COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE

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Date: October 22, 2024 CT- 2023-003

Badih Abboud for / pour REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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CT-2023-003

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 under sections 74.01 and 74.1 of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

Respondent

AFFIDAVIT OF DANIEL FRANCIS MCGRATH

- I, Daniel Francis McGrath, of the Town of Oakville, in the Province of Ontario, SWEAR THAT:
- 1. I am the Chief Operating Officer ("COO") of Cineplex Inc. ("Cineplex").
- 2. I have a Bachelor of Business Administration from Brock University and I am a Certified Public Accountant.
- 3. I joined Cineplex Odeon Corp., a now-defunct Cineplex subsidiary, in 1987 and held various financial and operational roles from 1987 to 2000. In 2000, I joined Galaxy Entertainment, an entity which subsequently merged with Cineplex Odeon Corp, serving as Executive Vice President ("EVP"). In 2005, on the subsequent

acquisition of Famous Players, I continued as EVP of the resulting entity, Cineplex Entertainment, a role I held until 2011 when I was appointed to my current role.

- 4. I have been the COO of Cineplex since 2011. As the COO of Cineplex, I oversee the Exhibition and Location Based Entertainment ("LBE") Department (theatre operations and food service), digital commerce (Cineplex Store), location-based entertainment (The Rec Room and Playdium), real estate, design and construction, strategic planning, Cineplex's media businesses, and until early 2024, Cineplex's amusement gaming business (Player One Amusement Group), which was sold on February 1, 2024.
- 5. The online booking and advance seat reservation fee ("online booking fee"), as I will further describe in this statement, is managed by the Theatre Exhibition Department. I therefore oversaw the conceptualization, decision-making, and implementation processes of the online booking fee.
- 6. As the COO, I work closely with Cineplex's Chief Financial Officer and Chief Executive Officer, and I am aware of Cineplex's financial obligations, and its cash flow and balance sheet.
- 7. I have personal knowledge of the matters contained in this affidavit. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, I believe it to be true.

The Tribunal Decision

- 8. The Tribunal released its decision on September 23, 2024. In the course of its 120 page decision, the Tribunal set out its conclusions that certain representations made on Cineplex's website and mobile application constituted drip pricing under s. 74.01(1.1) of the *Competition Act*, and were false and misleading in a material respect under s. 74.01(1)(a) of the Act. The Tribunal ordered the following, beginning at paragraph 488 of its reasons (the "Order"):
 - (a) For a period of ten (10) years, Cineplex:

- (a) shall not make representations to the public on its website or App concerning Online Booking Fees that are false or misleading in a material respect, and
- (b) shall not engage in substantially similar conduct that constitutes reviewable conduct under paragraph 74.01(1)(a) (including subsection 74.01(1.1)).
- (b) Cineplex shall pay an administrative monetary penalty under paragraph 74.1(1)(c) of the *Competition Act* in the amount of \$38,978,000, within 30 days of [the] Order.
- (c) Cineplex shall pay costs to the Commissioner in the amounts of:
 - (a) \$77,000 plus HST, in respect of legal fees, and
 - (b) \$160,000 (inclusive of tax) in respect of disbursements.
- 9. I will refer in this affidavit to the relief ordered in paragraph (a) above as the "Conduct Order" and the relief ordered in paragraphs (b) and (c) as the "Monetary Order".
- 10. Cineplex announced in a press release published the same day as the Tribunal's reasons and order (September 23) that it intended to appeal the Tribunal's ruling to the Federal Court of Appeal. Attached as **Exhibit "A"** is a copy of the press release.

Discussions with the Competition Bureau following the Order

11. Since the Tribunal's reasons were released, Cineplex has been considering revisions to its website to comply with the Order. Some changes involving the placement of text are fairly straightforward, while others that require revisions to the Website and App coding require additional time. This is because Cineplex's information technology team carries out coding changes in four-week segments, which are known as "sprints". Following the sprint, there is a period of time required for testing, followed by implementation. It is not technologically possible to

implement a global change simultaneously across all of Cineplex's theatres because these types of changes also involve revisions to Cineplex's point of sale system ("POS") at each location, which are rolled out on a theatre-by-theatre basis. Each of Cineplex's 155 theatres has its own server, which must be upgraded individually.

- 12. Cineplex has also been considering the impact to its business of the payments required by the Monetary Order. I outline some of those impacts further below beginning at paragraph 30.
- 13. Given the forthcoming appeal, the timing required to implement any changes to the Website and App, and the financial impact of the Monetary Order, Cineplex, through counsel, initiated discussions with the Commissioner of Competition to reach an agreement on the timelines for Cineplex's compliance with the Order.
- 14. Following those discussions, the parties have reached an agreement whereby Cineplex will implement two waves of changes to its website, as described immediately below, with the goal of having all modifications fully rolled out by January 31, 2025. The Commissioner has agreed in the circumstances to a stay of the Monetary Order.

Changes to the Website to Address the Conduct Order

15. As described above, Cineplex intends to make two sets of changes to its Website and App. The first set is in the process of being implemented as of the date of this affidavit. Those changes will modify placement of text to revise the disclosure of the online booking fee and will take approximately one month to be fully rolled out. The second set of changes will modify the manner in which ticket prices are displayed. Those are the changes that are targeted to be fully rolled out by January 31, 2025. The changes will take approximately four weeks to develop and then the rollout would be implemented on a location by location basis, starting with major markets. Part of the reason for the longer implementation time for the second set of changes is that Cineplex has a "technology blackout period" from December 15 to January 5 each year, which means that no changes to its POS coding are made during

this time. This blackout is in place to minimize the risk of information technologyrelated issues during the busy holiday movie season.

16. Cineplex's website can be viewed on both "desktop" and mobile platforms. Accordingly, each of the changes described below is made in three different versions. The screenshots that are attached to this affidavit are "zoomed out" so the entire page fits on one screen.

First Set of Changes: Text Placement

17. In the first wave of changes, Cineplex will add text near the top of the first ticket page describing the existence of the online booking fee. The text will be in a box and read as follows (with bold text as indicated):

Online Booking Fee of **up to \$1.50** may apply and is capped at 4 tickets. Fee is discounted for Scene+ members and waived for CineClub Members. Fee does not apply for in theatre purchases.

- 18. While screen resolutions vary, this text will be "above the fold" as that term is used in the Tribunal's reasons.
- 19. Attached as **Exhibit "B"** are screenshots of the Website as seen on desktop computers. Three different screenshots are included, which show the user experience buying "regular", D-Box, and VIP tickets, respectively.
- 20. An additional change that is evident in these screenshots is the disclosure of the amount of the online booking fee in the "ribbon", next to the Proceed button. This change was in the process of being rolled out before the Tribunal issued its reasons.
- 21. Attached as **Exhibit "C"** are screenshots of the Website as it appears on a mobile device (in this case, an iPhone 13 mini). Again, the same text as set out in paragraph 17 appears above the fold. The image on the first page of the exhibit shows where the fold would be, though the exact location will change based on the device and personal settings selected by the consumer. The second page of the exhibit shows three different ticket selection options. The length of the page is determined in part by the type of experience the consumer selects, and the tickets available.

- 22. Attached as **Exhibit "D"** are screenshots of the App, again using the screen size of an iPhone 13 mini. The same text as set out in paragraph 17 appears above the fold. As with the mobile Website, the exact location of the fold will change depending on the device and personal settings. Again, on the three pages of this exhibit are different versions of the page depending on the consumer's choices regarding the type of experience and the tickets available. In each case there is a screenshot of what would appear above the fold and the entire page.
- 23. As seen in each exhibit, in each case at the bottom of the page where the online booking fee is itemized there is a circled "i", which is referred to as an information icon. Clicking on the information icon opens a pop-up that contains the same disclosure as in paragraph 17, and also provides a calculation of the online booking fee. This functionality is shown in the screenshots attached as **Exhibit "E"**. This aspect of the website is "dynamic", which means it is updated in real time based on the consumer (i.e., whether they are a Scene+ or CineClub member) and the number of tickets selected.

Second Set of Changes: Price Display

- 24. The second set of changes will modify the price representations on the Website and Mobile App, as described below.
- 25. Attached as **Exhibit "F"** are screenshots of the desktop Website. Four changes will be made to the website as part of this phase.
 - (a) Prices will no longer be displayed on the ticket page before the number of tickets are selected.
 - (b) An information icon (circled "i") will be added next to the ticket type (D-BOX, Standard, etc.). Clicking this button will cause a "pop over" that discloses pricing both online (showing the addition of the booking fee) and in the theatre. This is shown on the second page of Exhibit "F". This will be a dynamic element of the site, so that the booking fee that is disclosed will change if the customer is a Scene+ or

CineClub member. The pop-over will have the following explanation at the bottom:

* A non-refundable online booking fee of up to \$1.50 may apply to tickets purchased online, and is capped at 4 tickets per transaction. The fee is reduced to \$1.00 for Scene+ members, and waived for CineClub Members. Online booking fee is waived for certain certificates or promo codes.

Online booking fee does not apply to tickets purchased in-theatre.

- (c) An order summary box will be added to the right-hand side of the page, which will update automatically with the total to be paid (including the applicable online booking fee and tax). The Tickets line will also include the text "(Includes Online Booking Fee)".
- (d) Because of the expanded explanation in the Ticket Price Information pop-over, the text disclosing the existence of the online booking fee on the main tickets page will be shortened, and state:

Online Booking Fee of up to \$1.50 may apply. Fee does not apply for in-theatre purchases.

- 26. The text will be shortened in the second wave of changes to allow for more visibility to the consumer of information available on the initial view "above the fold", given the other changes being implemented.
- 27. Attached as **Exhibit "G"** are screenshots of the mobile Website. Again, these screenshots are modelled on an iPhone 13 mini. The modifications to the site are the same as described immediately above, with the exception of the order summary box in paragraph (c). This element will be on the mobile Web version but appear as part of the "ribbon" at the bottom of the page, immediately above the Proceed button.
- 28. These same changes as described in paragraph 27 will also be reflected on the App. I have not included screenshots because they are not available as of the date of this affidavit, but the pages and functionality will be similar to that described above.

29. Once these changes have been rolled out, Cineplex intends to keep them in place for the duration of the stay.

Financial Implications of the Monetary Order

30. While the Commissioner has agreed to stay the Monetary Order, for completeness in this section of my affidavit I briefly describe some of the financial implications to Cineplex of complying with the Monetary Order at this time.

Disruption of pandemic recovery efforts

- 31. Cineplex's business was severely impacted by the COVID-19 pandemic. From Spring 2020 onwards, Cineplex's theatres saw drastic declines in attendance, and there were extended durations during which government lockdown measures forced Cineplex to altogether close its theatres and halt business operations.
- 32. In order to manage the effects of the pandemic, Cineplex was required to engage in extensive refinancing transactions and renegotiate a majority of its commercial leases. Full time employees undertook voluntary pay cuts. Cineplex also sold its Player One Amusement Group subsidiary, as well as its head office buildings.
- 33. While there has been a modest return to the theatres since 2022, Cineplex is still actively making efforts to recover from the pandemic. The strikes by the Screen Actors Guild and the Writers Guild of America in 2023 impacted those efforts as they resulted in the suspension of movie production and impacted the pipeline of new movies set to be released. 2024 movie attendance is down 25% compared to prepandemic levels.
- 34. Overall, the Monetary Order represents a significant portion of Cineplex's working capital. If Cineplex is required to pay those amounts prior to its appeal being heard and decided, there will be financial impacts on Cineplex's ability to further its business operations and strategic plans to recover from the pandemic. These impacts are detailed below.

Limitation of 2025 business operation and upgrade plans

- 35. In short, diverting nearly \$40 million to the payment of the Monetary Order will mean Cineplex will not be able to fulfill its 2025 capital investment plans to upgrade its retail facilities (*i.e.*, movie theatres, The Rec Room and Playdium facilities). These upgrades are required to sustain the business and include:
 - (a) Constructing premium auditorium facilities;
 - (b) Implementing new laser projector technology to replace current digital projectors nearing end-of-life;
 - (c) Implementing recliner seating upgrades to theatres to enhance the customer experience and maintain competitiveness,
 - (d) Implementing Premium Experiences such as VIP Cinemas, ScreenX,IMAX and Dolby Cinema
 - (e) Upgrading concession counters and back of house facilities;
 - (f) Upgrading game offerings and gaming areas in movie theatre and location-based entertainment (e.g., The Rec Room or Playdium) locations;
 - (g) Repairing and replacing movie theatre seats; and
 - (h) Replacing all other equipment at end-of-life.
- 36. Cineplex's ability to implement these upgrades will be significantly limited after paying the AMP as this represents approximately 50% of its annual capital expenditures. Some of these plans may also need to be delayed until the following year.

Impacts on real estate matters

37. Paying the Monetary Order now will mean that Cineplex may not be able to fulfill binding agreements for retail expansion that are currently in the planning phase. It will also limit Cineplex from entering into any new agreements to build new The Rec Room and/or Playdium properties for a period of time, which cost

approximately \$10 million each and take one year to build. This will deprive Cineplex of the revenues associated with those facilities.

38. As the Monetary Order will have an impact on Cineplex's cash position, I expect that as Cineplex engages in routine and ongoing lease or contract negotiations while the appeal is underway, its counterparties will view Cineplex as a higher risk contracting party. This will impact Cineplex's bargaining position and mean Cineplex may not be able to secure advantageous terms. This may result in increased financial risk and costs.

SWORN by Daniel Francis McGrath of the City of Oakville, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on October 22, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

James Gotowiec

Daniel Francis McGrath

THIS **EXHIBIT "A"** REFERRED TO IN THE AFFIDAVIT OF **DANIEL FRANCIS MCGRATH**

SWORN BEFORE ME THIS 22nd DAY

OF OCTOBER, 2024

Commissioner for taking affidavits



FOR IMMEDIATE RELEASE

Cineplex Will Appeal Competition Tribunal Decision

TORONTO, ON, September 23, 2024 (TSX: CGX) – Cineplex, Canada's leading entertainment and media company, issued the following statement in response to the news released by the Competition Tribunal:

"Enhancing our guest experience is at the forefront of what we do and our commitment to Canadian consumers has always been about choice. The online booking fee is an optional, value-added service. It provides moviegoers with the confidence of knowing they have a ticket and an exact seat location before they arrive at a theatre. The fee is presented on our website and app in a clear and prominent manner.

We are shocked and disagree with the decision and will appeal to the Federal Court of Appeal including the \$39 million administrative monetary penalty. To clarify, this ruling has no impact on the continuation of offering this value-added service to consumers. We believe our guests make informed purchase decisions and remain confident our online booking fee is presented in a way that fully complies with the spirit and letter of the law."

-30-

About Cineplex

Cineplex (TSX:CGX) is a top-tier Canadian brand that operates in the Film Entertainment and Content, Amusement and Leisure, and Media sectors. Cineplex offers a unique escape from the everyday to millions of guests through its circuit of 169 movie theatres and location-based entertainment venues. In addition to being Canada's largest and most innovative film exhibitor, the company operates Canada's favourite destination for 'Eats & Entertainment' (The Rec Room), complexes specially designed for teens and families (Playdium), and an entertainment concept that brings movies, amusement gaming, dining, and live performances together under one roof (Cineplex Junxion). It also operates successful businesses in digital commerce (CineplexStore.com), alternative programming (Cineplex Events), motion picture distribution (Cineplex Pictures), cinema media (Cineplex Media) and digital place-based media (Cineplex Digital Media). Providing even more value for its guests, Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program.

Proudly recognized as having one of the country's Most Admired Corporate Cultures, Cineplex employs over 10,000 people in its offices and venues across Canada. To learn more, visit <u>Cineplex.com</u>.

Cineplex Media Relations:

Communications, Cineplex

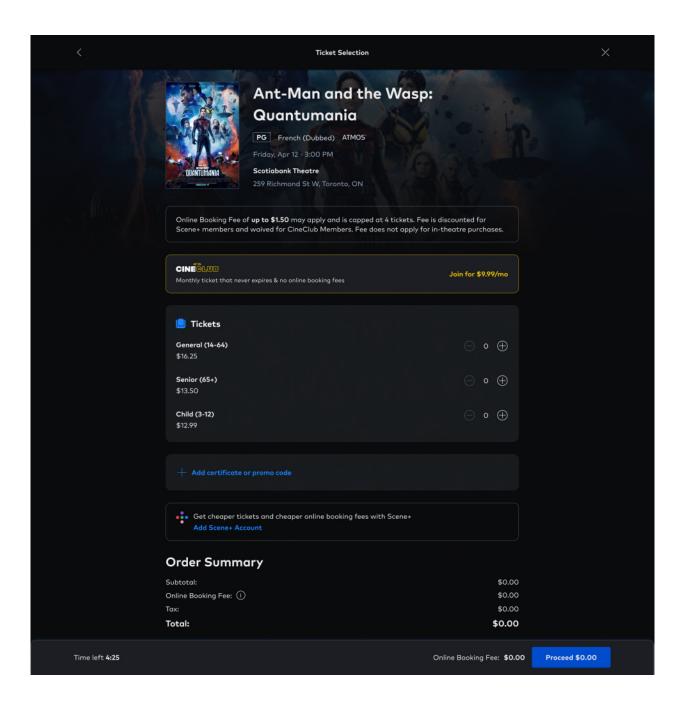
PressRoom@Cineplex.com

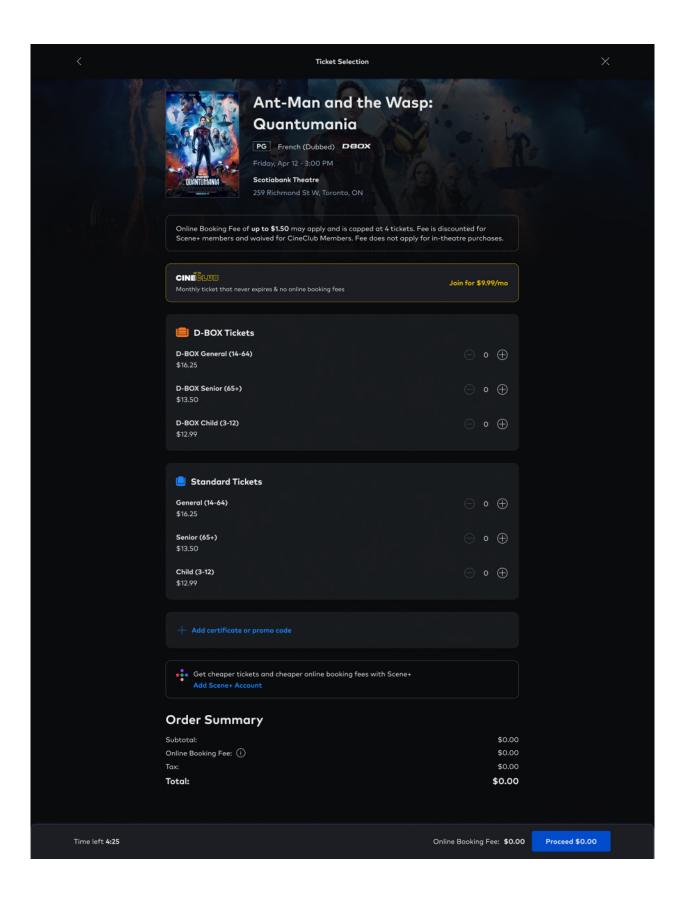
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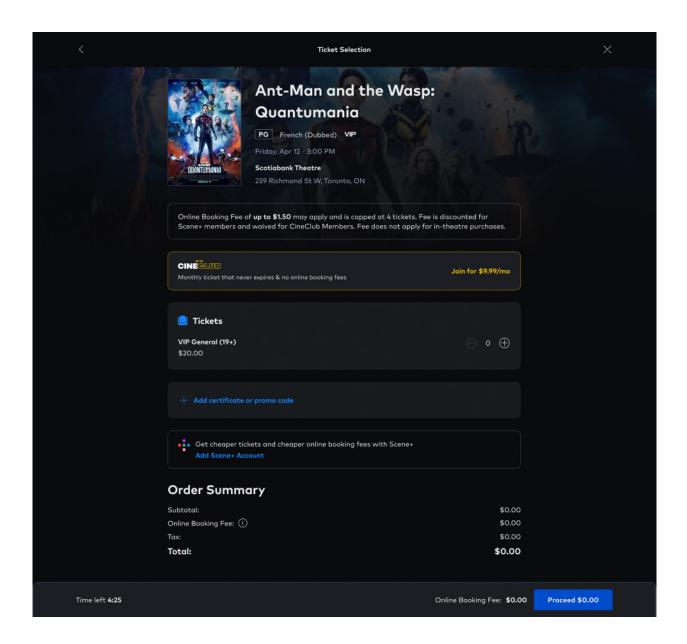
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Commissions for taking affidavits

Website Ticketing Page





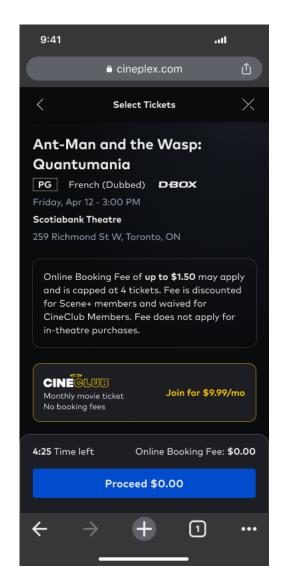


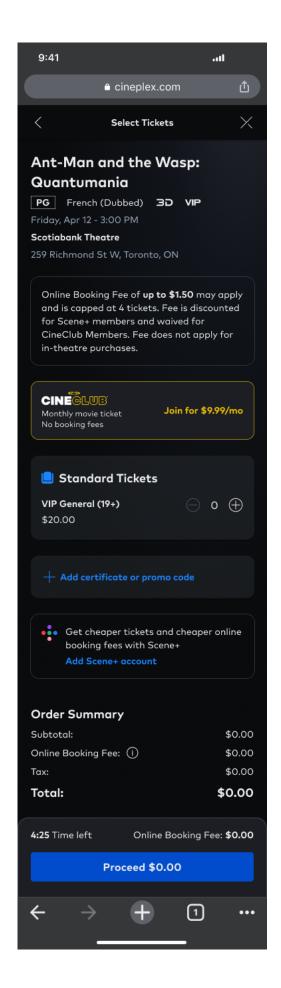
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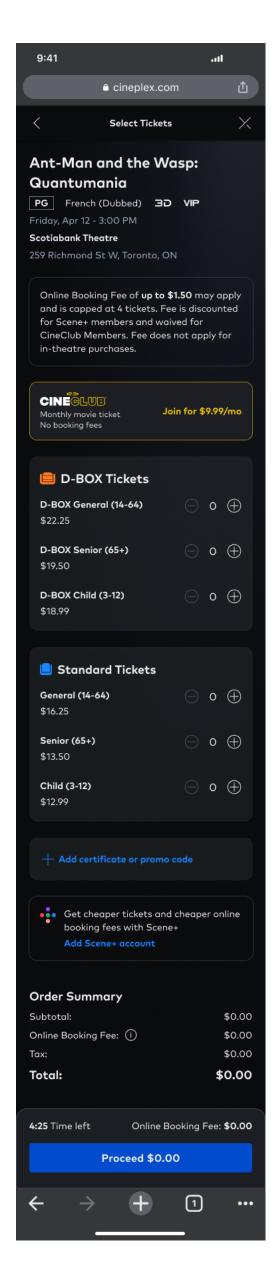
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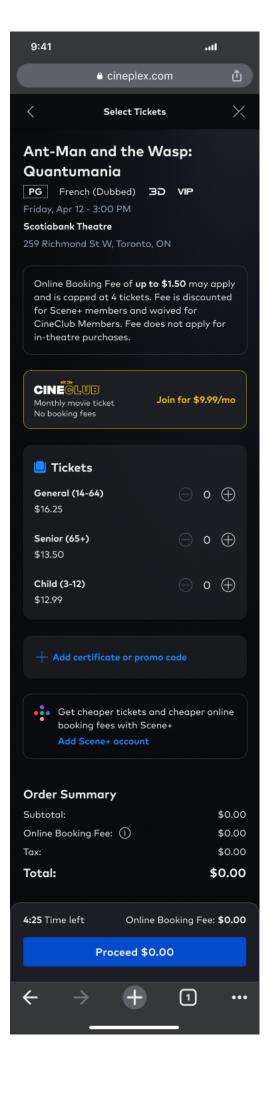
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Mobile Web Examples







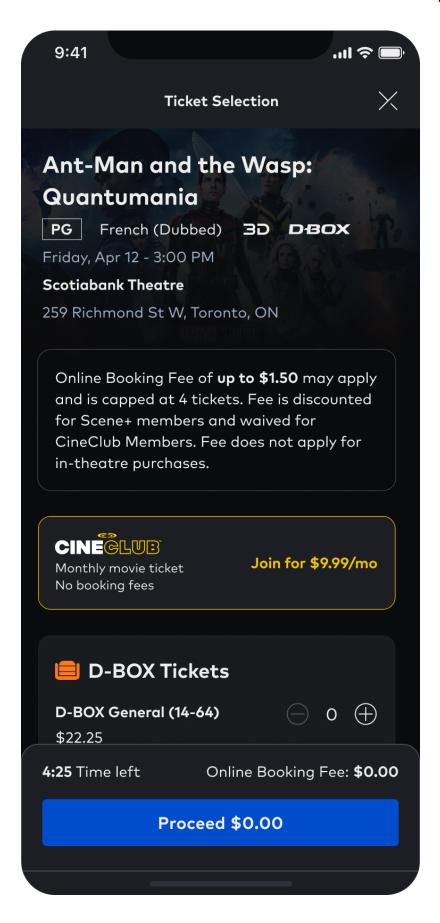


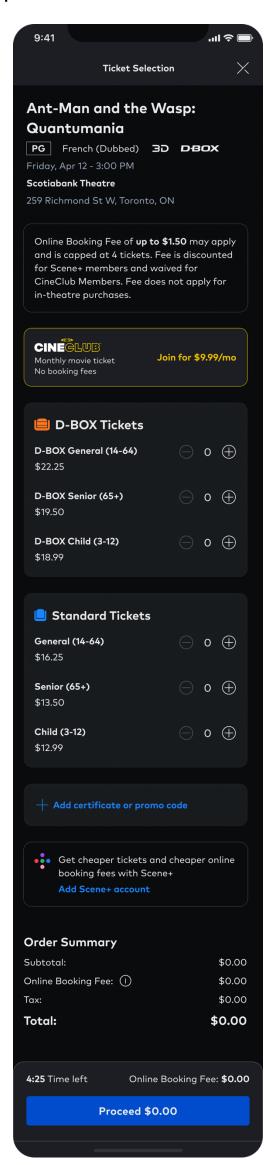
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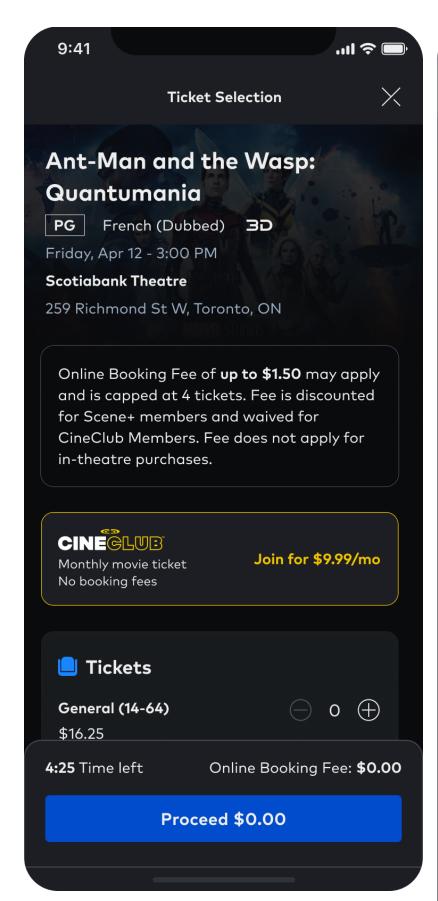
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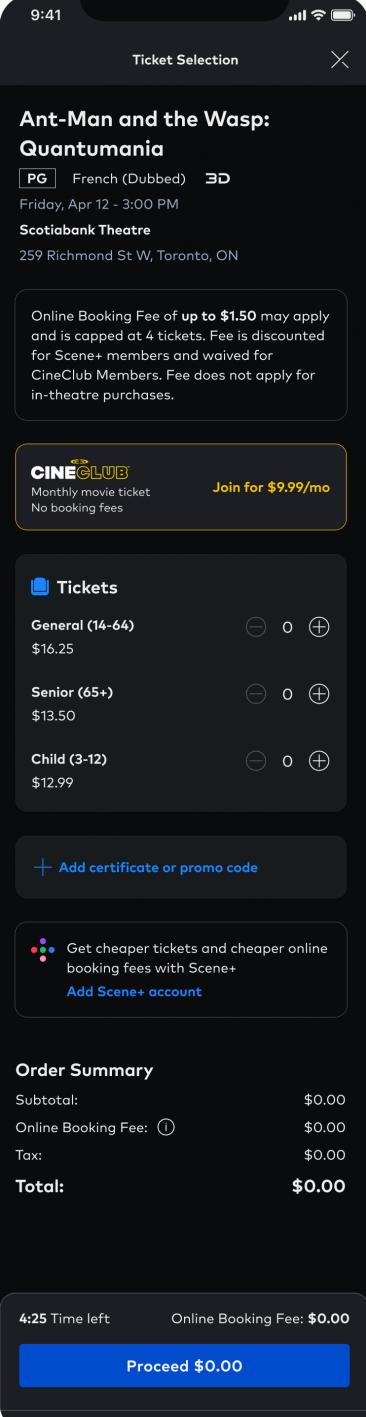
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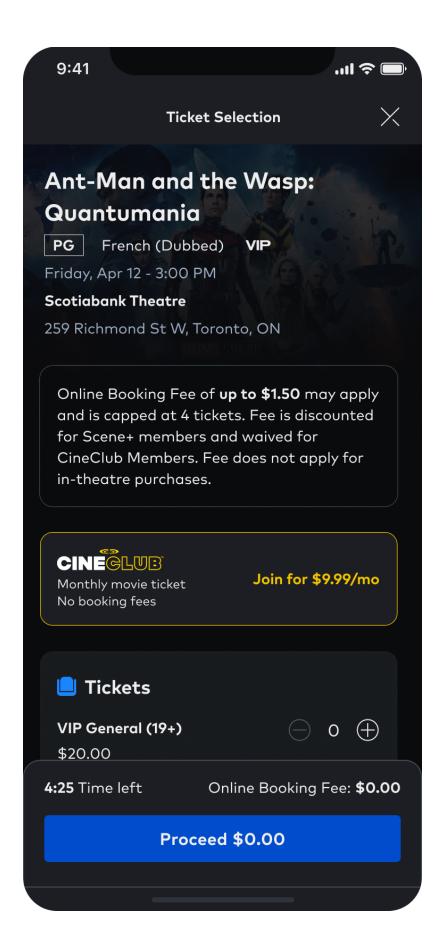
Mobile App Examples

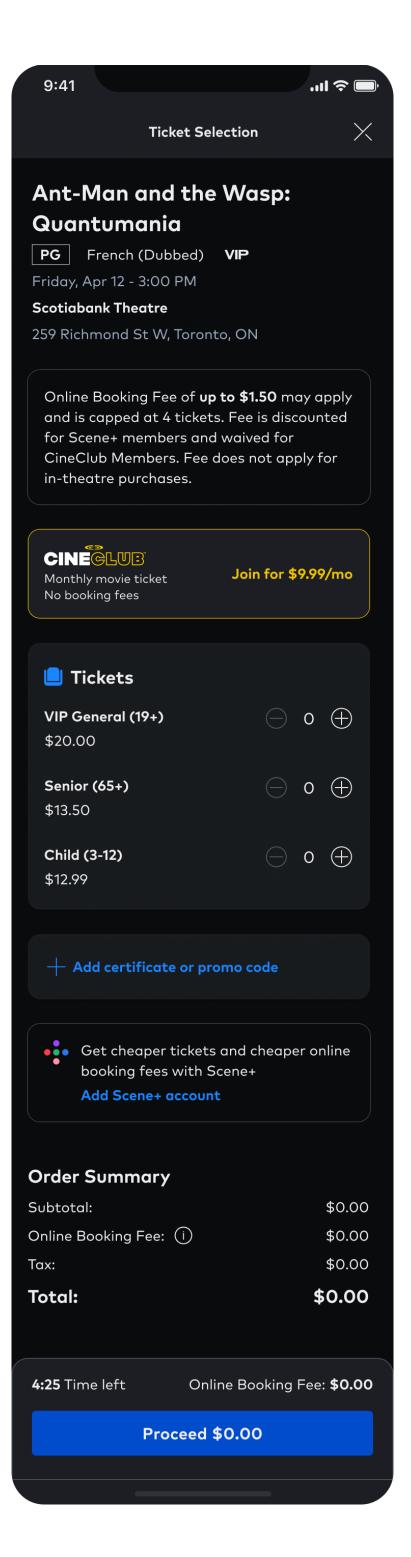












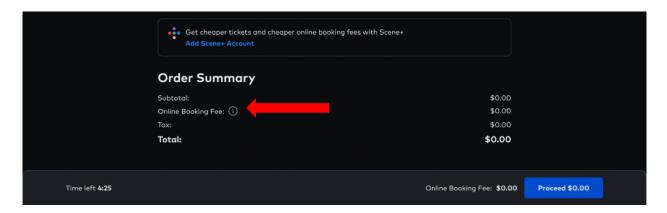
THIS **EXHIBIT "E"** REFERRED TO IN THE AFFIDAVIT OF **DANIEL FRANCIS MCGRATH**

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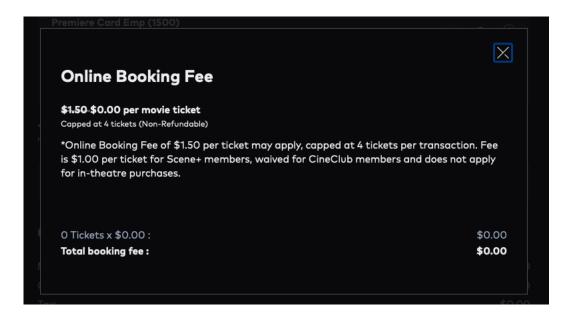
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Information Icon

In the order summary guests can click the (i) for more information about the online booking fee.



The (i) open to the following, which is updated in real time based on the consumer and the number of tickets selected.



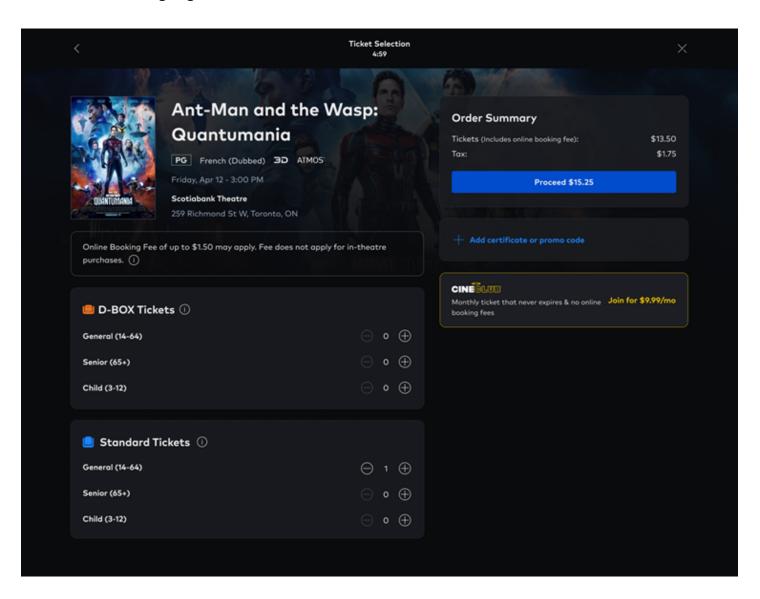
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OF OCTOBER, 2024

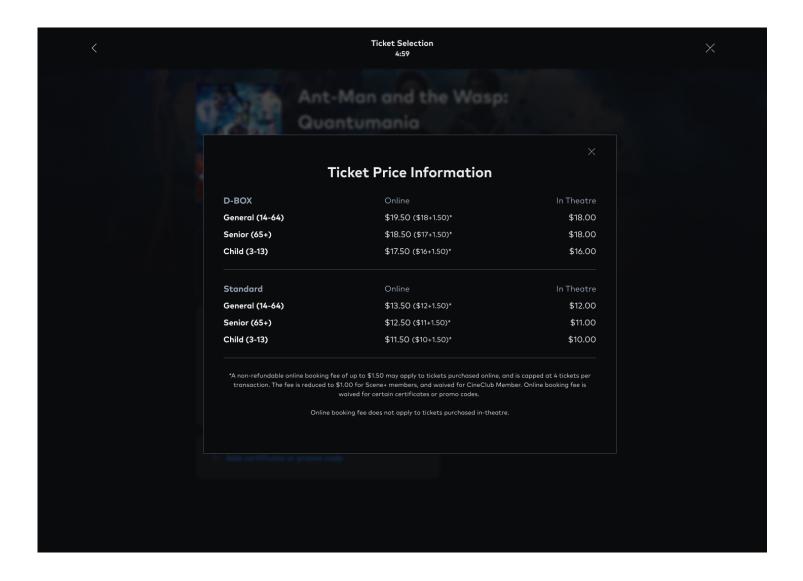
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Cineplex OBF Updates - Desktop View

Main Ticketing Page



Theatre Pricing Information



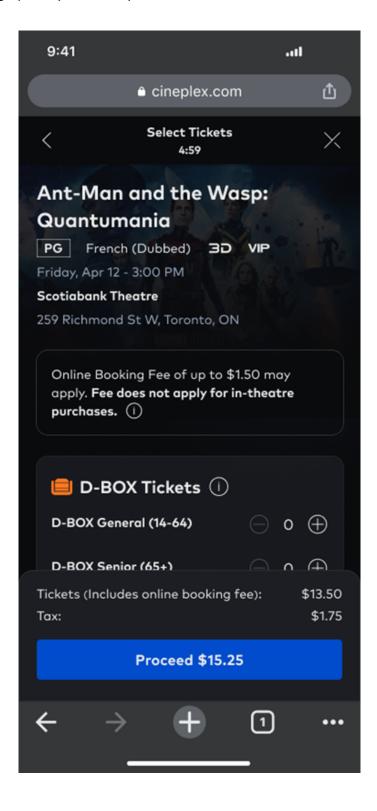
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Commissioner for taking affidavits

Cineplex OBF Updates - Mobile View

Main Ticketing Page (Collapsed View)



Theatre Pricing Info Model

