The last notification was filed with the Department on December 27, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act February 1, 2011 (76 FR 5610).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–10123 Filed 4–27–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc.

Notice is hereby given that, on March 21, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Cube-Tec International GmbH, Bremen, GERMANY; Harmonic, Inc., Sunnyvale, CA; Oracle America, Inc., Redwood Shores, CA; John Footen (individual member), Lansdowne, VA; and Yoshiaki Shibata (individual member), Yokohama, JAPAN, have been added as parties to this venture.

Also, Ascent Media, Stamford, CT, and Omneon, Inc., Sunnyvale, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on January 6, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act February 2, 2011 (76 FR 5826).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–10125 Filed 4–27–11; 8:45 am]

BILLING CODE 4410–11–M

U.S. DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Opensaf Foundation

Notice is hereby given that, on April 4, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), OpenSAF Foundation ("OpenSAF") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Aricent Technologies (holding) Ltd., Gurgaon, Haryana, INDIA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains Open, and OpenSAF intends to file additional written notifications disclosing all changes in membership.

On April 8, 2008, OpenSAF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on May 16, 2008 (73 FR 28508).

The last notification was filed with the Department on January 19, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act February 22, 2011 (76 FR 9811).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–10124 Filed 4–27–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. *Lucasfilm Ltd.*; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Lucasfilm Ltd.,* Civil Action No. 1:10–CV–02220, which was filed in the United States District Court for the District of Columbia on April 15, 2011, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, Plaintiff,

v.

Lucasfilm Ltd., Defendant.

Response of Plaintiff United States to Public Comments on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

The United States filed a civil antitrust complaint against Lucasfilm on December 21, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects of a three-part agreement between Lucasfilm and Pixar to forbid cold-calling and to restrict certain other employee recruiting practices. The agreement reduced competition for highly-skilled digital animators and other employees, diminished potential employment opportunities for those

employees, and interfered with the proper functioning of the price-setting mechanism that would otherwise have prevailed.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and Stipulation signed by the plaintiff and Lucasfilm, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. 16.[1] Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court also on December 21, 2010; published the proposed Final Judgment and CIS in the **Federal Register** on December 28, 2010, see *United States, et al.* v. *Lucasfilm Ltd.,* 75 FR 81651; and caused to be published in The Washington Post summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, for seven days beginning on December 25, 2010, and ending on December 31, 2010. The 60-day period for public comments ended on March 1, 2011; three comments were received as described below and attached hereto.

I. The Investigation and Proposed Final Judgment

The proposed Final Judgment is the culmination of an investigation of agreements between Lucasfilm and Pixar to restrain employee recruiting and cold-calling practices. As part of its investigation, the Justice Department issued Civil Investigative Demands to Pixar and Lucasfilm. The Department reviewed the documents and other materials from them, and interviewed witnesses to the activity. The investigative staff carefully analyzed the information obtained and thoroughly considered all of the issues presented.

Lucasfilm and Pixar are rival employers of digital animators. Beginning no later than January 2005, Lucasfilm and Pixar agreed to a three-part protocol that restricted recruiting of each other's employees. First, Lucasfilm and Pixar agreed they would not cold call each other's employees.[2] Second, they agreed to notify each other before making an offer to an employee of the other firm. Third, they agreed that, when offering a position to the other company's employee, neither would counteroffer above the initial offer. The protocol covered all digital animators and other employees of both firms and was not limited by geography, job function, product group, or time period.

Lucasfilm's and Pixar's agreed-upon protocol disrupted the competitive market forces for employee talent. It eliminated a significant form of competition to attract digital animation employees and other employees covered by the agreement. Overall, it substantially diminished competition to the detriment of the affected employees who likely were deprived of information and access to better job opportunities.

After reviewing the investigative materials, the Department determined that the agreement between the two firms was a naked restraint of trade that was per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1, as alleged in the Complaint.

The proposed Final Judgment is designed to restore competition for digital animators and other employees. Section IV of the proposed Final Judgment prohibits Lucasfilm, and others in concert with it who have notice of the proposed Final Judgment, from agreeing, or attempting to agree, with another person to refrain from cold calling, soliciting, recruiting, or otherwise competing for employees of the other person. Lucasfilm is also prohibited from requesting or pressuring another person to refrain from cold calling, soliciting, recruiting, or otherwise competing for employees of the other person. These provisions prohibit agreements not to make counteroffers and agreements to notify each other when making an offer to each other's employee. In Section V, the proposed Final Judgment states that it does not prohibit "no direct solicitation provisions" when they are reasonably necessary for, and thus ancillary to, legitimate procompetitive collaborations. Such ancillary restraints remain subject to scrutiny under the rule of reason, in accord with antitrust precedents. See CIS at 6–8. In this manner, the proposed Final Judgment prohibits anticompetitive conduct while preserving procompetitive collaborations.

II. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); see generally *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev NV./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the Final Judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3 Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461

[1] Pixar was not named as a defendant because Pixar is currently bound by a similar Final Judgment entered in *United States* v. *Adobe Systems, Inc.,* No. 1:10–cv–01629 (D.D.C. entered March 17, 2011).

[2] Cold calling involves communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another firm's employee who has not otherwise applied for a job opening.

[3] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

(noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is "within the reaches of public interest." *United States* v. *Am. Tel. & TeL Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff d sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); see also *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." SBC Commc'ns, 489 F. Supp. 2d at 17.

In its 2004 amendments to the Tunney Act,[4] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.[5]

[4] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] See *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should. * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

III. Summary of Public Comments and the United States' Response

During the 60-day comment period, the United States received three comments, which are attached hereto in the Appendix to this Response. The United States has carefully reviewed the comments and has determined that the proposed Final Judgment remains in the public interest. We address first the one from Mr. Kent Martin and then together, the two from The Association of Executive Search Consultants ("AESC").

A. Kent Martin

Mr. Martin is an employee in the digital film industry. He wrote that he believed the proposed Final Judgment would be unenforceable and that the firms would alter their practices and conspire in other ways to achieve the same result. Mr. Martin also asked that financial penalties be imposed, and in particular, that the penalties be distributed to workers in the industry. He felt this was necessary for the settlement to have an effective impact and to compensate employees industry-wide. Finally, he expressed the view that attempts to control wages are not limited to the Lucasfilm-Pixar recruiting agreement but could involve other studios.

After carefully considering Mr. Martin's comments, the United States believes that the proposed changes are inappropriate and entry of the judgment in its current form is in the public interest. First, the proposed Final Judgment is enforceable. As with any court order, the Final Judgment would be enforceable through civil and criminal contempt proceedings. The proposed Final Judgment gives the Antitrust Division the ability to investigate any possible violations of its terms. If the Antitrust Division learns of any violations, it can pursue a contempt action. In addition, Lucasfilm must disclose to the Antitrust Division any actual or potential violations of the Judgment. Lucasfilm officials must certify that they have read the Final Judgment and understand that violations can result in a civil or criminal contempt action.

Second, the proposed Final Judgment is designed to prevent Lucasfilm from entering into other agreements that limit competition for employees. Although the complaint alleges only that Lucasfilm and Pixar entered into agreements to refrain from cold-calling and counter offering, and to notify each other before making job offers, Section IV of the proposed Final Judgment more broadly enjoins agreements regarding solicitation, cold calling, recruitment, or other methods of competing for employees to provide prophylactic protection against other activities that could interfere with competition for employees. Third, Mr. Martin's request for financial penalties is not appropriate.

The proposed Final Judgment may not be rejected or modified simply because a different remedy might better serve an individual's interests, including individual employees. The United States represents the public interest. Unless the "decree will result in positive injury to third parties," a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." Microsoft, 56 F.3d at 1461 n.9. Here, the proposed Final Judgment clearly remedies the conduct alleged by the United States and does not result in positive injury to Mr. Martin or other employees in the digital animation industry.

Finally, while Mr. Martin is of the view that others may be involved in similar or related conduct, this case was filed against Lucasfilm for conspiring with Pixar as alleged in the Complaint. Accordingly, the Final Judgment can only reach Lucasfilm and that conduct. As stated above, Pixar is already subject to a similar Final Judgment.[6]

B. AESC

AESC is a worldwide professional association of executive search consulting firms. Its members identify and recruit senior executive talent for organizations in many industries. AESC submitted two comments about the proposed Final Judgment dated February 25, 2011, and March 15, 2011. Both comments focused on Section V.A.3. which allows Lucasfilm to enter no-direct solicitation agreements that are "reasonably necessary for contracts with. * * * recruiting agencies."

AESC's first comment asked that the term "reasonably necessary" be defined in the judgment, including enumerating factors, such as the duration and geographic scope of the no-direct solicitation restraint, that a court would consider in determining whether the restraint was reasonably necessary to the recruiting engagement. AESC is concerned that without a more precise definition, executive search firms will not know whether their no direct solicitation provisions in agreements with clients violate the law or the proposed Final Judgment. The second comment expanded upon the first. AESC noted that executive search firms may gain exposure to proprietary details about a client's business, and it may be reasonably necessary for the client and executive search firm to agree on a narrowly-tailored no direct solicitation covenant. For example, they may enter a limited-duration agreement restricting the executive search firm from soliciting employees who work in the relevant office or division of the client corporation. By contrast, some clients may request multi-year prohibitions that cover the entire company. AESC expressed the concern that overly broad restrictions could have the effect of placing significant numbers of individuals off limits to recruiters and thus narrow the pool of accessible talent from which to draw when conducting executive searches. AESC feared that the proposed Final Judgment could encourage the use of overly broad

[6] Pixar and four other defendants are subject to the Final Judgment entered in *United States* v. *Adobe Systems, Inc.,* No. 1:10–cv–01629 (D.D.C. entered March 17, 2011).

agreements. Accordingly, AESC asked that the Judgment be modified to state:

All no direct solicitation provisions that relate to agreements with recruiting agencies described in Section 5.A.3 shall be narrowly tailored such that the scope of the no direct solicitation provision bears a reasonable relationship to the scope of the recruiting engagement, including with respect to geographic reach, duration, and the number of personnel and business units affected.

After carefully considering AESC's comments, the United States has determined that the proposed modification is inappropriate, and entry of the proposed Final Judgment in its current form is in the public interest.

As explained in the CIS, naked agreements among horizontal competitors to restrain cold calling and recruiting of employees are per se unlawful. But agreements, even among horizontal competitors, that are ancillary to a legitimate procompetitive venture may be lawful. Such agreements are evaluated under the rule of reason, which balances a restraint's procompetitive benefits against its anticompetitive effects.

A determination of whether a restraint is ancillary to a legitimate collaboration depends on whether it is "reasonably necessary" to achieve the procompetitive benefits of the collaboration. The "reasonably necessary" standard is well understood in the antitrust case law.[7] The cases demonstrate that the determination of whether the conduct at issue meets the standard is made based on the facts of each individual case. It is not possible to identify every factor a court may choose to consider in every situation in every industry. Rather, the standard is flexible and allows the court discretion to protect legitimate restraints on competition while prohibiting those that are unlawful. The courts must consider each situation's individual facts and determine whether the agreement is "reasonably necessary" for the collaboration.[8]

In the CIS, the United States identified several facts that caused it to conclude that the Lucasfilm-Pixar agreement was not properly ancillary to any legitimate procompetitive collaboration between them. Indeed, the agreement was not tied to any specific collaboration. In addition, the agreement extended to all employees at the firms and was not limited by geography, job function, product group, or time period. See CIS at 7–8.

The factors identified by AESC certainly appear to be relevant to assessing the reasonable necessity of a non-solicitation. They are similar to the factors identified in the United States' CIS. However, to enumerate a list of factors courts must consider in determining reasonable necessity is both impractical and unnecessary. Moreover, the agreements AESC is concerned about-agreements between clients and executive search firms-are vertical in nature. They are not horizontal agreements between competitors, like the Lucasfilm-Pixar agreement. Vertical agreements are judged under the rule of reason where the court weighs the potential anticompetitive effects of the activity and its alleged procompetitive virtues.

For these reasons, the United States believes that the modification proposed by AESC is inappropriate. The public interest is well served by entering the Final Judgment as proposed.

IV. Conclusion

After carefully reviewing the public comments, the United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the **Federal Register**.

Dated: April 15, 2011.

Respectfully submitted,

Adam T. Severt,
Ryan S. Struve (DC Bar #495406),
Jessica N. Butler-Arkow (DC Bar #430022),
H. Joseph Pinto III,
Anthony D. Scicchitano,
Trial Attorneys.

U.S. Department of Justice, Antitrust Division, Networks and Technology Section, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530. Telephone: (202) 307–6200. Facsimile: (202) 616–8544. *adam.severt@usdoj.gov.*

From: Kent Martin,
Sent: Wednesday, February 16, 2011 9:22 pm,
To: ATR-Antitrust—Internet; Severt, Adam T,
Subject: United States of America vs. LucasFilm LTD.

Greetings Department of Justice,

As a member of the digital film community some of my co-workers made me aware of the case being brought against LucasFilm and the proposed settlement. After reading the proposed settlement I was rather disappointed. If I may oversimplify the proposal, simply giving a directive to stop the practice or practices being questioned is unenforceable. The Human Resources and Recruiting staffs will continue to operate as they have for many years. Attempts to control wages is not limited to the agreement uncovered between Pixar and LucasFilm. The major players in the LA area, including The Walt Disney Company, DreamWorks Animation, and Sony Pictures Imageworks all engage, in one form or another, in practices intended to limit wages as employees move between studios. And moving between studios is becoming ever more common as many studios are executing layoffs to minimize their full time staff and will rely on what effectively become temporary staff to complete the work.

Lowering or controlling wages is all about saving money. Any settlement to this case that does not involve financial penalties will fall short of having any effective impact. But how would financial penalties, if any be disbursed? To union pension plans? Not all studios are union. Payments to only those employees affected? In some way the entire industry has been affected, except for the few that seem to have secured lifetime positions at some outrageous hourly rate. Some form of payment to employees of the companies involved during the time period the practices were determined to have been in effect? Maybe. That would be a start.

A very good mess indeed. So a slap on the wrist will be administered, and I will watch my hourly rate continue to plummet as wage control techniques continue on.

Thought I would submit a few comments on this matter, even though it is shortly before the deadline. I am hoping that many more of my colleagues have taken the time to submit even a short comment on the matter.

Thank You for your time.

Kent Martin,
Digital Film employee for over 15 years.

The Association of Executive Search Consultants' Comments on the Proposed Final Judgment Between the Department of Justice and Lucasfilm

The Association of Executive Search Consultants ("AESC") respectfully submits these comments to the Proposed Final

[7] See generally Department of Justice, Antitrust Division, and Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors § 1.2 (2000) ("Collaboration Guidelines"). See also *Major League Baseball* v. *Salvino,* 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) ("a per se or quick look approach may apply * * * where a particular restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as a naked restraint against competition."); *Dagher* v. *Saudi Refining, Inc.,* 369 F.3d 1108, 1121 (9th Cir. 2004), rev 'd on other grounds sub nom. *Texaco* v. *Dagher,* 547 U.S. 1, 8 (2006); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.,* 792 F.2d 210, 227 (DC Cir. 1986); In re Polygram Holdings., Inc., 2003 WL 21770765 (F.T.C. 2003) (parties must prove that the restraint was "reasonably necessary" to permit them to achieve particular alleged efficiency), aff'd, *Polygram Holdings, Inc.* v. *F.T.C.,* 416 F.3d 29 (DC Cir. 2005).

[8] See, *e.g., Freeman* v. *San Diego Ass'n of Realtors,* 322 F.3d 1133 (9th Cir. 2003) (agreeing on a fixed fee was not reasonably necessary for a shared multi-state listing database because it was not a "necessary consequence" of the MLS' activities; organizations had shared databases in past without fixing fees); Salvino, 542 F.3d at 337 (Sotomayor, J., concurring) (Major League Baseball teams created a formal joint venture to exclusively license, and share profits for, team trademarks, resulting in "decreased transaction costs, lower enforcement and monitoring costs, and the ability to one-stop shop. * * * " Such benefits "could not exist without the * * * agreements."); *Blackburn* v. *Sweeney,* 53 F.3d 825 (7th Cir. 1995) (Agreement between former law partners to ban advertising in certain areas was an illegal horizontal market allocation and not an ancillary restraint. It was not reasonably necessary to partnership dissolution agreement, as the agreement was of unlimited duration and the firms had split before the agreement was written); Rothery, Storage & Van Co., 792 F.2d at 227 (court determined that national moving network in which the participants shared physical resources, scheduling, training, and advertising resources, could forbid contractors from free riding by using its equipment, uniforms, and trucks for business they were conducting on their own); *Addamax* v. *Open Software Found.,* 152 F.3d 48 (1st Cir. 1998) (computer manufacturers formed nonprofit joint research and development venture to develop operating system; agreement on price to be paid for security software that was used by joint venture was ancillary to effort to develop a new system).

Judgment between the Department of Justice ("DOJ") and Lucasfilm. In summary, the AESC is supportive of the Proposed Final Judgment with one exception: Section V.A. of the Proposed Final Judgment lacks sufficient clarity with respect to the circumstances under which "no direct solicitation" provisions are permitted in the context of "contracts with * * * recruiting agencies," and specifically what factors should be considered in determining whether such provisions are "reasonably necessary." AESC therefore respectfully requests that DOJ, prior to entry of the Proposed Final Judgment, supplement the language of the judgment to communicate clearer guidance both to recruiting agencies and to the firms that engage such agencies to perform employee and executive search functions.

The AESC is the worldwide professional association for retained executive search consulting firms. An offshoot of management consulting, retained. executive search consulting has played a major role in the identification and recruitment of senior executive talent for organizations in a wide variety of industries and countries. The success of executive search consulting is such that the profession has grown to become a global industry with revenues in excess of $10 billion. Today, the AESC is widely recognized as the standard bearer for the executive search industry and represents member firms in seventy (70) countries around the world, employing more than 6,000 search professionals. It is estimated that AESC member firms are retained by clients to conduct approximately 50,000 senior executive searches every year.

The AESC is concerned that ambiguity in the Proposed Final Judgment creates uncertainty regarding the extent to which "no direct solicitation" provisions are permitted in executive search contracts. Section V.A. of the Proposed Final Judgment expressly permits "no direct solicitation" provisions that are "reasonably necessary for contracts with * * * recruiting agencies." However, the judgment fails to define the term "reasonably necessary." Nor does the government's Competitive Impact Statement identify the factors that are relevant to determining whether a "no direct solicitation" covenant in an agreement with a recruiting or executive search agency would comply with Federal antitrust law. This ambiguity will make it difficult for executive search firms to ensure that they are complying with the terms of the judgment in any future contracts with Lucasfilm. More broadly, to the extent the judgment reflects Dal's current legal positions and antitrust enforcement policies, the lack of clarity on this issue could complicate the ability of executive search firms to ensure that their contractual practices comply with Federal antitrust law.

Accordingly, the AESC respectfully requests that DOJ modify the Proposed Final Judgment to provide further guidance regarding the circumstances under which "no direct solicitation" provisions in client engagement agreements may be deemed "reasonably necessary." For example, in the context of a recruiting engagement involving a single position in a discrete geographic area, would a "no direct solicitation" provision that is unlimited in geographic scope or duration be considered "reasonably necessary"? If not, because of the breadth of the restriction in relation to the limited nature of the search, what factors should be considered in narrowing the scope of the "no direct solicitation" provision? Likewise, would a "no direct solicitation" provision that broadly prohibits an executive search firm from contacting any employee at a large, diversified company be considered "reasonably necessary" where the firm was engaged only to fill positions in a single division or product group? Again, to the extent that such a provision would deemed overly broad and thus not "reasonably necessary," what principles should be considered in developing a more narrowly tailored restriction?

Questions such as these underscore the practical challenge that executive search firms will face in conforming their contractual practices to the terms of the Proposed Final Judgment, absent further guidance. The AESC therefore urges DOJ to give attention to this issue, and, in order to assure that "the decree is sufficiently clear" to be "in the public interest," Competitive Impact Statement § VIII, make appropriate revisions to the language of the judgment to ensure that it better equips the executive search industry with information needed for continued legal compliance in this area.

Respectfully,

Peter M. Felix, CBE,

President, Association of Executive Search Consultants.

March 15, 2011.

James J. Tierney, Esq.,

Chief, Networks & Technology Enforcement Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW, Suite 7100, Washington, D.C. 20530.

Re: Proposed Final Judgment in US. v. Lucasfilm

Dear Mr. Tierney:

The Association of Executive Search Consultants ("AESC") recently filed public comments concerning DOJ's proposed consent decree in the Lucasfilm matter. In its public comments, the AESC outlined practical scenarios in which a broad no direct solicitation provision in an executive search contract might not be "reasonably necessary." The AESC urged DOJ to consider adding language to the proposed Final Judgment identifying guideposts for tailoring overly broad non-solicitation provisions to more appropriately track the scope of a recruiting or executive search engagement. As the AESC noted, absent further clarification it may be difficult for executive search firms to ensure compliance with the standards of conduct outlined by the proposed Lucasfilm consent decree. In addition, the AESC believes there are policy issues that should be of some concern to DOJ, issues that could effectively be addressed through relatively minor revisions to the language of the proposed Final Judgment.

When a corporation engages an outside consultant to perform an executive search, the consultant may learn a great deal about the office or business in question, including its internal structure, personnel, reporting relationships, and compensation practices. Such knowledge can be very useful to the outside consultant and can aid the process of identifying and recruiting talented, well-placed executives, leading to better and more rapid results for the client. Where an executive search firm, in the course of its work, gains exposure to proprietary details about an aspect of a client's business, it is understandable that the client would desire to ensure that such knowledge is not used for the benefit of the search firm's other clients. Thus, to facilitate executive search engagements, it may be "reasonably necessary" for the client and search firm to agree upon a narrowly tailored non-solicitation covenant. An example would be a covenant of limited duration restricting the search firm from contacting, for recruiting purposes, individuals who work within the relevant office or division of the client corporation.

But as noted in the examples highlighted by our public comments, executive search clients can demand much broader non-solicitation terms. For instance, a large multinational corporate client could demand a multi-year contractual ban on solicitations extending across the client's entire global enterprise, even where the search that is the subject of the retention agreement is limited to a single position or a discrete business unit.

Where a client negotiates for and receives an overly broad non-solicitation covenant in a contract with an executive search firm, this alone likely would not raise antitrust concerns. Indeed, absent collusion, even pervasive use of overly broad non-solicitation terms in retention agreements with leading executive search firms likely would not rise to the level of an antitrust violation. Yet agreements containing such terms, if widespread within a given industry, do pose an arguable threat to competition, inasmuch as they tend to place significant numbers of talented individuals off limits from employment opportunities. If a corporation can broadly place its personnel off limits to top executive search firms, this serves to insulate the corporation from normal marketplace pressures, which in the words of the Lucasfilm Competitive Impact Statement could interfere with "the proper functioning of the price-setting mechanism."

Although inclusion of overbroad non-solicitation provisions in vertical retention agreements between executive search consultants and their corporate clients is not a matter of acute antitrust sensitivity, given the potential competition-reducing effect of such provisions presumably DOJ would not wish to encourage the use of such provisions. Yet as currently worded the proposed Final Judgment may do just that. The proposed Final Judgment addresses this subject under the heading of "Conduct Not Prohibited." This, combined with the fact that the term "reasonably related" is nowhere defined or clarified, could be interpreted to suggest that no direct solicitation provisions, no matter how broadly defined, are unlikely to pose legal concerns as long as they bear some relation to the recruiting or consulting engagement.

With relatively minor language revisions, DOJ could send a more constructive message, counseling in favor of some restraint in this area. What is missing from the proposed Final Judgment is simply some indication of the factors that would be relevant to consider in assessing the "reasonable necessity" of a non-solicitation restraint—factors such as:

- the nature and scope of the recruiting engagement;
- the extent to which the search consultant is given access to proprietary details about the client's business;
- the breadth of the proposed non-solicitation restraint in relation to the scope of the recruiting engagement and any proprietary information conveyed by the client in the course of facilitating the engagement; and
- the duration and geographic scope of the proposed non-solicitation restraint in relation to the scope of the recruiting engagement.

The AESC would therefore propose that DOJ consider adding this language as a new Section V.B. to the proposed Final Judgment, with the current Section V.B. being re-designated as Section V.C., etc.:

B. All no direct solicitation provisions that relate to agreements with recruiting agencies described in Section 5.A.3 shall be narrowly tailored such that the scope of the no direct solicitation provision bears a reasonable relationship to the scope of the recruiting engagement, including with respect to geographic reach, duration, and the number of personnel and business units affected.

Inclusion of additional language as simple and straightforward as this would establish a useful reference for executive search consultants and their clients when entering into non-solicitation terms. This would help to ensure against overly broad contractual restrictions that have the effect of placing significant numbers of individuals off limits to recruiters, thus expanding the pool of accessible talent from which to draw when conducting executive searches. The chief beneficiary of such a trend would be individual corporate executives and employees whose range of opportunities would be enhanced. This outcome is entirely in keeping with the policies that motivated the DOJ's action in the Lucasfilm matter, and we hope that you will give serious consideration to revising the proposed Final Judgment accordingly.

Sincerely,

Peter M. Felix,

President, Association of Executive Search Consultants.

[FR Doc. 2011–10121 Filed 4–27–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Collection of Information; Comment Request

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed information collection request (ICR) that is described below. A copy of the ICR may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

DATES: Written comments must be submitted to the office shown in the Addresses section on or before June 27, 2011.

ADDRESSES: G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693–8410, FAX (202) 693–4745 (these are not toll-free numbers); E-mail: *ebsa.opr@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor's Employee Benefits Security Administration (EBSA) maintains a program designed to provide education and technical assistance to participants and beneficiaries as well as to employers, plan sponsors, and service providers related to their health and retirement benefit plans. EBSA assists participants in understanding their rights, responsibilities, and benefits under employee benefit law and intervenes informally on their behalf with the plan sponsor in order to assist them in obtaining the health and retirement benefits to which they may have been inappropriately denied, which can avert the necessity for a formal investigation or a civil action. EBSA maintains a toll-free telephone number through which inquirers can reach Benefits Advisors in ten Regional Offices.

EBSA also has made a request for assistance form available on its Web site for those wishing to contact EBSA on-line. Contact with EBSA is entirely voluntary. To date, the Web form has included only basic identifying information which is necessary for EBSA to contact the inquirer. The proposed collection of information would require the same identifying information—first name, last name, street address, city, zip code, and telephone number. In order to improve customer service and enhance its capacity to handle greater inquiry volume, EBSA is proposing to include additional information on the form such as the plan type, broad categories of problem type, contact information for responsible parties, and a mechanism for the inquirer to attach relevant documents.

This information will be used by EBSA to make informed and efficient decisions when contacting inquirers who have requested EBSA's informal assistance with understanding their rights and obtaining benefits they may have been denied inappropriately. EBSA also will use the information to evaluate its service to inquirers, support the development of a broader understanding of the nature of current issues in employee benefit plans, and to respond to requests for information regarding employee benefit plans from members of Congress and governmental oversight entities in accordance with ERISA section 513.

II. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the collections of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

A summary of the ICR and the current burden estimates follows:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Web Intake Form.

Type of Review: New collection of information.

OMB Number: 1210–NEW.