meeting of Hollywood shareholders for purposes of voting on the Movie Gallery agreement. *Id.* at Exhibit 22. In the "conditions" section of this letter, the letter also stated that the staff had been unable to access the Specification 17(e) data even using numerous software programs, including Microsoft Access, and requested further assistance. *Id.* at Exhibit 2, at 2.

Immediately upon receipt of this letter, in an abundance of caution Blockbuster sent an additional copy of Blockbuster's response to Specification 17(e) to the staff, again copied from the master CD Blockbuster had originally provided to its counsel containing the response. Dunlop Decl. ¶ 52. The CD containing the file in question was delivered to the FTC staff on March 1, 2005, at approximately 4:15 p.m. *Id.* At approximately 5:15 p.m., the FTC staff notified Blockbuster's counsel that its staff were unable to open the file on the CD. *Id.* Blockbuster's counsel immediately made another copy of the file, which was delivered to the FTC staff's offices at approximately 6:25 p.m. on March 1. *Id.* The FTC staff informed Blockbuster's counsel that it was able to open that file and access the information for all stores. To date, the FTC staff has not informed Blockbuster of any concerns with the data in the March 1 copy of the Specification 17(e) response.

On March 2, 2005, the FTC staff sent Blockbuster's counsel a letter stating that the staff had compared the file originally submitted on February 2, 2005, with the file submitted



on March 1 (which the staff was successfully able to open) and found a sizeable discrepancy in the file sizes, suggesting that there has been either a copying error or some other corruption in the original file.<sup>3</sup> Exhibit 24 to Dunlop Decl. Although Blockbuster does not know the cause of this discrepancy, for the purpose of this proceeding Blockbuster will assume that it was due to inadvertent error in copying the master CD and which CD was submitted in response to the second request on February 2, 2005.

As part of its February 28, 2005, response to the FTC staff's formal deficiency notices, Blockbuster's counsel set forth the reasons why, under the circumstances present here, the staff's inability to access the file in the original response to Specification 17(a) did not mean that Blockbuster failed to "substantially comply" with the request within the meaning of Section 17A(g)(2), even if Blockbuster somehow erred in the creation of the copy of the file sent to the FTC staff. Issue was joined when the FTC staff ultimately rejected Blockbuster's reasons, and the question of substantial compliance is now before this Court.

### Argument

#### **A. Blockbuster was in substantial compliance with the second request when it made its final submission on February 4, 2005**

This is a case of first impression. Neither of the two cases that have been brought to date under Section 7A(g)(2) construe the test for substantial compliance nor develop any principles for the fashioning of a remedy whether a party is not in substantial compliance with its second request.<sup>4</sup> Moreover, the Commission and the Department of Justice ("DOJ") have failed

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<sup>3</sup> The fact that Blockbuster's counsel was able to provide the FTC staff with another copy of the original file that Blockbuster had provided with the Specification 17(e) response indicates that the original file was complete and not corrupted.

<sup>4</sup> In *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,976 (D.D.C. 1988), the court found without any meaningful discussion of the test of substantial compliance, or even identifying the nature of the deficiency, that the defendant was not in substantial compliance. In

to define a standard for substantial compliance. The ABA Antitrust Section has “urge[d] the agencies to promulgate standards (1) by which the proper scope of second requests can be assessed and (2) for determining whether substantial compliance has been achieved.” ABA Antitrust Section, *The State of Federal Antitrust Enforcement—2001*, at 32.

1. The test of substantial compliance is whether a submission permits the Commission to fulfill its statutory obligation, which is to determine whether it is in the public interest to challenge the transaction

The purpose of the HSR Act, as declared by its sponsors, is to:

strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a premerger injunction . . . .

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976). An examination of the legislative history of the HSR Act shows Congress intended the government to use its authority in a manner which balances the need to detect and prevent unlawful mergers and acquisitions prior to consummation against the burden on the filing companies of data production under the time constraints inherent in these types of transactions. S. Rep. No. 803, 94th Cong., 2d Sess. 65 (1976).<sup>5</sup>

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FTC v. Dana Corp., No. CA 381-003 H (N.D. Tex., Jan. 2, 1981), the court never reached these questions, since the parties settled the deficiency dispute prior to any decision by the court.

<sup>5</sup> "The Committee believes that Title V represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays. To this end, the Committee adopted a number of amendments offered by the sponsors of the legislation, including a clarification and expansion of exemptions, a reduction in the number of transactions subject to the notification and waiting provisions, a confidentiality provision, a modification of several provisions to provide the court with greater discretion, and a modification of the automatic injunction provision ... S. Rep. No. 803, 94th Cong., 2d 65 (1976). The committee concluded that "those provisions will neither deter nor impede consummation of the vast majority of mergers and acquisitions." *Id.* at 66.

To avoid unduly burdening business with unnecessary paperwork or delays, Congress, as part of the premerger notification legislation, provided the enforcement authorities with only a narrow grant of premerger "discovery" authority in order to determine whether to seek a preliminary injunction. *See* 122 Cong. Rec. 30877 (1976) (remarks of Representative Rodino).<sup>6</sup> Congress did not intend for the enforcement authorities to gather by means of a second request all the facts necessary to argue that a preliminary injunction should be granted or to prosecute an action. Congress was fully aware that such facts could be discovered under the ample discovery provisions of the Federal Rules of Civil Procedure. Congress was concerned with providing the antitrust enforcement authorities with a strictly limited, but meaningful, opportunity to study the potential antitrust consequences of significant mergers and acquisitions prior to consummation and to determine whether an enforcement action should be brought. *See* 122 Cong. Rec. 29342 (1976) (remarks of Senator Hart).

Congress introduced the standard of substantial compliance to protect respondents from an overly expansive interpretation by the agencies of their powers to conduct precomplaint discovery through second requests under the HSR Act. An extensive treatment of the meaning of "substantial compliance" in the context of requests for additional information was provided by Chairman Rodino in comments he described as a statement of legislative intention regarding the Act:

A broad and liberal interpretation of the doctrine of "substantial compliance" should protect the rights of the Government as well as the parties to the proposed merger. Thus, a company would not fail to "substantially comply" if it withheld information, for example, that was subject to a legitimate privilege.

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<sup>6</sup> Representative Rodino's remarks are particularly probative of legislative intent since he was the sponsor of H.R. 14580, 94th Cong., 2d Sess. (1976), which, with minor amendments, was ultimately substituted for the Senate-approved version of Title II of the Antitrust Improvements Act.

*And plainly, Government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government. But lengthy delays and extended searches should consequently be rare. It was, after all, the prospect of protracted delays of many months--which might effectively "kill" most mergers--which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the "automatic stay" provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill.*

*In sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable. In these cases, a failure to comply with such unreasonable portions of a request would not constitute a failure to "substantially comply" with the bill's requirements. All the equities of the particular situation should be considered in determining what constitutes "substantial compliance."*

122 Cong. Rec. 30877 (1976) (emphasis supplied.)

Applying the Rodino test, Blockbuster was in substantial compliance with the second request as of its final submission on February 4, 2005, notwithstanding the two inadvertent errors in the production.

2. Blockbuster was in substantial compliance with the second request as of its certification on February 4, 2005, despite the two inadvertent errors in its production

In responding to the second request, Blockbuster produced the equivalent of over 1900 boxes of responsive documents as well as a 116-page written response supported by a further 22 boxes of documents and 83 CDs containing responsive data and information. Preparation of the response involved almost 16,000 hours of work by outside counsel and untold hours of work by Blockbuster employees. Given the amount of information Blockbuster turned over to the FTC staff, taken together with all the documents and information the staff has collected from third parties in the last two months of its investigation, it is inconceivable that the

Commission is unable to determine whether it would be in the public interest to challenge Blockbuster's acquisition of Hollywood as anticompetitive.

The Commission argues that it cannot determine from all this information whether the transaction may have an anticompetitive impact because the pricing data specified in Specifications 17(a) and 17(e) is so fundamental. This argument, however, is simply not credible. First, the Commission does not explain why the volumes of other information – much of which pertain to Blockbuster's prices – are insufficient to determine whether the transaction is so likely to be anticompetitive that the Commission should seek a preliminary injunction to block the tender offer. It is the Commission's burden to explain why it asked Blockbuster to produce volumes of other information that now appear to be completely useless. Second, if these specifications were fundamental, Blockbuster cannot understand why were they buried in the middle of the second request as Specifications 17(a) and 17(e) rather than say, numbers one and two.<sup>7</sup> Third, it took the FTC staff between two and three weeks to identify these errors to “fundamental” data. Particularly with respect to Specification 17(e), there is no excuse for the FTC staff to take almost three weeks to notify Blockbuster's counsel it could not access complete data on a CD.

In fact, the Commission received ample data from Blockbuster to perform the econometric analysis necessary to determine whether the transaction might be anticompetitive. Even before Blockbuster made its HSR filing, Dr. Velluro, one of Blockbuster's economists, provided the Commission with relevant data demonstrating that the anticompetitive impact of the

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<sup>7</sup> In fact, while the Commission's own economist attests that pricing data is often an important component of the Commission's economic analyses of mergers and acquisitions, he is careful not to say that it is *fundamental* to the determination of whether a transaction may be anticompetitive. Declaration of Michael Vita, dated March 4, 2005 ¶ 3. Rather, he cites to a

proposed merger is minimal. Velturo Decl. ¶¶ 13- 16. Similarly, other data submitted in response to the second request should have enabled the Commission to conduct the empirical analyses necessary to determine whether the transaction might be anticompetitive. For example, using submitted data other than Specifications 17(a) and 17(e), Ms. Guerin-Calvert was able to conduct extensive empirical analyses of structure, including proximity, distance of closest competitor, number of rentailer competitors, entry and exit, without any reference to Specification 17. Declaration of Margaret Guerin-Calvert, dated March 7, 2005 (“Guerin-Calvert Decl.”) ¶ 8. In addition, Guerin-Calvert was able to conduct extensive analyses of changes in actual rental transactions pricing over time, including panel regressions and average price analyses of changes in actual price by Blockbuster stores without regard to Specification 17(a). *Id.*

The Commission’s argument that it notified Blockbuster that these data were among the most important data to be received is also unreasonable. The Commission seems to be saying that if Blockbuster had properly supplied the information requested by Specifications 17(a) and 17(e) but had failed to supply information for most of the remaining specifications, it would have been in substantial compliance. However, unless the FTC staff regarded much of the second request as frivolous, this cannot possible be the case. Moreover, the FTC staff put the whole of Specification 17 on priority list, not simply Specifications 17(a) and 17(e). Specification 17 requests data for 18 separate “relevant products” for each of Blockbuster’s over 6000 stores over a 6-year time period and requests 11 separate pieces of data for each relevant product. The errors in this case related to only two of the 11 pieces of data with respect to two of the 18 relevant products. Certainly, inadvertent error pertaining to a small portion of the second

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single case where econometric evidence played an “important” role. *FTC v. Staples Inc.*, 970 F.

most important specification in a second request of more than 100 specifications and subspecifications cannot mean insubstantial compliance.

**B. Even if Blockbuster was not in substantial compliance on February 4, 2005, it has corrected the two errors in question and no order mandating further compliance or extending the waiting period is necessary or appropriate.**

The Commission asks this Court to exercise its power under Section 7A(g)(2)(A) of the Clayton Act to extend the HSR waiting period “until 30 days from such time as Blockbuster substantially complies with the Second Request.” Commission Br. at 23. Section 7A(g)(2) provides that a court, upon a finding that the reporting party did not “substantially comply” with the second request, “may order compliance,” and, if such an order is entered “shall extend the waiting period until there has been substantial compliance.” 15 U.S.C. § 18a(g)(2)(A)-(B). Section 7A(g)(2) also authorizes the court to grant “such other equitable relief as the court in its discretion determines necessary or appropriate,” *Id.* at 15 U.S.C. § 18a(g)(2)(C), which presumably is the provision upon which the FTC staff is relying in asking this Court to extend the waiting period beyond the time of substantial compliance.

Under the facts here, the Court should decline to order further compliance or extend the waiting period because: (1) upon learning of the two inadvertent errors the Commission has challenged in this action, Blockbuster immediately corrected them and the FTC staff has alleged no deficiencies in the corrected responses, so that the need to order further compliance is moot, and (2) the FTC staff will have had more than sufficient time to analyze the corrected data and complete its analysis during the original waiting period without any extension.

1. Blockbuster corrected the two errors immediately upon learning of them

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Supp. 1066, n.2 (D.D.C. 1997).

As detailed in the Statement of Facts above, Blockbuster corrected the two errors immediately upon discovering them. A corrected response to Specification 17(a) was provided to the FTC staff on February 22, 2005, while a new readable file for Specification 17(e) was provided on March 1, 2005. To date, the FTC staff has not informed Blockbuster of any questions or concerns with the corrected versions of either response.

2. The Commission had sufficient time to analyze the corrected data and complete its analysis during the waiting period

Congress, in enacting the HSR Act, determined that the investigating agency should have only 30 calendar days (10 in the case of a cash tender offer) following the receipt of a second request response to review the submitted materials and make a decision whether to commence an action in federal district court to preliminarily enjoin the consummation of the reported transaction. 15 U.S.C. § 18a(e)(1)(A). In providing this time limit, Congress sought to balance the interests of the investigating agency to review the materials and make an informed decision whether to seek a preliminary injunction to enjoin the transaction before consummation with the interest of the reporting parties to be able to proceed, either to consummate the reported transaction or to defend it in court, as soon as possible. S. Rep. No. 803, 94<sup>th</sup> Cong., 2d Sess. 65 (1976); H.R. Rep. No. 1373, 94<sup>th</sup> Cong., 2d Sess. 11(1976). Thus, the waiting period should not be extended longer than is necessary for the Commission to make an informed judgment whether to challenge the proposed transaction and seek a preliminary injunction in federal district court. Just as it is the Commission's burden to show a second request response is not in substantial compliance, so too should it be the Commission's burden to justify any extension of the waiting period.

The Commission is asking this Court to extend the waiting period 30 days from March 2, 2005, the first business day following Blockbuster's submission of the corrected file for



Specification 17(e) on the evening of March 1. The Commission argues that it needs this time in order to complete its analysis of the transaction now that it has the corrected responses to the two specifications in issue. The Commission, however, provides no support for the need for additional time other than the *ipse dixit* of two of its staff economists. The relevant portions of the declarations of both FTC staff economists are instructive as to what they do not say as they are for what they do say.

On the question of whether the Commission has the time to complete its analysis of the transaction in the absence of an extension, Dr. Michael Vita only states (and then somewhat guardedly): “If the March 7th deadline holds, the Bureau of Economics *might be* prevented from providing the Commission with a fully reliable econometric analysis that would help inform the Commission’s decision on whether to seen an enforcement action in this matter. Blockbuster’s failure to provide accurate pricing information in response to Specification 17(a) *may* have impaired the ability of the Bureau of Economics to fulfill its responsibility to provide the Commission with a useful and reliable economic analysis of the likely competitive effects of the proposed Blockbuster/Hollywood transaction.” Declaration of Michael Vita, dated March 4, 2005 (“Vita Decl.”) ¶ 7 (emphasis added). Significantly, Dr. Vita only points to the need for the list price data in response to Specification 17(a); he says nothing about the need for the late fee information in response to Specification 17(e). Blockbuster corrected its response to Specification 17(a) on February 22, 2005, so that the Bureau has had almost two weeks to work with the corrected list price data. If the Bureau was in fact having a problem in completing its econometric work in the time available without an extension, it should have known it with certainty by the time Dr. Vita submitted his affidavit, especially since the waiting period was scheduled to expire only three days hence. And if the Bureau did in fact have a problem, then

Dr. Vita should have so stated clearly and without qualification in his affidavit, and he should have provided the Court with the details of what work remained to be done and the time it would take to complete this work. Dr. Vita did none of these things in his declaration.

Robert McMillan, the second of the FTC staff economists submitting a declaration, said little more. Mr. McMillan states, without providing any detail, that he spent “substantial amounts” of time analyzing the erroneous list price data provided in response to Specification 17(a), McMillan Decl. ¶ 7, and that he had to replicate all of his previous data analysis once the corrected data was supplied on February 22, *id.* at ¶ 6. Nowhere does he say that he could not easily complete his analysis of the corrected list price data within the original waiting period. Mr. McMillan does state that he could not conduct any econometric analyses on the late fee data provided by Blockbuster on March 1, *id.* at ¶ 8, but he does not detail any hypothesis he might test with this data, the length of time that it might take to conduct the analysis, or the significance of the analysis in light of all of the other evidence that the Commission has had available to it.

Especially here, where Blockbuster’s errors were inadvertent and almost immediately corrected once discovered, a few conclusory assertions from two economists of the FTC staff should not be sufficient to discharge the Commission’s burden of showing that it needs more time to complete its investigation and discharge its statutory obligations than the waiting period would otherwise allow. The Commission’s request for an extension of time should be denied for a failure of proof.

Moreover, there is good reason to believe that the assertions of the FTC staff economists are simply incorrect about the need for more time beyond what the original waiting period provides. Blockbuster’s economists were able to complete their pricing analyses within

two days or less once they received the corrected data. Declaration of Margaret Guerin-Calvert, dated March 7, 2005 (“Guerin-Calvert Decl.”), ¶ 11. Although it is true that any analysis of econometric results derived from the incorrect data would not be probative in the competitive analysis, a substantial amount of the work the FTC staff undertook in reaching those results would be immediately applicable to the new data. *See id.* ¶12-14; Vellturo Decl. ¶24-28. Therefore, the formative work the FTC staff economists has done to develop, specify and organize the data relating to any analysis involving 17(a) and 17(e) should not have been “rendered useless”-- the models and programs should have stood ready, and it should have been relatively simple and quick to incorporate the revised data. Vellturo Decl. ¶ 27; Guerin-Calvert Decl. ¶ 11.

To run the regressions the staff indicated it had run on the erroneous list price data, the staff would have had to: 1) construct the relevant testable hypotheses; 2) design the appropriate econometric models/specifications and simulations to evaluate these hypotheses; and 3) construct the relevant datasets. Vellturo Decl.” ¶ 25. These are the three most time-consuming stages of an econometric analysis. *Id.* The fact that one of the variables (list price) in the dataset contained an error would not negate the value of work done earlier by the FTC staff. *Id.* All the staff should have had to do once it was supplied with the correct list price data was to substitute that data for the erroneous data, and then run the regressions that had already been designed through a standard econometrics package. *Id.*

For example, once Blockbuster’s economists had the corrected data for Specification 17(a) assembled, the actual re-computations of the statistical analyses and the compilation of related results (and verification of these results) were completed in less than 24 hours. Vellturo Decl. ¶ 26. The FTC staff was provided with the corrected data on February 22,

2005. It should have had ample time to re-run its analyses before the expiration of the waiting period on March 7, 2005. *Id.*

Similarly, once the FTC staff had the corrected data for Specification 17(e), the time required to execute the results should have been relatively limited, probably less than two days. Vellturo Decl. ¶ 28. Perhaps more importantly, however, the FTC staff had store-level information on extended viewing fees (“EVFs”) as part of Blockbuster’s response to Specification 33, and these alternative data could have been used as a preliminary proxy with which to setup the principal lines of analyses in place of the actual Specification 17(e) data. *Id.* In fact, Blockbuster supplied EVF share data and average movie rental price data to the FTC staff on January 13. Average movie rental prices were calculated using revenues (from the response to Specification 33(f)), transactions (from the response to Specification 33(n)) and the EVF data submitted to the staff on January 13. *Id.* Once the Specification 17(e) data were available, it would take little time and effort to substitute these data in for the proxy EVF data – again likely less than two days. *Id.* The corrected Specification 17(e) data were supplied to the FTC staff on March 1, thus it should have had ample time to analyze this data before end of the waiting period on March 7.

In addition, the FTC staff should have been able to fulfill much of its statutory obligation in assessing the transaction from the other documents, information, and data available to it in the course of its investigation. Apart from the two files in question in this action, the FTC staff had the benefit of over 1900 boxes of Blockbuster’s regular course of business documents and a 116-page written response supported by 22 boxes of documents and 83 CDs containing its data and information responsive to interrogatory specifications of the second request. Further, there are a number of analyses that the FTC staff could have conducted using data provided in

Specifications 9 and 33, as well as the financial and other information provided by Blockbuster's economists, which would have been in no way hampered by the data reporting issues relating to Specification 17. In fact, Dr Velturo's conclusions as to the competitive implications of the proposed transaction were based on extensive quantitative analyses, yet he did not rely on any data provided in Specification 17 to reach his conclusion. Velturo Decl. ¶ 29.

**C. If the Court decides to enter an order extending the waiting period, the record and the equities weigh heavily in Blockbuster's favor for extending the waiting period for only a minimal amount of time.**

The Commission seeks an order extending the waiting period under the HSR Act to prevent Blockbuster from consummating its tender offer until some specified date in order to permit the FTC staff to complete its analysis of the transaction in light of the two errors in Blockbuster's second request response. Blockbuster has argued that no extension is appropriate. In the event that this Court is inclined to grant any extension, the record and the equities weigh heavily in Blockbuster's favor for extending time for at most only a few additional days.

1. The evidentiary record favors Blockbuster

As discussed in the prior section, the Commission adduces no evidence other than the unsupported assertions of two staff economists that they *might* need more time in order to complete their analyses using the corrected data. By contrast, Blockbuster has submitted declarations from two of its economists explaining in detail how the types of econometric analysis that the FTC staff is considering can be accomplished in a matter of days once the corrected data was received.

2. The equities favor Blockbuster

Despite the Commission's intimations to the contrary, Blockbuster has remained exceptionally cooperative with the Commission staff throughout the merger investigation.

Blockbuster voluntarily brought its intention to acquire Hollywood to the attention of the Commission prior to the filing of its Notification and Report Form under the HSR Act. At its own initiative, Blockbuster, led by its most senior executive officers, voluntarily gave the Commission staff a very detailed and lengthy presentation of its competitive analysis of the transaction, again prior to its initial filing. At its own initiative, Blockbuster voluntarily asked its economists to give the Commission staff a detailed presentation of their econometrics study along with the data and assistance necessary to permit the Commission staff to replicate the study. Blockbuster also voluntarily gave the Commission staff complete access to the company's employees, documents, and data at the Commission's request, although the Commission staff did not take advantage of the offer. Prior to its initial premerger notification filing, Blockbuster voluntarily provided the Commission staff with a copy of Blockbuster's draft HSR filing, including all item 4(c) documents collected to that point, as well as four boxes of key Blockbuster internal documents to assist the staff in its analysis. Indeed, throughout the investigation, Blockbuster has engaged in numerous communications with Commission staff to ensure full compliance with all requests, including immediately correcting errors as soon as they were discovered.

In contrast, the Commission was dilatory in informing Blockbuster of its alleged deficiencies, contrary to the "promptness" requirement of Rule 803.10(c)(2). 16 CFR § 803.10(c)(2). Under Rule 803.10(c)(2):

[i]f notification or a response to a request for additional information or documentary material received by the Commission or Assistant Attorney General does not comply with these rules, the Commission or the Assistant Attorney General shall *promptly* notify the person filing such notification or response of the deficiencies in such filing, and the date of receipt shall be the date on which a filing which complies with these rules is received."

16 CFR § 803.10(c)(2) (emphasis added). Despite such language, the Commission waited until three weeks after receiving Blockbuster's submission before notifying Blockbuster that it could not open the file responsive to Specification 17(e). Moreover, the Commission makes no effort to explain why this delay occurred.

Further, despite Commission claims to the contrary, public interest favors Blockbuster. The Commission claims that Blockbuster can point to no public interest because although it has "repeatedly mentioned the pendency of [a meeting by Hollywood shareholders to vote on the merger with Movie Gallery], Hollywood has not announced any such meeting, nor is it likely to do so for the next several weeks." *Id.* at 18.

However, as the investigation proceeded, it became apparent that the FTC staff was unwilling to join issue with Blockbuster on the competitive analysis and give Blockbuster a fair opportunity to respond to any arguments or evidence that the Blockbuster/Hollywood transaction might be anticompetitive. Currently, the timing of the Hollywood shareholders' meeting is such that Blockbuster might be able to exercise its rights to require the Commission, in the event it chooses to challenge the transaction, to make its case in court rather than kill the Blockbuster/Hollywood transaction simply through inaction.

Hollywood has already executed a definitive merger agreement with Movie Gallery subject to Hollywood shareholder approval. Blockbuster believes that Hollywood shareholders are likely to approve the merger with Movie Gallery if there is a significant possibility that an acquisition by Blockbuster would be blocked by the Commission. Thus, for example, if the Commission sues to enjoin the merger and this suit is ongoing during the meeting, or ends right before the meeting, Hollywood shareholders may believe there is a significantly possibility that an acquisition by Blockbuster would be blocked.

Blockbuster does not have any input on when the Hollywood shareholders' meeting will occur. Blockbuster only knows the meeting is imminent. Given that litigation may take several weeks and the Commission admits that a shareholder meeting may occur in the next several weeks, it is crucial for the Commission to reach a decision as soon as possible. Failure to do so may deny Hollywood shareholders of an opportunity to sell their stock to Blockbuster at a significantly higher price than Movie Gallery is offering and it may deny customers and parties the benefits of what could be an efficiency-enhancing transaction in an ever-changing competitive landscape.

**Conclusion**

For the reasons stated above, the Court should: (1) deny Plaintiff's prayer that it extend the waiting period; and (2) deny Plaintiff's prayer that it enter a temporary restraining order.

Respectfully submitted,

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