

**FILED / PRODUIT**

Date: June 30, 2023

CT- 2023-003

Sara Pelletier for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

# 4

CT-2023-003

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the *Competition Act*;

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

—and—

**CINEPLEX INC.**

**Respondent**

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**RESPONSE**

1. The Respondent, Cineplex Inc. (“Cineplex”), submits this Response to the Notice of Application of the Commissioner of Competition (the “**Commissioner**”), filed on May 18, 2023 (the “**Application**”) for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Act*”). Cineplex opposes the Commissioner’s Application and for reasons set out below, the Application should be dismissed in its entirety.

## I. OVERVIEW

2. The Application brought by the Commissioner alleges (an allegation that Cineplex denies) that Cineplex has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(1.1) of the *Act*. Specifically, the Application focuses on purchases that are made on Cineplex.com (the “**Website**”) and the Cineplex Mobile App (the “**App**”) and the application of a contingent and contemporaneous on-line booking fee (“**the on-line booking fee**”).
3. Cineplex pleads that this is a straightforward matter for resolution. The facts and the law are uncomplicated. Cineplex’s position is simple and well-founded in law and fact, as particularized in this pleading. The Commissioner’s assertion that Cineplex engages in drip pricing by promoting its movie tickets to the public on its Website and App, at prices that are obligatory and unattainable, is based on a mischaracterization of the Web Site and App purchase process, and a misapprehension and misapplication of the law. This assertion also contradicts the Competition Bureau’s own published definition of drip pricing.
4. The ticket prices on the Website and App are clearly *attainable* by the customer. All information is clearly shown on the very first page of the Website and App when a customer first sees prices, including ticket prices and movie availability.
5. Notably, ticket prices are differentiated in a number of ways, including the age of the moviegoer, the theatre experience, the day of the week, the theatre location, and other factors further particularized in this pleading. Customers can purchase tickets in person (at the theatre) or online (through the Website and the App). There are many options that impact the overall cost of attending the theatre to see a movie. This requires an ‘interactive’ approach to the selections by the customer. This “interactive necessity” is approached by Cineplex in a direct and transparent manner where the customer knows the overall cost of purchasing a movie ticket instantaneously on the very first page where pricing is disclosed. There are no hidden fees or

fees that are added in the process from the very first moment the customer clicks on the box indicating the show and type of ticket that the customer wishes to purchase.

6. If the customer decides to purchase on-line, the on-line booking price (including the on-line booking fee) is shown on the *very first page* of the Website and App *and throughout* the purchasing process. The customer can then move forward through the advance seat selection to the completion of the purchase on the pages that follow.
7. Importantly, regardless of the purchase method, the prices are all *attainable* and the on-line booking fee is clearly not obligatory for the purchase of a ticket to see a movie.
8. There is no secondary payment (other than taxes) subsequently introduced on the pages that follow the very first page of the Website or App (or at all). The customer is repeatedly made aware of the on-line booking fee (where such on-line booking fee applies) and of the on-line booking fee's simultaneous integration into the full price of the offering as the customer navigates through the purchasing process on both the Website and the App.
9. Further, there is no basis for the Commissioner's claim that Cineplex made price representations that are false or misleading in a material respect contrary to section 74.01(1)(a). In, *inter alia*, paragraphs 20 to 26 of the Application (which are denied), the Application inaccurately describes the Website and App ticket purchase flow and misrepresents and omits crucial aspects of the purchasing process in an attempt to establish a violation of section 74.01(a). A review of the purchasing flow and process on both the Website and App discloses that the process is transparent, efficient, and user-friendly.
10. The customer can attain the offering as initially presented. The prominence, proximity, and presentation of disclosures in relation of the on-line booking fee further dispel any allegation of deceptive marketing practices as asserted in the Application (and denied by Cineplex) or at all.

11. The Commissioner's claims against Cineplex are without merit and this Application should accordingly be dismissed in its entirety with costs payable to Cineplex.

## **II. ADMISSIONS AND DENIALS**

12. Except as expressly admitted below, Cineplex denies each and every allegation in the Application. Cineplex denies any wrongdoing at all. Cineplex further denies that the Commissioner is entitled to the relief sought in the Application - or to any relief at all - and puts the Commissioner to the strictest proof thereof.

## **III. MATERIAL FACTS**

### *Background*

13. Cineplex is a film and entertainment company with head offices at 1303 Yonge Street in Toronto, Ontario, Canada.

14. Cineplex offers CineClub membership, which provides members with benefits accessible across Cineplex's businesses nationwide including Cineplex's theatres. Cineplex also offers membership in the Scene+ loyalty program, which allows customers to earn and redeem points for entertainment, movies, travel, shopping, and dining.

### *Variability of Ticket Pricing: The Importance of Choices*

15. Customers can purchase tickets either in person (at the theatre) or online (using the Website or the App.)

16. Importantly, there is no single price for a movie ticket, whether purchased in person or online. There is multiple variability: Prices vary according to the age of the moviegoer, the theatre experience (IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Clubhouse or regular), the day

of the week, the theatre location, whether the moviegoer is a member of either CineClub or the Scene+ loyalty program, and whether the customer wants to purchase a ticket at the theatre or proceed with an advance ticket purchase and advanced seat reservation through an on-line purchase.

17. This price differentiation and variability accordingly requires an interactive approach (“**Interactive Necessity**”) to the Website and the App to allow for various possible customer selections. There is nothing unusual about this Interactive Necessity. There are many examples where pricing depends on customer choices.
18. Drip pricing is a form of deceptive marketing where the customer is drawn into the purchase process without full disclosure of overall pricing or cost. Cineplex has absolutely ensured that the pricing is transparent and instantaneous. Immediately upon the customer making some initial choices, the customer is presented with the overall cost before the customer proceeds with the purchase process. There is no drip pricing in the Cineplex purchase process.
19. The Website and App have two primary functions:
  - a. **Choices:** They provide the customer with information regarding movies playing at theatres, the locations, times, and prices for which tickets can be purchased at theatres or through the on-line purchase process. At all times, the customer receives a clear indication of the choices with respect to the purchase of tickets. The attainable price for purchase at the theatre or purchase on-line is always prominently shown to the customer based on the customer’s choice of purchase.
  - b. **Process:** They provide the customer with the convenience of an instant on-line purchase process as well as the benefit of instant advance ticket purchase and advance seat reservation if the customer chooses to purchase on-line.

### *Advance Ticket Purchases and Seat Selection*

20. Customers can purchase advance tickets, which come with a guaranteed seat, in more than one way. Customers can purchase an advance ticket by attending in person at the theatre or through the added convenience of instantaneous access to the advance electronic ticket online, via the Website or the App (“**Advance e-Ticket**”).
21. By purchasing Advance e-Tickets, customers can instantly derive the additional benefit, convenience, cost savings, and service of a guaranteed seat of choice and avoid a sold-out showing. An Advance e-Ticket can also be instantly gifted or forwarded without having to incur the cost of physically attending at the theatre and can also be used to ensure instant seat selection for groups that wish to sit together.
22. In essence, there are two separate services or products being purchased in the on-line booking system: the ticket for the show and the advance seat reservation for that show. Locking in the experience that the customer wants, including preferred seating, is an important value-add that the online booking system provides. This has been shown to be particularly important, for example, at the time of launch of new movies for film buffs. The online booking system accordingly helps ensure that customers experience no lineups at the theatre, or disappointment that the film, time, and seat of their choice is not available, because it can be locked in instantaneously through the on-line booking system.

### *Variability of Online Booking Fee: The Importance of Choices*

23. On June 15, 2022, Cineplex introduced an on-line booking fee for certain Advance e-Ticket purchases as part of expanded services and benefits offered to customers. This did not impact the pricing of tickets that could be purchased at the theatre (including regular advance tickets purchased at the theatre.)
24. The on-line booking fee was implemented to provide for the expansion and improvement of Cineplex’s digital infrastructure and offerings to provide customers with more options

(including instant advance and reserved seating options online by way of the Advance e-Tickets) quicker service, and more secure transactions.

25. The on-line booking fee is not an obligatory fee. It only applies to certain types of online ticket purchases and never applies to purchases at the theatre.

26. Further to the benefits of Advance e-Tickets, as particularized at paragraphs 20-22, above, the on-line booking fee provides the customer with distinct additional benefits, including the benefits of advance choice of seat reservation. Customers can accordingly assure themselves that they will be able to see the movie they have selected at the time they have chosen, that they can obtain their preferred seating, and ensure that their group is seated together, all at their fingertips, within a few instantaneous clicks and without the inconvenience of physically going to the theatre to purchase a ticket in advance or wait in line. Cineplex pleads that these benefits provide an additional service or product within the meaning of Section 2 of the *Act*.


27. It is important to note that the on-line booking fee is contingent: it either does not apply at all or is lower for some on-line purchasers. Only certain tickets purchased on the Website or the App - and only under certain prominently presented scenarios - can incur a fee of \$1.50 up to a maximum of four tickets per transaction (i.e. capped at \$6 for those tickets to which the \$1.50 on-line booking fee applies). Customers who purchase their tickets in a theatre, at ticketing kiosks, box-office or concession are not charged the on-line booking fee. Further, customers using a promotional coupon for a free admission, such as a "buy one – get one free" offer, are not charged the online booking fee. In addition, CineClub members are also not charged the online booking fee, and the fee is reduced to \$1.00 for Scene+ members. Again, this Interactive Necessity is dealt with in a full, transparent and instantaneous basis at the very moment the customer initiates an online purchase.

### *Cineplex's Website*

28. Customers wishing to view movie availability and pricing using the Website begin by either selecting a theatre or a movie from the navigation bar. Once they select their preferred theatre location, the movie they want to see, their preferred theatre experience, and their preferred showtime, customers are asked to sign into their Cineplex account.
  
29. Immediately after signing in, the first page the customer sees is the “**Tickets**” page, which lists the types of tickets available for purchase and their corresponding price for purchase at the theatre. Customers who want to purchase tickets at the theatre and simply visit the website to determine the availability of a movie, can determine the price and availability at the theatre of their choice immediately and then exit the Website.
  
30. Those customers who wish to purchase tickets through the advance on-line ticket purchase process begin by selecting tickets based on the age bracket of the moviegoer. The total price including the on-line booking fee is *immediately shown* on the “Tickets” page (i.e. at the first page the customer sees when inquiring about ticket availability and pricing.), as particularized in Figures 1(a) and 1(b) (full page showing before and after selection of ticket), below.



TICKETS SEATS PAYMENT



## Guardians of the Galaxy Vol. 3

**PG**

DATE: Thursday, Jul 6, 2023  
TIME: 2:55 PM  
LOCATION: Scotiabank Theatre Toronto

**CINECLUB**

Instantly save on your ticket

Join CineClub for \$9.99/month. Cancel anytime.

- 1 movie ticket every month
- 20% off on concessions
- No Online Booking Fees

[JOIN CINECLUB](#)

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### Standard

General Admit \$13.50	<a href="#">ADD</a>
Senior (65+) \$9.50	<a href="#">ADD</a>
Child (3-13) \$8.50	<a href="#">ADD</a>

Applicable taxes will be calculated at checkout.

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### Scene+ ⓘ

Scene+ Members Earn And Redeem Points

[ADD CARD](#)

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### Certificate or Promo code ⓘ

Add a code from your voucher or promo code to apply to your tickets

[ADD A CODE](#)

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### Online Booking Fee ⓘ

**\$0.00**

Booking fee is discounted for Scene+ members and waived when you're a CineClub member.

Applicable taxes will be calculated at checkout.

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**4:50** Time Left

Subtotal: \$0.00

[PROCEED](#)



Figure 1 (a): "Tickets" page before a ticket is selected by the customer.

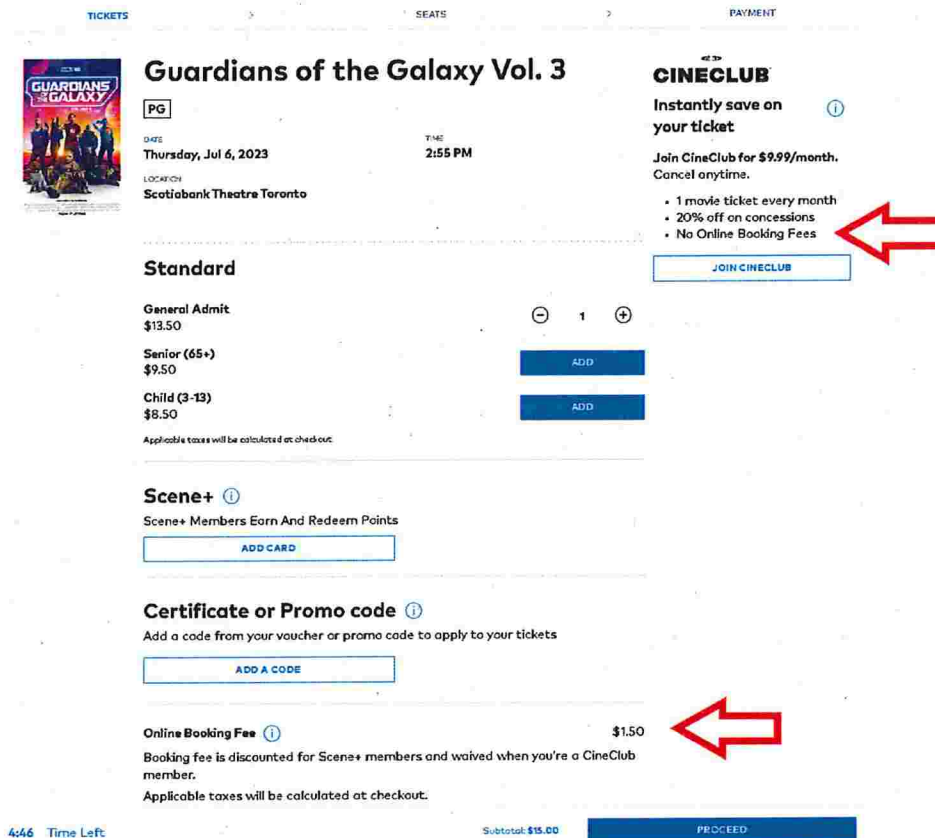
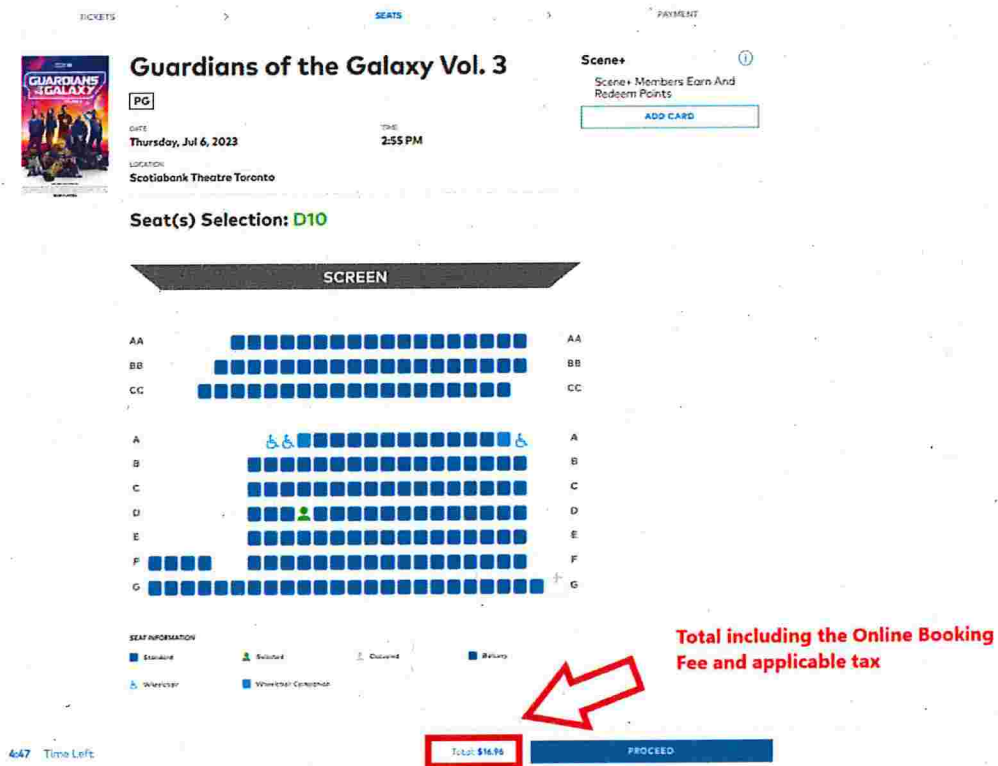


Figure 1 (b): "Tickets" page after a ticket is selected by the customer.

31. No price for online purchases is shown before the customer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal at the bottom of the page is \$0.00, as particularized at Figure 1(a), above. Immediately upon selection of the number and type of ticket, the subtotal reflects the total cost (other than taxes) that will be charged in the on-line purchase process, as particularized in Figure 1(b), above.
32. Further, the customer is clearly made aware of the on-line booking fee *before* the customer first selects to purchase the ticket and is able to make an informed choice before proceeding with the advanced on-line purchase. The customer can either choose to purchase a ticket at the theatre at the price shown in the ticket category section or proceed with an advance on-line purchase with the advantage and service of an advance seat reservation at the price shown

immediately before the button to 'PROCEED' with the advance on-line purchase. There is no subsequent or secondary add-on to pricing except for taxes.

33. The customer may then proceed through the on-line purchase to the 2<sup>nd</sup> page which is the "Seats" page, where the customer is able to make a seat reservation in advance with the added convenience of doing this online. A total price is shown at the bottom of the page, which includes the on-line booking fee (if applicable) and tax, as particularized in Figure 2, below:



[Figure 2]

34. Once the customer has made a seat selection, the customer is taken to the "Payment" page, where the Customer is provided with an "Order Summary" that provides a clear breakdown of the purchase price. Customers can then select their payment method and proceed to enter their payment information.

35. Throughout the course of the transaction, the total cost including the on-line booking fee is prominently shown on every page. The customer has the opportunity to review the purchase price at four separate, consecutive stages.

#### *Cineplex's Mobile App*

36. The process for purchasing tickets on the App is similar to the purchasing process on the Website described above. The only difference is that after App users select their preferred movie and showtime, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

37. The design of both Website and App prioritizes the user experience. The layout is designed for transparency and user-friendliness, providing clear and consistent pricing information for the offering from the initial page throughout the purchase flow. As further particularized in diagrams herein, on both the Website and App, on the same page or screen at the first point of contact, there is: (a) a specific representation as to the specific price for the specific movie selected, (b) explicit disclosures of the existence and quantum of the on-line booking fee, and (c) disclosure of the circumstances in which the on-line booking fee will be charged. Single disclosures of similar kind, allowing the customer to discern and appreciate the online booking fee (and where or whether applicable), are made in the following two pages or screens and a comprehensive disclosure is made at the "Payment" page. At every instance, the online booking fee is apparent on the face of the pages.

#### **IV. THE GROUNDS ON WHICH THE APPLICATION IS OPPOSED**

##### *a) Cineplex is not in breach of section 74.01(1.1) of the Act*

38. Subsection 74.01(1.1) states:

For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the

obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province. [emphasis added]

39. Contrary to the Commissioner's allegations in paragraphs 3, 13, and elsewhere in the Application (allegations which are denied), Cineplex does not make unattainable price representations on either its Website or App. The Commissioner's position is based on a mischaracterization of the purchase process on both the Website and the App and a misapplication of the law.
40. All pricing displayed on the Website and App *is attainable*. Specifically, the price representations made on the Website and App are attainable as the on-line booking fee for advanced purchase and advance seat reservation is *not obligatory* (nor is it fixed.) As indicated in paragraph 27 of this Response, CineClub members can purchase tickets without incurring the on-line booking fee, and customers using a promotional coupon will also not be charged the on-line booking fee. Scene+ members also receive a discount on the online booking fee. Further and importantly, all customers can purchase tickets without incurring the on-line booking fee at any Cineplex box office counter or kiosk. Accordingly, despite the Commissioner's claims in the Application, the first price that customers see on the "Tickets" page is attainable and does not, in any way, meet the criteria of subsection 74.01(1.1) of the *Act*.
41. In any case, the price representations on the "Tickets" page do not contravene the Competition Bureau's own definition of drip pricing. The Competition Bureau defines drip pricing as the practice of offering attractive headline prices and then adding additional mandatory fees *later*

*in the transaction* [emphasis added].<sup>1</sup> There are absolutely no fees added after the customer makes a ticket selection, other than taxes.

42. At paragraph 14 of the Application, the Commissioner incorrectly claims that “after customers select the number of tickets they want, they are invited to proceed with the purchase. A non-refundable fixed on-line booking fee of \$1.50 is subsequently added to the purchase.” In fact, the on-line booking fee is *not fixed* and is added to the purchase *at the same time* as the customer first selects the tickets on both the Website and the App. The customer is aware of the price that the customer is paying for the ticket as soon as the ticket is selected. The subtotal on the very first page discloses the overall cost before the customer proceeds into the on-line purchase process and is prominently displayed throughout the remainder of the purchasing process. The only other charges that are subsequently added to the price are taxes. Attainment of the expected initial offer, as presented, is at all times possible. There is no secondary charge (other than taxes).
43. Cineplex pleads, and the fact is, that the customer is presented with the online booking fee before any selection is made at all (in both the Website and the App) again when the selection is made, and throughout the purchase process and until payment is completed on the “Payments” page (on both Website and App.)
44. Cineplex pleads that that the repeated disclosure (throughout the purchasing process) of the online booking fee as part of the full price for the offering does not and cannot meet the relevant

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<sup>1</sup> Competition Bureau Canada, “Deceptive Marketing Practices Digest – Volume 5,” March 4, 2020; see also Competition Bureau, *Examining the Canadian Competition Act in the Digital Era*, February 8, 2022, available online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era#sec06> where the Bureau described drip pricing as the practice of “**presenting a customer with a price, while concealing mandatory fees until later in the purchasing process**”.



definition of - or test for - drip pricing, and this is accordingly fatal to the Commissioner's allegations in the circumstances.

***b) Cineplex did not breach subsection 74.01(1)(a) of the Act***

45. Contrary to the allegations made in paragraphs 20 to 26 of the Application (which are denied), Cineplex's price representations on its Website and App are not false or misleading in a material (or in any) respect. The purchasing process is transparent and uncomplicated throughout.

46. Section 74.01(1) of the *Act* states:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

47. With specific reference to the allegations at paragraph 20, and as made elsewhere, in the Application (which allegations are denied), wherein the Commissioner claims that the design of the Cineplex purchase process is such that customers may not become aware of the on-line booking fee, Cineplex pleads that the purchase process was designed to ensure that transactions remain at all times transparent, expedient, and efficient, including specifically in respect of the on-line booking fee. A review of the purchase process on both the Website and the App indicates that this process is consistent with these goals.

48. The Commissioner's allegations at paragraph 21 and elsewhere in the Application (allegations which are denied), that a customer may not scroll to the bottom of the page, are unfounded in both fact and law. First, reference to the on-line booking fee is found both at the top of the page and bottom of the page *before* the customer makes any selection on the Ticket page, as well as in a pop-up window. Secondly, the information presented on the "Tickets" page is concise and

requires minimal scrolling. Thirdly, it is a matter of law that information within the four corners of an advertisement or any other promotional material is considered to be complete and adequate disclosure. This is not a situation where there is any attempt to hide any information from the customer by using small type or hiding the information so it is unlikely a customer will make a choice before becoming aware of the information. The reference to the on-line booking fee is present *before* any selection is made by the customer in the on-line booking process and is immediately shown as part of the on-line price. It is not added at a later stage or hidden in any way. It is a proposition of ordinary common sense that for customers using e-commerce, scrolling while shopping is a natural and expected part of the purchasing process. Even for customers who are credulous and inexperienced, scrolling down the page before proceeding to the next step in the purchase process would be common and habitual.

49. Contrary to the Commissioner's allegations at paragraph 22 of the Application (allegations which are denied), both the Website and App use *the same font* for pricing throughout the "Tickets" page and the subtotal is prominently displayed.
50. With specific reference to paragraph 24 of the Application (which is denied), the Commissioner incorrectly asserts that the on-line booking fee is not separately shown to customers before they pay for the purchase. The fee is displayed in at least two separate places on the very first page, the "Ticket page". The on-line booking fee is also included in the price as the customer proceeds through the purchase process and the entire purchase is shown in an "Order Summary" on the "Payment" Page immediately before customers are asked to pay for the purchase.
51. With specific reference to paragraph 25 of the Application (which is denied), the Commissioner incorrectly asserts that the use of "urgency cues" increases the pressure on customers to complete the transaction as quickly as possible. What the Application conveniently fails to mention, is that the countdown timer is set at 5 minutes beginning on the "Tickets" stage of the process, that it re-sets, and that there is no limit as to the amount of resets



available to a customer. Further, from start to finish, it takes customers an average of 3 minutes and four seconds to complete a transaction on the Website and 2 minutes and 44 seconds to complete the transaction on the App. Customers therefore have more than ample time to complete their purchases, even assuming that the countdown timer did not reset.

***c) Administrative Monetary Penalty is Inappropriate***

52. Further to the foregoing, Cineplex did not engage in reviewable conduct under the *Act*. However, if the Tribunal determines that Cineplex contravened the *Act* (which is not admitted but herein expressly denied), the Commissioner would not be entitled to an administrative penalty as requested under section 1(d) of the Application.

53. Cineplex denies each and every one of the alleged aggravating factors outlined by the Commissioner in paragraph 33 of the Application. Specifically, Cineplex notes the following:

- i. The price representations are not false or misleading in a material (or in any) respect. The nominal nature of the fee would not influence the average customer's decision to purchase tickets online.
- ii. If the price representations are found to be misleading, which is not admitted and expressly denied herein, self-correction will fully remedy the conduct. Cineplex only introduced the fee in June 2022, less than one year from the date of the Application and self-correction would be sufficient in the circumstances.

54. In light of the foregoing, an administrative penalty is not warranted in this case.

***d) No Basis for Reimbursement***

55. As described above, Cineplex did not contravene the *Act*. However, if the Tribunal determines that Cineplex contravened the *Act* (which is not admitted but herein expressly denied), the Commissioner's request that former and current customers should be reimbursed as outlined

in paragraph 1(e) of the Application is inappropriate and should be denied. Specifically, customers received the product that they willingly chose to purchase at prices that Cineplex fully disclosed to them prior to the purchase. Customers received a benefit and suffered no loss or detriment from the transaction. As such, no reimbursement should be made for events that customers have already enjoyed.

**V. PROCEDURAL MATTERS/ORDER REQUESTED**

- 56. Cineplex agrees with the Commissioner's proposal that the proceedings be conducted in English.
- 57. Cineplex requests that this matter be heard in person in the City of Toronto.
- 58. Cineplex requests that the Application be dismissed, with costs.

DATED at Toronto, this 30th day of June 2023.



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Robert S. Russell

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**AND TO: The Registrar**

**Competition Tribunal**

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