

THE STATE HUMAN RELATIONS COMMISSION

STATE OF DELAWARE

COMPLAINANTS,)
) Case No. K-EA-716-08
 v.)
)
 DAVID STEWART and)
 CARMIKE CINEMAS, INC.,)
 d/b/a CARMIKE 14)

PANEL DECISION AND ORDER

STATEMENT OF THE CASE

Pursuant to notice, a hearing was held on the above-captioned complaint on November 6 and 10, 2008 by a Panel of the Delaware State Human Relations Commission (“Panel”) at the Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904, to determine whether Respondents had violated the *Delaware Equal Accommodations Law* found at 6 *Del.C.* Ch. 45. The Panel members were Commissioners James E. Gray who served as Panel Chair, Marian L. Harris, and Richard D. Senato. The majority of Complainants¹ were represented by Umbreen S. Bhatti, Esquire of the American Civil Liberty Union of Delaware. Complainants Veronica Becton, Jamiera Burke, Robert Waters, Harold Dixon, and Arnola Burke-Dixon appeared *pro se*.² Respondents were represented by Christina H. Bost Seaton, Esquire of Troutman Sanders LLP

¹ The following Complainants were represented by Ms. Bhatti: Jeff Blackledge, Andre Boggerty, Kimberly Boggerty, Barbara Bryant, Larry Bryant, Kemmeisha Burris, Kemuel Butler, Andrea Carter, De’Von Carter, Nicole Davis, Victoria Fuentes-Cox, Nicole Graves, Tracy Harvey, Chauntel Hayward, Kenneth Hutchinson, Mondaria Hutchinson, Brian Jordan, Delores Percy, William G. McCulley, Sonji McCulley, Chontel McMillan, Barbara O’Neal, Quetcy Rivera, Trisha Scott, Monica Sewell, Rosa Smith, Pamela Starling, and Theresa Williams.

² A *pro se* litigant is one who does not retain a lawyer but appears for himself or herself in a court or a legal action. BLACK’S LAW DICTIONARY (5th ed.1968).

who was admitted *pro hac vice*, Daniel V. Folt, Esquire, and Matt Neiderman, Esquire of Duane Morris LLP. Deputy Attorney General Barbara J. Gadbois was counsel to the Panel.

The Complainants alleged that on October 12, 2007, Respondents David Stewart and Carmike 14 violated Section 4504 of the *Delaware Equal Accommodations Law* when Complainants were denied access to public accommodations furnished by Respondents on the basis of their race or color. According to Complainants, David Stewart, manager of Carmike 14 movie theater, insulted, humiliated, and demeaned them when he made a public announcement before the movie began that they should turn off their cell phones, remain quiet, and stay in their seats in a manner that deprived them of their right to equal accommodations.

Respondents denied all allegations of discrimination. Respondents contended that the announcement made by Mr. Stewart was not discriminatory or insulting but was made to further the enjoyment of all of the movie patrons.

Respondents submitted a request for fees and costs pursuant to 6 *Del.C.* § 4508. Matt Neiderman, Esquire provided an affidavit in support of the request for fees and costs stating that Respondents paid \$87,787.25 for legal services provided prior to the two-night hearing and estimated that Respondents would incur approximately \$30,000 in additional fees and costs during the hearing.

Complainants did not submit a motion or affidavit concerning fees or costs prior to the hearing. On January 23, 2008, more than two months after the hearing but before the Panel issued its decision, Complainants filed a Motion for Leave to File a Request for Fees and Costs and their counsel's Affidavit in Support of an award of fees in the amount of \$21,510 and travel expenses in the amount of \$194.

Respondents also filed a Motion to Dismiss thirteen complaints³ on the basis that seven complaints were filed beyond the 90-day statute of limitations and four complaints were not properly verified. The Panel took the Motion under advisement and postponed ruling on the Motion until after the hearing was concluded.

SUMMARY OF THE EVIDENCE

COMPLAINANTS' WITNESSES

Testimony of Pamela Starling

Ms. Pamela Starling testified that she has attended more than one hundred movies at Carmike Theaters which is the only theater in Dover. Ms. Starling is thirty-nine years old and has taken her daughter to movies at Carmike and has also taken a child that she mentored to the movies at Carmike.

On October 12, 2007, Ms. Starling bought tickets to the new Tyler Perry movie, "Why did I get Married?". She purchased tickets earlier in the day for herself and her husband to celebrate their wedding anniversary. It was a Friday night and the movie was to start at 7:15.

When Ms. Starling and her husband arrived at the theater, they waited in line in the lobby. There were two security officers, one was outside the door to the theater showing the movie. At that door, she again had to show her tickets to the security guard. Ms. Starling had never before had to show her tickets to a security guard and had never seen a guard at the door to a theater. Having to show their tickets again to the guard, "set the tone for the evening." The security guard came inside the theater but did not stay for the whole movie.

In the theater, people were quietly talking. The audience was dressed as if they had just

³ Respondents' Motion to Dismiss requested that ten complaints rather than thirteen be dismissed. One of the ten complaints had already been dismissed by the Complainants, leaving nine complaints to be considered by the Panel.

come from work. Ms. Starling saw messages on the theater screen concerning the use of cell phones and talking and she was not offended by them. The messages were for everyone's enjoyment of the movie.

Ms. Starling testified that she has not ever felt uncomfortable or threatened by other patrons at any movie. While there may have been times when people talked during movie, there was never a disturbance. There had never been any disruptions at movies when the audience consisted mostly of African Americans.

There were more than one hundred people in the audience. There were some empty seats but it generally was a full movie. Before the movie started, a man who said that he was the manager, entered the theater and told the audience to turn off all cell phones, be quiet, and stay in their seats. Ms. Starling testified that the manager's tone was as if the customers had been causing problems which they had not done. The manager then left the theater but came back in a few minutes later and said, "I didn't mean to offend anyone," and that he was required to make the statement at all new releases. She had the impression that he said what he did because he thought that he had offended people.

Ms. Starling testified it was not the words the manager said she found offensive but the condescending manner and tone in which he talked to them as if they were children. Because the same message was on the screen and there were no problems with the audience, she did not understand why the announcement was made. After he made the announcement, Ms. Starling felt like she was treated as a little child who did not know how to behave at the movies. She felt disrespected, hurt, and upset. She doesn't know if he made the announcements at any other movie and had not attended the "Halloween" movie the weekend before October 12, 2007.

Over the years Ms. Starling has attended movies, the message concerning cell phones and

talking has been on the screen, but no one has ever come into the theater and made any such announcement.

People in the audience began to talk about what this was all about but Ms. Starling talked mainly to her husband about the incident. She did not say anything to the manager but other people in the audience asked him why he said what he did. Ms. Starling said that the manager's apology was insincere. She had never before felt discriminated against at Carmike. Ms. Starling did not later call the theater to complain nor did she demand a refund. She did not complain to the manager because she knew she might be filing a complaint in the future.

A paper was circulated among the audience and Ms. Starling signed it because she was upset with the announcement. She understood that if she was upset, she could sign the paper and someone would get in touch with her later. Ms. Starling did not remember the name of the woman who circulated the paper but knew that she was from the Human Relations Division. The woman from the Human Relations Division did not ask anyone to sign the paper and a different woman passed the paper around to the audience. Ms. Starling did not know how far the paper was circulated around the theater or if there were any people who did not sign it.

Ms. Starling testified that she and her husband did not leave the movie because it was their anniversary, she had taken time from her lunch hour to purchase the tickets, and she wanted to support the film.

Ms. Starling was offended by the manager's announcement. As a black woman, she deserved to be respected like anyone else. She attended other movies during the same time period when the majority of the audience members were not minorities and the announcement was not made. She believed that the announcement was racial discrimination and that if it was an all white crowd, the announcement would not have been made.

Ms. Starling stated that her husband was upset too and he signed the paper. However, he did not file a complaint because no one ever contacted him. She was contacted by Sharese McGee who asked her what had happened. Ms. McGee said that a complaint might be filed and asked if she would like to be part of the complaint. She and other complainants later met with Ms. McGee. Ms. Starling was not sure who was filing the complaint. Ms. McGee then sent a form to her, told her to look it over and see if it was accurate and if she wanted to sign it, to do so and send it back to her. Ms. Starling agreed with the content of the form complaint and so she signed it.

At the first meeting of the Complainants with Ms. McGee, they talked about what they wanted to see happen. The woman from the Human Relations Division who was at the movie was also at the meeting. The Complainants did discuss whether they should demand money. The group felt this was not about money but that if Carmike had to pay money, they would not do the same thing again. Everyone decided that Fifteen Thousand Dollars per person would be a reasonable amount of money to compensate them.

Ms. Starling testified it was not about the money for her but an apology or requirement to take training might not be sincere. She believed that if Carmike had to pay money to the Complainants it would mean something. Ms. Starling has been back to Carmike one time since this incident.

Testimony of Larry Bryant

Mr. Larry Bryant testified that since 1981, he has attended movies at Carmike more than one hundred times. Prior to October 12, 2007, he attended other first run movies. He is forty-nine years old.

The Tyler Perry movie was about relationships and appealed to minorities. Mr. Bryant

anticipated that the movie would be sold out because when he bought his tickets at lunch time there was a very long line.

That evening, Mr. Bryant entered the theater lobby and went to the concession stand where he bought candy, soda, and popcorn. He then got into line, showed his ticket, and was told where the theater was. When he got to the door to the individual theater, he again had to get in line and a female security guard who was not a person of color, checked his ticket at the door. He did not see any security guards at any other theater doors.

Mr. Bryant entered the theater, went to the back area, and sat down. The theater began to fill up and people were sitting and talking quietly. Everyone he saw in the theater was a person of color. The members of the audience ranged in age from thirty to seventy years.

A man then came into the theater, went up front, and told them not to be moving around or talking during the movie and to turn off all cell phones. The manager told them to be quiet in a condescending tone. He did not hear the manager say that the policy was new. Mr. Bryant was insulted by the announcement which he had never heard at any other movie. The same message was on the screen and the audience did not need a second reminder – they knew what to do. While the manager's tone was bad the announcement was also bad.

Mr. Bryant testified that he did not know how he would have reacted if the manager making the announcement had been African American. He has never been at a movie regardless of the racial makeup of the audience where there were any disruptions although a baby might have cried.

After the manager left the theater, Mr. Bryant went after him and told him that he was uncomfortable with what the manager had said. The manager told him that he made the announcement at all sold out movies but Mr. Bryant knew that was not true because he had been

at other sold out movies and the announcement was never made. Mr. Bryant did not respond to the manager because a woman had come out of the same theater and Mr. Bryant did not want to create a problem.

Mr. Bryant was angry and he needed to take a walk to cool off. He then went back into the theater to see the movie because he was not going to allow the manager to control his conduct. If the manager apologized, Mr. Bryant was not in theater when he did so. The manager did not apologize to him. He did not threaten the manager and did not see any one else threaten him.

When Mr. Bryant went back into the theater, someone was trying to calm everyone down and saying that the incident could be handled at a later date. He agreed that should be done. A paper was circulated in the theater and his wife wrote their names and phone number on the paper. Mr. Bryant had no idea who signed and who declined to sign. The paper was started in the back of the theater where he was sitting and when the lights went out for the movie to begin, the paper stopped circulating.

Mr. Bryant testified that during the movie people were not talking about the incident but he was thinking about it the entire time he watched the movie. He saw theater employees standing along the wall inside the theater during the movie but he did not know if it was the manager or guards. He did not know how long they stood there or what they were looking at.

Mr. Bryant testified he did not believe that reasonable people would not have been offended by the announcement. He did not enjoy the movie even though it was a very good movie. He later rented the movie and watched it at home. He was not going to leave the theater because of the manager's conduct.

Mr. Bryant filed a complaint because he was treated differently from other people and not

in the way he deserved to be treated. If he is uncomfortable, he speaks up. He knew discrimination when he saw it as he had worked on a plantation in Mississippi. Mr. Bryant wanted to be sure that his kids and grandkids did not have to experience this kind of thing.

On cross-examination, Mr. Bryant identified his complaint and said that the information it contained was true and accurate to the best of his knowledge. He did not write the words on the complaint and doesn't know who did. He gave his testimony over the phone and there was nothing inaccurate in the complaint he signed. He did not use the word "appalled" in describing his experience, rather he was surprised. Some of the words in the complaint he signed were his but the complaint was not his "word for word." The complaint he signed was a conglomerate of the group of Complainants and not just his own single complaint. He read the complaint, agreed with it, and signed it as a group statement.

Mr. Bryant gave his phone number at the theater and he was called by a woman but he does not remember her name. He gave a statement to her and his statement was put into the complaint.

Mr. Bryant testified that he believed that the manager said what he did because Mr. Bryant is a black person and he would not have said the same thing if the audience was white. Mr. Bryant believed that he was being treated differently from Caucasians. He did not know if the announcement was made at other theaters that night or at the "Halloween" movie the week before at Carmike.

Testimony of Barbara O'Neal

Ms. Barbara O'Neal went to the movies on October 12 with a group of friends for a "ladies' night out." Some members of the group had purchased their tickets earlier in the day but some did not. At the box office, the members of the group who did not have tickets were told

they could not purchase tickets because the movie was sold out. When they explained that six members of their group already had tickets, the rest of group was permitted to purchase tickets.

Ms. O'Neal and her group went into the theater and sat patiently waiting for the movie to start. Messages were on the screen – one slide said to turn off cell phones, not to make noise, and to be respectful of neighbors.

A man came into the theater and stood in front of the screen and started giving them orders. He said the same things that she had just read on the screen. When the man finished talking, she asked the person next to her why did he come in and say the same thing that was on the screen in a “not pleasant voice.”

Ms. O'Neal is African American and had been vice president of a bank. She would not take condescension from someone who thought he was better than her especially from someone who could not even get a job working for her.

Ms. O'Neal testified she was a university professor and she treated her students as adults. The manager spoke to the audience in a condescending manner. She knew about subtle discrimination and when someone read to her in a condescending and disingenuous manner what she had already read, she did not like it. She did not know what was said in other theaters or how the manager treated other people.

Ms. O'Neal did not go to the movies often – this was her first movie in ten years. She will always remember what happened and will never go to the theater again.

Ms. O'Neal wanted to file a complaint because things like this must be nipped in the bud. She wanted things to be better for her grandchild. She and her group stayed to see the movie but most if not all of the women in her group are also Complainants in this case.

Testimony of Kemuel Butler

Ms. Kemuel Butler testified that she was a regular patron, had attended many movies previously at Carmike, and had seen first run movies at Carmike. She had attended other first run movies where the majority of the audience members were not minorities and she never heard the announcement she heard on October 12. She went to the movies every Friday and Saturday. There was no other movie theater other than Carmike in Dover.

On October 12, Ms. Butler testified she noticed extra security guards in the theater. After she gave her ticket to the ticket taker, she again had to show her ticket to a security guard at the theater door. This had never happened before October 12.

Some people in her group were separated because the movie was being shown in more than one theater. Ms. Butler entered the theater and commercials were playing about cell phones and not talking. Ms. Butler was with her daughter.

Ms. Butler knew the manager, David Stewart as she had talked with him on another occasion. During another movie, her daughter had become sick and Mr. Stewart refunded their money.

Before the movie, Mr. Stewart came into the theater, went to the front, and stood on the stage. He told the audience, "don't get out of your seats, no moving around, be quiet." She was offended by the way the message was presented and she thought the message was made because they were people of color and he thought they did not know how to act.

Mr. Stewart then left the theater and a heavysset woman went out after him. Mr. Stewart returned and stood at the side of the theater. He did not apologize but made a statement that he did not mean to offend anyone.

Someone in the audience asked Mr. Stewart why he made the statement and he said that the new policy was that they make this announcement at all sold out movies. Ms. Butler had

been at the movies just a week before and the announcement was not made. The theater was packed and the audience was "mixed." She did not see the "Halloween" movie. Ms. Butler believed that it may have been the "Bee Movie" which she had taken fifteen children to see. Parents and children were in the audience and there were no disruptions during the movie.

Ms. Butler said the tone was set when an extra security guard, a white woman, stood next to Mr. Stewart, a white man, when he made the statement. Other theater attendants were also with him. The attendants were in uniform and usually only one came into the theater. That night, three or four attendants came in, stood against the wall of the theater, and went out again. Ms. Butler testified she had never seen that previously.

Mr. Stewart did not use any racial words but even without racial words a statement can still be racial. It was the way the manager said it that made the announcement racial.

When a woman asked if anyone felt offended, Ms. Butler said that she did. A woman who was from the Human Relations Division said that if anyone felt offended they could sign a paper. Ms. Butler signed the paper. Ms. Butler later received a call that there would be a meeting of everyone who had been offended.

Ms. Butler asked her friends who were in the other theater where the Tyler Perry movie was shown if the same announcement had been made. Her friends told her no announcement had been made in their theater.

Ms. Butler testified that she knew what discrimination feels like and knew when someone was treating her in a way he shouldn't. She could not believe what happened at the movies that night and she talked about it all the time. Ms. Butler believed she was discriminated against because of her race when she had to show her ticket the second time to a security guard, by the presence of extra attendants in the theater, and by the announcement. Taking all of the events

together led her to believe that the conduct was racially motivated.

Ms. Butler stated that the complaint she signed was a summary and general description of the events that happened on October 12.

Testimony of Jamiera Burke

Ms. Jamiera Burke was not represented by counsel but appeared *pro se*. She testified that she went to the movies on October 12 at Carmike with her parents and her boyfriend. The theater was large and was mostly filled.

Before the movie started, the screen showed messages saying turn cell phones off, stay seated, be courteous. Five minutes after seeing the messages on the screen, the manager came into the theater and told them to stay seated and turn off cell phones. Ms. Burke said he treated them like children. She was offended by his language and the way he said it. She asked her mother why the manager would do this.

A paper was circulated for them to sign their name if they had a problem with what the manager said. Ms. Burke signed the paper because she was treated differently because she and the majority of people in the audience were African Americans.

On cross-examination, Ms. Burke stated that about five percent of the members of the audience were not minorities and that she and they were treated the same. She believed it likely the non-minorities in the audience did not feel the same way she did about the announcement. However, anyone who had a problem with the announcement could have signed the paper including non-minorities.

The manager did not use racial remarks but there was no need for him to say what the screen had already said. Everyone in the theater were adults and they knew not to stand up and walk around. Ms. Burke has attended children's movies where children were running¹ around

and the manager never came in and told them to sit down.

Ms. Burke did not know if the same announcement was made in any other theater that night. She attended the opening night of the "Halloween" movie the week before the Tyler Perry movie and no announcement was made. She attended the show at 7 or 8 pm.

Ms. Burke later saw the manager, Mr. Stewart, at a convenience store. She asked him why he made the announcement. Mr. Stewart told her that he had never made the announcement before that night. She told him that she became angry when he made the announcement.

Mr. Stewart asked her what different approach he should take in the future. Ms. Burke told him that he should not have done what he did. Mr. Stewart smiled and left and Ms. Burke felt he didn't care about what had happened.

On cross-examination, Ms. Burke said she would have been angry if the announcement had been made by a black manager and would have still felt that she had been discriminated against. She attended movies at Carmike before and after this incident and the announcement was never made.

RESPONDENTS' WITNESSES

Testimony of Lina Powell

Ms. Powell testified she was sixty-five years old and lived in Dover. She is African American. She attended the movies on October 12 with her daughter and granddaughter but she had never before been at the Carmike theater.

The theater was dark and noisy before the movie started. There were some empty seats in the theater. Messages were being shown on the screen about telephones and being quiet.

The manager came into the theater and made an announcement. He said he was the new manager and wanted to try something new. He wanted everyone to be happy and to enjoy

themselves.

A woman spoke up and said she thought he was out of order. Someone was yelling and someone told Mr. Stewart to shut up. The manager then left the theater. Someone went out and got the manager and he came back in and apologized.

A woman said everyone saw the messages on the screen. She started handing out papers. Ms. Powell said she didn't want a paper. Almost everyone in the back of the theater where she was sitting gave their contact information.

Ms. Powell said she was embarrassed and ashamed by the woman and that she didn't see anything wrong with what the manager said. She didn't think the announcement was made because of race because there were white people in the audience, too. If people in the audience didn't like what the manager said, they should have asked the white people in the front of the theater how they felt.

Ms. Powell testified she didn't feel there were too many attendants or guards in the theater that night. On cross-examination, she said there were three guards in the theater and she didn't think that was unusual.

Ms. Powell said she doesn't attend the movies and had never before been to the Carmike Theater. She didn't know if the manager said he was new or that new management had just taken over but he wanted everyone to be comfortable. After the movie, Ms. Powell and her family told the manager that if he needed someone to come to court with him, they would.

Despite the averments in her affidavit submitted into evidence as Respondents' Exhibit 3, Ms. Powell said she did not know how many people were in the theater. When asked about the statement in her affidavit that "it's my experience that nearly all movie theaters make such announcements for the benefit of their patrons," Ms. Powell admitted that she had not gone to the

movies since her children were little and her baby was now thirty-nine years old.

Testimony of Sharron Lowery

Ms. Sharron Lowery testified that she was thirty-nine years old and was the daughter of Lina Powell. She and her twelve-year-old daughter went to the movies with her mother on October 12, 2007. Ms. Lowery had been at the Carmike Theater previously.

In her affidavit submitted as Exhibit 2 by Respondents, Ms. Lowery stated that, “visual slides containing various advertisements were running on the screen. One of the slides contained a reminder to theater patrons to silence our cell phones and remain quiet during the film to that other patrons could enjoy the show.” However, Ms. Lowery testified that she was unable to see except up close. She did not know if there were messages on the screen or not because if they were in small print she would not have been able to see them.

Ms. Lowery testified the manager came into the theater and introduced himself. He said there was something new that the theater was doing. He was the new manager and to let him know if he could do anything for them. The manager said there had been problems with cell phones and asked everyone to turn them off. He then left.

The manager came back into the theater and apologized. A woman stood up and said that she felt his comment was racist because the majority of the audience was black. Ms. Lowery testified the manager said, “if he offended anyone he apologized.” The woman who had stood said she was an attorney or worked for an attorney and said she was going to do something. The woman was taking names and contact information but Ms. Lowery would not give her information as she thought it was inappropriate because the movie was starting.

Ms. Lowery testified she did not feel the announcement was wrong or racist. She did not feel that the manager was talking down to the audience. Before she lost her eyesight, Ms.

Lowery remembered seeing employees standing at exit doors at other theaters. She never felt treated differently at Carmike because of her race.

On cross-examination, Ms. Lowery stated she had never heard such an announcement before October 12 and she has not been to the movies again since then.

Ms. Lowery testified the audience was acting “normal” before the manager came into the theater but things were not normal after the woman spoke. There was a lot of commotion going on and numerous people were making complaints about the announcement. The reaction to the announcement scared her twelve-year-old daughter.

In response to questions from the Panel, Ms. Lowery testified she was unable to read the slides on the screen because she lost her eyesight in 2005. In her affidavit, Ms. Lowery stated, “there were over 100 people in the auditorium, and I believe that less than one third of the patrons seemed to be interested in providing their contact information or getting involved in her complaint.” At the hearing, Ms. Lowery admitted she could not see how many people were in the theater. She based her estimate on how many people gave their contact information on what Christine Bost Seaton, Respondent’s counsel, told her about the number of people who had filed complaints.

Testimony of David Stewart

Mr. David Stewart testified that he was the manager for Carmike Theaters on the night at issue in this case. He made an oral statement to the audience in the Tyler Perry movie. The theater is one hundred feet long and seats one hundred thirty-five people. When he made the statement, he had to talk loud but he did not speak condescendingly. He asked the audience to refrain from talking, refrain from moving around, turn off cell phones, and to let him know if there was anything he could do for them.

Mr. Stewart said he had never previously made this statement at the Dover Carmike Theater but had made the statement at the Carmike Theater in Olean, New York, where he had previously been the manager. Mr. Stewart later testified he had made the same announcement at the Dover Carmike the week before at the "Halloween" movie.

Mr. Stewart testified the division of Carmike he worked for had a policy in effect since 2005 that such a statement was to be made. Mr. Stewart said he did not tell the audience it was a new policy but did tell them that he was a new manager to the area and that this was something that he said in other theaters. He thought the old manager at the Dover Carmike might have sometimes made the statement. Mr. Stewart later testified he believed the same policy was given to the manager of the Dover theater but didn't believe that he "followed up with it."

The announcement policy was established in an email in 2005 because of problems with talking and cell phones. There was not much of a problem with people moving around. The policy required the manager to make the pre-show announcement if there were more than twenty-five patrons in the theater.

Carmike had four divisions in the United States and the theaters in Olean and Dover were in the same division. The Olean Carmike had eight theaters with sixty to two hundred twenty-five seats in each theater. He used his discretion when he worked as the manager in the Olean theater and did not make the announcement unless the movie was sold out. To Mr. Stewart, sold out meant that ninety percent of the seats had been sold.

Mr. Stewart testified he had been working at Carmike 14 in Dover for four months when he made the announcement at the Tyler Perry movie. He transferred from Olean to Dover for a promotion to a bigger theater which Carmike considered more important and for more money.

Mr. Stewart testified in the four months he had been the manager at Carmike 14, he made

the announcement only two times before the Tyler Perry movie. He made the same announcement on the previous Friday and Saturday nights at the "Halloween" movie. Mr. Stewart stated he made the announcement at only one of the shows each night. The announcement was made at either at the 7:15 or 9:45 pm show, whichever one had greater attendance.

Mr. Stewart testified he did not make the announcement at the Tyler Perry movie based on the race of the audience and that he has never looked at the racial composition of the audience before making the announcement. He didn't always have time to make the announcement and he only made it at the "busiest" movies whether they were sold out or not.

On the night of the Tyler Perry movie, he walked through the theater before making the announcement. Mr. Stewart noted that the audience was "mixed" but could not say how many people were white.

Mr. Stewart testified he never treated minority patrons different from white patrons. He regularly dealt with minorities at Carmike and never received any complaints of discrimination.

Mr. Stewart stated he no longer worked at Carmike in Dover. He moved back to Olean to be closer to family and friends and for other reasons he did not want to go into. His experience at the Dover theater in October 2007 was not involved in his moving back to Olean. He now worked as the manager at the Olean Carmike.

Mr. Stewart testified that on the night of the Tyler Perry movie, one hundred and thirty patrons were in the theater. Other theaters in the complex were as crowded but had less people in them. Because advance ticket sales for the movie were very high during the day, Mr. Stewart decided to show the Tyler Perry movie in two additional theaters at the same time. The other two theaters were filled but they each had only fifty seats. He assumed there was a large number

of minorities in those two theaters because the Tyler Perry movie appealed to minorities.

That night the theaters had slides operating – called “screen vision slides.” Mr. Stewart testified it was necessary to make the announcement as an additional reminder because people sometimes chose to use cell phones and talk even though the slides told them not to do so.

Mr. Stewart testified he had been a Carmike manager for four years. Every weekend on Friday and Saturday nights at the Olean theater in New York he made the announcement because he would get three or four complaints about people on cell phones or talking. The complaints were not about minorities.

Mr. Stewart had many different reactions to the announcements including thanks, accusations of racism, and heckling. After he made the announcement at the Tyler Perry movie, a man came out and told him people were offended. Mr. Stewart had not intended to offend anyone so he went back into the theater and apologized. When he made the two announcements at the “Halloween” movie, no one accused him of racism. When he made the announcements in Olean, no one accused him of racism.

Mr. Stewart testified he was approached by two people in the lobby after he made the announcement, Mr. Bryant and a woman. After the Tyler Perry movie was over, he took a break and went to the Royal Farms convenience store to buy cigarettes. He saw Ms. Burke at the store and she casually asked him why he did what he did. Ms. Burke did not act in an offensive or threatening manner. Ms. Burke did not answer his question as to how he could improve his approach in making the announcement.

Mr. Stewart stated the announcement he made at the Tyler Perry movie did not have the customer service effect he was trying to get. Mr. Bryant told him there were many patrons who were upset and offended. Mr. Bryant’s tone was casual, he was respectful, and was controlling

himself. Mr. Bryant told him he should go in and apologize. Mr. Stewart went back into the theater and stood near the doorway. He made a sincere apology, saying, "I do apologize to anyone who was offended. I did not mean to offend anyone but it was policy."

No one came up to Mr. Stewart immediately after he apologized because he ran out of the auditorium after hearing comments from the crowd to shut up and that he was making it worse. The crowd was very upset.

One woman later gave him her card. Mr. Stewart immediately reported the incident to Anthony Sharp, the district manager and his direct supervisor. He told Mr. Sharp the audience was very upset and Mr. Sharp told him to stand at the door after the movie. Mr. Sharp said nothing more about the incident.

After the movie was over, Mr. Stewart stood at the theater doorway to say "good night" to the patrons. About ten people thanked him, thirty people told him he shouldn't have done it, and one person told him that if he made the announcement in a similar situation he "might be stabbed." Mr. Stewart said he was scared. He didn't think he did anything wrong but he didn't want anyone to be upset.

Later, Mr. Sharp told Mr. Stewart he had to keep making the announcement. However, Mr. Stewart never made the announcement again during the next year he worked at the Dover Carmike.

Mr. Stewart testified that the Dover Carmike hired security guards through a company – he had nothing to do with their hiring. He understood guards were hired because a manager had been "taserred" and robbed of six thousand dollars and there had been a fight between patrons on Valentine's Day.

According to Mr. Stewart, two security guards worked every Friday and Saturday night.

One guard was armed, the other was unarmed. There were two guards on duty the night of the Tyler Perry movie. Mr. Stewart was in charge of where the guards patrolled. He had the armed guard positioned in the lobby area by the manager's office and the unarmed guard stood in the hallway to prevent people from coming in without a ticket.

The night of the Tyler Perry movie both guards were Caucasian. The unarmed guard was helping check tickets at the door to the Tyler Perry movie because there were three theaters showing the feature and there was a line for the movies. Mr. Stewart did not tell the guard to check tickets but the guards knew to do it.

The security guards were the first line of offense for problems in the theater. No one that night complained about the security guards.

Attendants, called "door employees," cleaned the theaters and helped patrons find their seats. They used to be called ushers. The attendants all wore uniforms - the manager wore a different uniform. Mr. Stewart testified that attendants go into a theater near the end of the movie to start cleaning after seeing how many people were in the theater.

Mr. Stewart testified he might have gone back into the theater with the Tyler Perry movie one or two times after making the announcement that evening to make sure the movie was operating correctly. No one complained that night about the presence of the attendants. If he had seen an attendant standing in the theater during the movie, he would have told them to find something to do.

Mr. Stewart stated that in the four years he had been a manager, he had been present for thousands of movies. The number one complaint made by minorities and non-minorities was about cell phones. Teenagers generated the most complaints for talking, cell phone use, and throwing things. Complaints about teenagers were no different for minorities and non-

minorities.

Mr. Stewart testified he had never treated teenagers differently unless something happened. He also said he never treated whites differently.

On cross-examination, Mr. Stewart said he didn't make the announcement at the two other Tyler Perry movies because he had to go back into the largest theater after he made the announcement there.

Mr. Stewart testified that on the evening in question, he took the security guard off her post and told her to check tickets at the door to the theater to make sure people were going into the right theater. The guard on occasion walked into the theater to see if any seats were left.

On that night the Tyler Perry movies were shown at the same time in all of the theaters. Later, he decided not to run the movies at the same time but to stagger them.

Mr. Stewart testified the Tyler Perry movie was the "first big movie" shown since he arrived in Dover. He had only one print of the movie but he decided to show the movie in two other theaters. He assigned the security guard to check tickets based on the number of patrons. The security guards were there to make sure that patrons went to the correct place.

In November or December 2004, Mr. Stewart started working at the Carmike 8 in Olean, New York. He transferred to Dover in June 2007 and transferred back to New York on October 15, 2008, about one month prior to the hearing.

Mr. Stewart testified the announcement policy was new in 2005. The policy was "if twenty-five or more patrons are in any theater, do the pre-show announcement." An email was sent to every complex manager in the division. There are probably about one hundred complexes in the division.

Mr. Stewart testified the policy was not mandatory but optional. The announcement

policy was “not at the top of the priority list.” The manager’s priorities were first, customers; second, employees and handling money; and third, taking care of the building and making it presentable. Mr. Stewart did not know where the announcement policy fell into the priorities. He believed he was to use “common sense” as to when to make the policy a priority.

Mr. Stewart testified all policies should be implemented but all policies cannot be followed on all days and at all times because there was not enough time. He twice exercised his discretion to make the announcement - at the “Halloween” movie and once at the Tyler Perry movie. For the first four months he was in Dover, Mr. Stewart had not implemented the policy because he was still trying to get comfortable with larger audiences and more employees.

Mr. Stewart testified that “Halloween” was a “teenage movie” so he thought it would be good to do the announcement before that movie. Mr. Stewart admitted he did look at the age of an audience but never looked at the race of an audience. He decided to make the announcement at the “Halloween” movie and then to do it at every busy movie on the weekends thereafter.

After the Tyler Perry movie was over, Mr. Stewart told Mr. Sharp there were good and poor reactions to him saying “Good Night” to the customers. He never talked to Mr. Sharp about the incident again until the complaints were made. Mr. Sharp knew the pre-show announcement had not gone well and there were many complaints. Mr. Sharp told him to let the legal department handle it.

Mr. Stewart testified that Mr. Sharp never counseled him about the matter because they both felt that the pre-show announcement was good, there was nothing wrong with the pre-show, and it was division policy. Mr. Sharp did not know that Mr. Stewart had not been following the division policy about the announcement.

Mr. Stewart said the Tyler Perry movie was the busiest movie of the weekend because it

sold the most tickets on Friday and Saturday nights. Mr. Stewart looked at the ticket sales throughout the day based on what happened during the day.

Mr. Stewart admitted that from October 2007, after the Tyler Perry movie, until October 2008, he never made the announcement. He knew in advance that the Tyler Perry movie would draw a minority audience. When the announcement policy was written it may not have been optional but later it was made optional. In Olean, Mr. Stewart adhered to the policy one hundred percent but not in Dover.

Mr. Stewart testified he was never counseled or reprimanded for his conduct at the Tyler Perry movie. He agreed that Respondents' Exhibit 9, an email from Thomas Bridgman on December 18, 2005, said the pre-show announcement was not optional. Mr. Stewart never provided any feedback to his district manager about the policy and his manager never asked for any feedback.

In response to questions from the Panel, Mr. Stewart stated the discretion he had to make the announcement or not was implied from his immediate supervisor, Anthony Sharp.

The Tyler Perry movie shown on October 12, 2007 was the number ten movie of the year.

When asked about whether he was required to keep an incident log, Mr. Stewart said the procedure for logging complaints depended on the type of incident. There was no log of complaints concerning cell phones or talking during movies. Carmike logged incidents only if someone was injured.

Mr. Stewart called his district manager and followed his directions about this incident. He did not prepare a report about the announcement incident and was not asked to make a report. He did send his supervisor an email about the incident. Mr. Stewart did not put anything in

writing about the threat that he might be stabbed because he did not take the threat seriously. He had been called names and threatened in his job but he filled out information about incidents only if someone was hurt.

Mr. Stewart testified he did not know why the audience reacted the way they did to the announcement. He knew something disturbed them but he didn't know what it was. The audience was upset but not to the point of yelling at him. When he went back into the theater after making the announcement, the people were very upset but he didn't know why.

Mr. Stewart testified he made the announcement in theater 8 the night of the Tyler Perry movie and intended to make the same announcement in the two other theaters showing the Tyler Perry movie. He was not able to do so because he had to back into theater 8 to "soothe" the audience. Mr. Stewart remembered the members of the audiences in the three theaters showing the Tyler Perry movie were mostly minorities.

Mr. Stewart testified he had the security guard stand at the number 8 theater that night because it was the biggest theater with the most people going into it.

Testimony of Thomas D. Bridgman, II

Mr. Thomas D. Bridgman, II, testified that he is the Northern Division Manager for Carmike and had that position in October 2007. He is responsible for all of the theaters in his division including Carmike 14.

Carmike used "screen vision slides" which showed advertising, trivia from Coke a Cola, policy slides from Carmike, messages about ratings, turn off cell phones, remain quiet, and visit concession stand. The slides were played at every intermission in every theater. The most common complaints received by Carmike were about cell phones, talking, and crying babies. The slides were geared to combat problems.

The announcement policy was not a Carmike policy but a policy just in his division. Mr. Bridgman wanted his managers to tell patrons to turn off cell phones, not to talk, and to remove crying babies. He identified Respondents' Exhibit 9 as the email he sent out to all his theaters in December 2005. He testified he told the managers to:

...make a short announcement in your busiest auditoriums (those having 50 or more patrons) on Friday and Saturday nights. The announcement is to contain the following information: 1) 'Welcome to Carmike Cinemas'; 2) Your name and title; 3) Turn off cell phones; 4) Refrain from talking; 5) Remove crying children; 6) We will faithfully enforce our policy of removing disruptions from the auditorium; 7) 'Thank you and enjoy the show.'

In the same email message, Mr. Bridgman informed his managers, "you MUST monitor your auditoriums and remove disruptions including crying babies, talking patrons, wandering children, laser pointers, etc. Do not allow our patrons to control the atmosphere in your theater, YOU must control it." (Emphasis in the original)

Mr. Bridgman produced a script and gave it to all his district managers. The script was not included in the email. The script included the items in the email and also asked patrons to be considerate of their fellow patrons and not to change seats. The script warned that "any disturbances may result in ejection from the theater."

Mr. Bridgman said the policy began in October 2005. The policy was not followed which did not surprise him because it was difficult for people to speak publicly to large crowds. One of the purposes for the policy was for managers to get used to talking before crowds so that they could do so if there was an emergency.

Mr. Bridgman received lots of feedback about the policy. Customers liked it. Managers gave feedback that timing of the shows made it difficult to make the announcements. All of the feedback from customers was very good.

Mr. Bridgman identified Respondents' Exhibit 8 as his May 4, 2006 email to his

managers reminding them that the “Manager or Assistant Manager must greet patron [sic] in the auditoriums with the welcome speech. This should be done for any opening week film and if time allows for busy second week shows.”

In the May 4, 2006 email, Mr. Bridgman told his managers about a business practice used by Arclight Theaters in Los Angeles, California. At Arclight, the managers, many of whom were aspiring actors, would act out the “screen vision slides” to the audience concerning theater etiquette. Not only was etiquette addressed, the managers were encouraged to expand the presentation to include character impersonation and provide additional entertainment to the audience. Mr. Bridgman encouraged his managers to adopt this “fun way” of making “a monotonous task more fun and exciting.” (Respondent’s Exhibit 8)

Mr. Bridgman testified that doing the announcements was not optional at the beginning but later became optional because of practicalities. He loosened up and gave the managers “a little discretion” as to how and when to give announcements. The policy ended on March 1, 2008 due to the digital pre-show from Screenvision as indicated in his email in Respondents’ Exhibit 11.

Mr. Bridgman testified that between seventy-five and eighty-five theater complexes were supposed to make the live announcements between October 2005 and March 2008. He never received any complaints about the announcements concerning race. He had not received any racial discrimination claims. The announcement policy had nothing to do with the racial make-up of the audience.

Between one-half and three-fourths of Carmike theaters have security guards. Guards were first hired in Dover in 2005. Carmike hired guards through Wackenhut, a security guard service. Carmike had nothing to do with the hiring of the guards or their race. Mr. Bridgman

testified that the racial make-up of the audience was not a factor in placing guards or attendants in theaters.

On cross-examination, Mr. Bridgman testified that the policy was to make a pre-show announcement. David Stewart had worked for him since 2004. Mr. Stewart received the policy through Mr. Bridgman's email. The policy might have also been discussed in the newsletter or in phone calls.

Mr. Bridgman did not know if Mr. Stewart was making the announcements or not. District Manager Anthony Sharp did not give him feedback about specific theaters. District managers are responsible for fifteen to thirty theaters. District managers were asked for feedback from patrons and managers as to how the policy was being perceived out in the field.

Carmike hired Alcops, a mystery shopper service, to do reports. Between three and six times a year, mystery shoppers visit all of his theaters as customers to check on whether the employees are "upselling" at the concessions, if the movie is clear, and if the theater and bathrooms are clean. Mr. Bridgman never received any reports about the Carmike 14 announcements. Only one mystery shopper report noted anything about the announcements at any theater.

Mr. Bridgman visited Carmike 14 when Mr. Stewart was working there but he did not know if he asked Mr. Stewart if he was making the announcements. Mr. Bridgman relaxed the policy when he heard it was not always possible to do the announcements. No manager was ever going to be reprimanded or terminated for not doing announcements. He wanted announcements made in case there was an emergency – he didn't want the managers to run and hide.

Mr. Bridgman testified he was never told that a specific manager was not doing the announcements. He never wrote anyone up for not following the policy. He never looked for

any evidence of whether managers were doing the announcements or not. He did not micro manage managers.

Mr. Bridgman testified that if a manager bent the policy for good customer service it was okay with him. Systemic disregard of a policy might lead to discipline depending on the policy and the severity of the policy or latitude may have to be given. No policy should be disregarded but he did not know if Mr. Stewart was disregarding the policy. He never asked any specific manager or specific theater about policies.

Mr. Bridgman testified that he did not consider the complaints filed with the Human Relations Division to be "customer feedback." Neither he nor Mr. Stewart ever received any "official complaints."

Anthony Sharp told Mr. Bridgman the announcement was made in the Tyler Perry movies and wasn't taken well. He and Mr. Sharp decided that Mr. Stewart had done nothing wrong. He never talked to Mr. Stewart about it. Mr. Bridgman believed Mr. Stewart did the right thing in making the announcement when he did, where he did, and in what he said.

Mr. Sharp told Mr. Bridgman people were upset because the announcement was racially motivated. He never asked and Mr. Sharp never said why people thought the announcement was racially motivated. No one from the audience ever told Mr. Bridgman why anyone thought the announcement was racially motivated. He never had any contact information for the customers. He would have expected to have heard from the customers but he never did.

Mr. Bridgman testified Mr. Stewart was not reprimanded or counseled about the announcement incident because they did not believe that he did anything wrong. Mr. Stewart was not systematically ignoring policy.

In answer to questions from the Panel, Mr. Bridgman stated that if a patron was

disruptive they would be removed from the auditorium – that was policy across the board. The “first line of defense” was by the manager telling patrons to please turn off cell phones. The manager would keep checking to see if this was being followed and if not, the person was removed.

Mr. Bridgman did not give the script for the announcements to his supervisors. The script was not sanctioned by his supervisors. New policies were to go through HR depending on what the policy was. The announcement policy was not Carmike policy but was his own policy under his “system of administration.”

According to Mr. Bridgman, the culture of the Carmike corporation depended on each division as each division implemented their own system of operating their theaters. The core basic policy of all was unwavering but his policies in his division were “wavering.” Mr. Bridgman wanted his managers to be thinkers and think for themselves, to explore and make decisions on their own.

Mr. Bridgman never received a complaint about a threat against a manager in Dover. Carmike had no customer service department. Customer feedback came through emails on Carmike’s website. If Mr. Bridgman got a lot of complaints, he looked at it to see what needed to be done. Customers could make phone calls to district managers and managers gave feedback.

Mr. Bridgman testified there was a reporting process in place for “incidents of interest.” He received only a verbal report of the stabbing threat because Mr. Stewart did not take it seriously. Incident reports were filled out for customer injury, property damage, and lost property. Customers with complaints could call the corporate office, send an email, or call the district manager whose contact information was posted at the theater.

Mr. Bridgman believed he heard about the incident at the Tyler Perry movie that night or the next day. He didn't know if there had ever been any other claims of racial discrimination against Carmike.

DECISION AND ORDER AS TO RESPONDENTS' MOTION TO DISMISS

Respondents filed a Motion to Dismiss thirteen complaints on the basis that they were filed beyond the ninety-day statute of limitations and/or were not properly verified. Respondents contended that the following complaints should be dismissed because they were untimely filed: Robert Waters, dated January 17, 2008; Nichole Graves, dated January 21, 2008; Andre and Kimberly Boggerty, dated January 17, 2008; Jamiera Burke, dated January 17, 2008; Chaunteal Hayward, dated January 20, 2008; and, Harold Dixon and Arnola Burke-Dixon, dated January 17, 2008. Respondents' argument concerning the complaint of James and Sharon Collins is moot as the complaint was withdrawn on October 27, 2008.

Respondents contended that the following complaints should be dismissed because they were "unverified" due to lack of the Complainant's signature: Larry and Barbara Bryant; Chontel McMillan; Kenneth Hutchinson and Mondaria Hutchinson; and Harold Dixon and Arnola Burke-Dixon. The Complainants did not sign the first page of the complaint form but did sign the second page which contained the details of the alleged discriminatory conduct.

Respondents listed Juana Fuentes-Bowles, Director of the Division of Human Relations, and Sharese McGhee, Human Relations Supervisor, as witnesses they intended to call at the hearing. However, Respondents did not call Ms. Fuentes-Bowles or Ms. McGhee to testify at the hearing.

The *Equal Accommodations Law* provides that a person aggrieved by a discriminatory public accommodation practice:

...may...file with the Division a complaint in writing stating: (1) His or her name and address; (2) The name and location of the place of public accommodation at which the discriminatory public accommodation practice occurred, and the date, time and an explanation thereof; (3) If known, the name and address of each respondent and, if different, the name of the owner, lessee, proprietor, manager or superintendent of the place of public accommodation; and (4) Such other information as the Division requires. 6 *Del.C.* § 4508(a)

The statute also provides that, “No complaint shall be filed with the Division more than 90 days after the occurrence of the alleged discriminatory public accommodation practice.”

6 *Del.C.* § 4508(b). After the complaint is filed, the Division of Human Relations is charged with investigating the complaint and endeavoring to eliminate any unlawful discriminatory practice through conciliation. 6 *Del.C.* § 4508(c).

The State Human Relations Commission established Rules and Regulations 2.3 through 2.6.5 concerning the complaint process. The Rules and Regulations required that complaints of violations of the *Equal Accommodations Law*: be filed with the Division of Human Relations (2.3); be in writing and are “deemed to be ‘filed’ when received at the Division in substantially completed form” (2.4); be filed on a complaint form provided by the Division (2.5); include the Complainant's name and address (2.6.1) and the name and location of the place of public accommodation at which the discriminatory public accommodation practice occurred, and the date, time and other details (2.6.2); include “if known, the name and address of each Respondent” (2.6.3); include “the date of the first occurrence of the alleged discriminatory practice” (2.6.4); and include “the signature of the complainant or his/her attorney” (2.6.5).

Respondents introduced into evidence all of the complaints filed by Complainants as Exhibit 5. December 27, 2007 was the earliest date that any of the complaints were signed and submitted to the Division of Human Relations. As pointed out by Respondents, all of the complaints contain the same language. Page one on each complaint form referred to “See

Attached List” for the name and address of the aggrieved person. On the same page, the Respondents were named and their address provided. Each complaint form stated the Complainants were refused, withheld or denied accommodations, facilities, advantages, or privileges of a place of public accommodations on the basis of race or color. In the area where the Complainant was instructed to “summarize in your own words what happened” each complaint stated “See Attachment.” As noted by Respondents, each of the attachments contained the same information. In addition, each attachment to each complaint form stated at the top, “Equal Accommodations Complaint - Complainants (See Attached List)”.

The witnesses provided testimony concerning the complaint process. Ms. Pamela Starling testified that after the announcement was made, a paper was circulated among the audience. She and her husband signed the paper because they were upset with the announcement. She understood that if she was upset, she could sign the paper and someone would get in touch with her later. Ms. Starling did not remember the name of the woman who circulated the paper but knew she was from the Human Relations Division.

Ms. Starling was later contacted by Sharese McGee, an employee of the Human Relations Division, who asked her what had happened. Ms. McGee said that a complaint might be filed and asked if she would like to be part of the complaint. Ms. Starling and other Complainants later met with Ms. McGee.

During the first meeting of the Complainants with Ms. McGee, they talked about what they wanted to see happen. The woman from the Human Relations Division who was at the movie was also at the meeting. The Complainants discussed whether they should demand money. The group felt that their complaint was not about obtaining money but that if Carmike had to pay money, Carmike and their employees would not do the same thing again.

After the first meeting, Ms. McGee sent the complaint form to Ms. Starling, told her to look it over and see if it was accurate and that if she wanted to sign it, to do so and send it back to her. Ms. Starling agreed with the content of the form complaint and so she signed it.

Larry Bryant testified that when he went back into the theater, someone was trying to calm everyone down and saying that the incident could be handled at a later date. He thought that was the best way to handle the situation. A paper was circulated in the theater and his wife wrote their names and phone number on the paper.

Mr. Bryant filed a complaint because he was treated differently from other people and not the way he deserved to be treated. Mr. Bryant identified his complaint and testified the information it contained was true and accurate to the best of his knowledge. He did not write the words on the complaint and doesn't know who did. He gave his testimony over the phone. Since there was nothing inaccurate in the complaint, he signed it. Some of the words in the complaint he signed were his but the complaint was not his word for word. The complaint he signed was a conglomerate of the group of complainants and not just his own single complaint. He read the complaint, agreed with it, and signed it as a group statement.

Mr. Bryant gave his phone number at the theater and he was called by a woman but he does not remember her name. He gave a statement to her and his statement was put into the complaint.

Ms. Barbara O'Neal testified she wanted to file a complaint because things like this must be nipped in the bud. Most if not all of the women in her group also filed complaints.

Ms. Kemuel Butler testified that after the announcement was made, a woman from the Human Relations Division stated if people felt offended by the announcement, they could sign a paper with their name and contact information. Ms. Butler signed the paper and later received a

call notifying her that a meeting had been scheduled. Ms. Butler testified that the complaint she signed was a summary and general description of the events that happened on October 12.

Ms. Jamiera Burke testified a paper was circulated for them to sign their name if they had a problem with what the manager said. Ms. Burke signed the paper because she was treated differently due to the fact that she and the majority of people in the audience were African Americans.

Ms. Lina Powell testified that after the announcement, a woman spoke up and said she thought the manager was out of order. A woman stated they could sign a paper with their contact information. She chose not to sign because she was not offended by the announcement.

From the testimony of the witnesses and the complaint forms introduced into evidence by Respondents, the Panel finds that all of the Complainants made known their names, addresses, the name and location of the place of public accommodation at which the discriminatory public accommodation practice occurred, the date, time and an explanation of the discriminatory conduct, and the name and address of each Respondent within the ninety-day period. The Panel finds that the Complainants filed one complaint against Respondents concerning the incident that occurred on October 12, 2007 and that all of the complaint forms were effectively "filed" as of the date the first complaint form was received on December 31, 2007 within the ninety-day period. In addition, the Panel finds that all of the complaint forms were signed by the Complainants as required by statute and rule. Accordingly, the Panel denies the Motion to Dismiss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Panel makes the following findings of fact and conclusions of law:

1. Complainants claimed Respondents violated 6 *Del.C.* § 4504(a) of the *Equal*

Accommodations Law which provides:

No person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of ...disability...any of the accommodations, facilities, advantages or privileges thereof.” 6 *Del.C.* § 4504(a)

The provisions of the *Equal Accommodations Law* are to be “liberally construed” to safeguard the rights set forth therein. 6 *Del.C.* §4501. “The ultimate purpose (of the public accommodation laws) is to ‘eliminate the inconvenience, unfairness, and humiliation of...discrimination.’” *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709 *4 (Del.Super.) (citations omitted).

2. In Delaware, the adjudication of claims alleging a direct or indirect refusal or denial of public accommodations based upon unlawful discrimination is guided by the three part analysis set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709 (Del.Super.) (applying *McDonnell Douglas* analysis to a case brought under the *Delaware Equal Accommodations Law*).

3. In *McDonnell Douglas*, the Supreme Court established a three-part burden-shifting test. For complainants to prove a denial of public accommodations claim, the procedure is as follows:

- a. The complainant must establish a *prima facie* case⁴ of discrimination;
- b. Once the *prima facie* case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory reason for denying

⁴ “*Prima facie* case” is defined as “... the plaintiff’s burden of producing enough evidence to permit the fact-trier to infer the fact at issue.” *Fahey-Hosey v. Capano*, 1999 WL 33117229 (Del.Super.)

complainant access;

c. After this production of evidence, the complainant retains the burden of persuading by a preponderance of the evidence that the respondent's proffered reason was a pretext for discrimination.

Salty Sam's Pier 13 v. Washam, 2000 WL 1211227 *2 (Del. Super.)

4. Complainants alleging violations of the *Equal Accommodations Law* establish a *prima facie* case of discrimination by showing that they are members of a protected class, that they were denied access to public accommodations, and that nonmembers of the protected class were treated more favorably. *Uncle Willie's Deli v. Whittington*, 1998 WL 960709 * 4 (Del. Super.) (citations omitted).

Place of Public Accommodation

5. The *Equal Accommodations Law* defines "a place of public accommodation" as "an establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. (6 Del.C. § 4502(12)). Respondents did not dispute that Carmike 14 movie theater is a place of public accommodation. The Panel finds that Carmike 14 in Dover is a place of public accommodation.

Membership in Protected Class

6. The first element of a *prima facie* case is proof of membership in a protected class. Respondents did not dispute that Complainants were people of color and/or African American. The Panel finds that Complainants are people of color and/or African American and as such are members of a protected class. The first element of the *prima facie* case has been met.

Denial of Access to Public Accommodations

7. The second element of a *prima facie* case is proof of refusal or deprivation of service.

As noted by the Delaware Superior Court in *Hadfield's Seafood v. Rouser*, 2001 WL 1456795 (Del.Super.), aff'd, *Rouser v. Hadfield's Seafood, Inc.* 792 A.2d 189, (2002 Del.Supr.), the definition of "accommodations, facilities, advantages or privileges-encompass much more than the textbook question of whether someone exchanged goods or services for consideration." The Court cited *Bethea v. Michael's Family Rest. & Diner*, E.D. Pa., C.A. No. 00-6216, 2001 LEXIS 8665, at *8, Hutton, J. (June 26, 2001) for the proposition that, "A contract formed between a restaurant and a customer has been found to include all of the accoutrements that are ordinarily provided with a restaurant meal. This includes more than just the food served." See also, *Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 707 (D. Md. 2000) As noted by the Delaware Superior Court, "withholding 'accommodations, facilities, advantages or privileges' can take the form of something less than an 'outright denial of service.'" *Hadfield's Seafood v. Rouser* at 4.

Ms. Pamela Starling testified she attended more than one hundred movies at the Carmike Theater. When Ms. Starling and her husband arrived at the theater, they waited in line in the lobby. There were two security officers, one was outside the door to the individual theater showing the movie. At that door, Ms. Starling was required again to show her tickets to the security guard. Ms. Starling had never before had to show her tickets to a security guard and had never seen a guard at the door to an individual theater. Having to show their tickets again to the guard, "set the tone for the evening." The security guard came inside the theater but did not stay for the whole movie.

Before the movie started, a man who said that he was the manager, entered the theater and told the audience to turn off all cell phones, be quiet, and stay in their seats. Ms. Starling testified the manager's tone was as if the customers have been causing problems which they had

not done. The manager left the theater but came back in a few minutes later and said, "I didn't mean to offend anyone," but he was required to make the statement at all new releases. She had the impression that he came back into the theater and made the second statement because he thought that he had offended people.

Ms. Starling testified it was not the words the manager used that she found offensive but the condescending manner and tone in which he talked to them as if they were children. Because the same message was on the screen and there were no problems with the audience, she did not understand why the announcement was made. Over the years Ms. Starling has attended movies, the message concerning cell phones and talking has been on the screen, but no one has ever come into the theater and made any such announcement. After the manager made the announcement, Ms. Starling felt like she was treated as a little child who did not know how to behave at the movies. She felt disrespected, hurt, and upset.

Since 1981, Mr. Larry Bryant has attended movies at Carmike more than one hundred times and had attended other first run movies before October 12, 2007. He is forty-nine years old. The Tyler Perry movie appealed to minorities.

After purchasing candy, soda, and popcorn, Mr. Bryant got into line, showed his ticket, and was told where the theater was. When he got to the door to the individual theater, he again had to get in line and show his ticket to a white security guard at the door. He did not see any security guards at any other theater doors.

Mr. Bryant testified that everyone he saw in the theater was a person of color. The members of the audience ranged in age from thirty to seventy years.

A man came into the theater, went up front, and told them not to be moving around or talking during the movie and to turn off all cell phones. The manager told them to be quiet in a

condescending tone. Mr. Bryant was insulted by the announcement which he had never heard at any other movie. The same message was on the screen and the audience did not need a second reminder – they knew what to do. While the manager's tone was bad the announcement was also bad.

After the manager left the theater, Mr. Bryant went after him and told him that he was uncomfortable with what the manager had said. The manager told him that he made the announcement at all sold out movies but Mr. Bryant knew that was not true because he had been at other sold out movies and the announcement was never made. Mr. Bryant was so angry he needed to take a walk to cool off.

Mr. Bryant testified he was thinking about the incident the entire time he watched the movie. He saw theater employees standing along the wall inside the theater during the movie but he did not know if it was the manager or guards. He did not know how long they stood there or what they were looking at.

Mr. Bryant did not believe that reasonable people would not have been offended by the announcement. He did not enjoy the movie even though it was a very good movie. He later rented the movie and watched it at home.

Ms. Barbara O'Neal testified she went to the movies on October 12 with a group of friends for a "ladies' night out." Ms. O'Neal and her group went into the theater and sat patiently waiting for the movie to start. Messages were on the screen – one slide said to turn off cell phones, not to make noise, and to be respectful of neighbors. A man came into the theater and stood in front of the screen and started giving them orders. He said the same things she had just read on the screen. Ms. O'Neal questioned why the man came into the theater and in an unpleasant voice repeated the same information that had been on the screen.

Ms. O'Neal is African American and has been vice president of a bank. Currently, she is a university professor and she treats her students as adults. The manager spoke to the audience in a condescending manner. She knew about subtle discrimination and when someone read to her in a condescending and disingenuous manner what she had already read, she did not like it.

Ms. Kemuel Butler testified that she was a regular patron, had attended many movies previously at Carmike, and had seen first run movies at Carmike. At the first run movies she attended where the majority of the audience members were not minorities, she never heard the announcement she heard on October 12. She attended the movies every Friday and Saturday and Carmike was the only movie theater in Dover.

On October 12, Ms. Butler noticed extra security guards in the theater. After she gave her ticket to the ticket taker, she again had to show her ticket to a security guard at the theater door. This had never happened before October 12.

Before the movie, Mr. Stewart came into the theater, went to the front, and told the audience, "don't get out of your seats, no moving around, be quiet." Ms. Butler was offended by the way the message was presented. She thought the message was made because they were people of color and the manager thought they did not know how to act. Mr. Stewart did not use any racial words but even without racial words a statement can still be racial. It was the way the manager said it that made the announcement racial.

Mr. Stewart left the theater but later returned and stood at the side of the theater. He did not apologize but made a statement that he had not meant to offend anyone.

Someone in the audience asked Mr. Stewart why he made the statement and he said that the new policy was that he make this announcement at all sold out movies. Ms. Butler had been at the movies just a week before and the announcement was not made even though the theater

was “packed.” The audience at that movie was “mixed.”

Ms. Butler said that on October 12, 2007, the tone was set when an extra security guard, a white woman, stood next to Mr. Stewart, a white man, when he made the statement. Additional theater attendants were also present. The attendants were in uniform and usually only one comes into the theater. That night, three or four attendants came in, stood against the wall of the theater, and went out again. Ms. Butler had never seen the attendants act that way previously.

Ms. Butler testified she knew what discrimination felt like and knew when someone was treating her in a way that he shouldn't. She could not believe what happened at the movies that night. Ms. Butler believed that she was discriminated against because of her race when she had to show her ticket the second time to a security guard, by the presence of extra attendants in the theater, and by the announcement. Taking all of the events together led her to believe that the conduct was racially motivated.

Ms. Jamiera Burke testified that on October 12 before the movie started, the screen showed messages saying turn cell phone off, stay seated, be courteous. Five minutes after seeing the messages on the screen, the manager came into the theater and told them to stay seated and turn off cell phones. Ms. Burke said he treated them like children. She was offended by his language and the way he said it. She asked her mother why the manager would do this.

The manager did not use racial remarks but there was no need for him to say what the screen had already said. Everyone in the theater was an adult. They knew not to stand up and walk around. Ms. Burke had attended children's movies where children were running around and the manager never came in and told them to sit down.

Ms. Burke later saw the manager, Mr. Stewart, at a convenience store. She talked to him and asked why he made the announcement. Mr. Stewart told her he had never made the

announcement before that night. She told him she became angry when he made the announcement.

Mr. Stewart asked her what different approach he should take in the future. Ms. Burke told him he should not have done what he did. Mr. Stewart smiled and left and Ms. Burke felt he didn't care about what had happened.

Ms. Burke believed she was treated differently because she and the majority of people in the audience were African Americans. About five percent of the members of the audience were not minorities.

On cross-examination, Ms. Burke said she would have been angry if the announcement had been made by a black manager and would have still felt that she had been discriminated against. She attended movies at Carmike before and after this incident and the announcement was never made.

Ms. Lina Powell testified she was sixty-five years old and lived in Dover. She is African American. She attended the movies on October 12 with her daughter and granddaughter but she had never before been at the Carmike theater.

Ms. Powell testified there were three guards in the theater. The manager came into the theater and made an announcement. He said he was the new manager and wanted to try something new.

Ms. Powell said a woman spoke up and said she thought he was out of order. Someone was yelling and someone told Mr. Stewart to shut up. The manager then left the theater. Someone went out and got the manager. He came back in and apologized.

Ms. Sharron Lowery testified that she is thirty-nine years old. She attended the movie with her mother, Lina Powell, and her twelve-year-old daughter on October 12, 2007.

Ms. Lowery testified the manager came into the theater and introduced himself. He said that there was something new the theater was doing. He was the new manager and to let him know if he could do anything for them. The manager said there had been problems with cell phones and asked everyone to turn them off. He then left.

When the manager returned to the theater, a woman stood up and said she felt his comment was racist because the majority of the audience was black. Ms. Lowery testified the manager said, "if he offended anyone he apologized."

Mr. Stewart testified that after being informed that his announcement was offensive, he went back into the theater and said, "I do apologize to anyone who was offended. I did not mean to offend anyone but it was policy." He then "ran out" of the auditorium after hearing comments from the crowd to shut up and that he was making it worse.

Mr. Stewart did not know why the audience reacted the way they did to the announcement. He knew that something disturbed them but he didn't know what it was. When he went back into the theater after making the announcement, people were very upset but he still doesn't know why they were upset. After the movie was over, Mr. Stewart stood at the theater doorway to say "Good Night" to the patrons. About ten people thanked him, thirty people told him he shouldn't have made the announcement, and one person told him that if he made the announcement in some audiences, he "might be stabbed." Mr. Stewart was scared but he still didn't think that he did anything wrong. However, he also didn't want anyone to be upset.

Mr. Stewart later testified he did not take the stabbing remark seriously and told his supervisor, Anthony Sharp, he didn't think the remark was serious. Thomas Bridgman testified he received only a verbal report of the stabbing threat because Mr. Stewart did not take it seriously.

Thomas Bridgman is the Northern Division Manager for Carmike and had that position in October 2007. Anthony Sharp, Mr. Stewart's direct supervisor, told Mr. Bridgman the announcement was made in the Tyler Perry movie and wasn't taken well.

Despite Mr. Stewart's testimony that he had no idea why members of the audience were upset, Mr. Sharp told Mr. Bridgman that the people were upset because the announcement was racially motivated. According to Mr. Bridgman, Mr. Sharp never offered and he never asked why people thought the announcement was racially motivated. Mr. Bridgman never tried to talk to anyone who was in the audience and he never talked to Mr. Stewart about the incident.

The Panel did not find the testimony of Mr. Stewart and Mr. Bridgman to be credible. Mr. Stewart testified he had no idea why the audience reacted negatively to his announcement but his supervisor told Mr. Bridgman that the audience believed the announcement was racially motivated. Since Mr. Sharp was not at the theater, he must have come to the conclusion concerning the allegation of racial motivation from what Mr. Stewart told him about the incident.

After being told by Mr. Sharp that the audience was upset due to an announcement they believed was racially motivated, Mr. Bridgman never talked to Mr. Stewart or anyone else to find out what had happened or what was said. Instead, he and Mr. Sharp decided that Mr. Stewart had done nothing wrong but had done "the right thing in making the announcement when he did, where he did, and in what he said." Mr. Stewart was not reprimanded or counseled about the incident because Mr. Bridgman and Mr. Sharp did not believe he did anything wrong.

The testimony established that the announcement made by David Stewart, a white man, to turn off cell phones, keep quiet, and stay in their seats was hostile, demeaning, and insulting. It was made in the presence of a white security guard. The witnesses testified that unlike their previous experiences at Carmike,³ on this occasion, they were required to show their tickets a

second time to a white security guard before they entered the individual theater. Witnesses also noted the presence of extra attendants in the theater.

The Panel finds that the Complainants were permitted to watch the movie they had paid to attend. However, the circumstances under which they were permitted to watch the movie were hostile, humiliating, and demeaning. While the Complainants did receive service in that they were allowed to watch the movie, “they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.” *Hadfield's Seafood v. Rouser* at 5. Accordingly, the second element of the *prima facie* case has been met.

Nonmembers of Protected Class were Treated More Favorably

9. The third element of a *prima facie* case is proof that “nonmembers of the protected class were treated more favorably than members of the protected class.” *Hadfield's Seafood v. Rouser* at 4. In this case, the Complainants were required to prove that non-minorities were treated more favorably than they were treated by Respondents.

Ms. Pamela Starling testified she has attended more than one hundred movies at Carmike 14, the only theater in Dover. She had taken her daughter to movies at Carmike and had also taken a child that she mentored to the movies at Carmike.

At none of the movies attended by Ms. Starling at Carmike had an announcement been made to turn off all cell phones, be quiet, and stay in their seats. After the manager made the announcement, Ms. Starling felt like she was treated as a little child who did not know how to behave at the movies. She felt disrespected, hurt, and upset. Ms. Starling testified that at the other movies she attended during the same time period when the majority of the audience members were not minorities, the announcement was not made.

Since 1981, Mr. Larry Bryant has attended movies at Carmike more than one hundred

times and has attended other first run movies before October 12, 2007. Never before had he heard an announcement like the one made by the manager that night not to be moving around or talking during the movie and to turn off all cell phones. Mr. Bryant was insulted by the announcement which he had never heard at any other movie. The same message was on the screen and the audience did not need a second reminder -- they knew what to do.

After the manager left the theater, Mr. Bryant went after him and told him he was uncomfortable with what the manager had said. The manager told him he made the announcement at all sold out movies. Mr. Bryant knew that was not true because he had been at other sold out movies and the announcement was never made.

Mr. Bryant testified that he did not believe that reasonable people would not have been offended by the announcement. He filed a complaint because he was treated differently from other people and not the way that he deserved to be treated.

Mr. Bryant testified that he believed that the manager said what he did because Mr. Bryant was a black person. The manager would not have said the same thing if the audience was white. Mr. Bryant believed he was treated differently from Caucasians.

Ms. Kemuel Butler testified she was a regular patron, had attended many movies previously at Carmike, and had seen first run movies at Carmike. She had attended other first run movies where the majority of the audience members were not minorities and she never heard the announcement she heard on October 12. She attended the movies every Friday and Saturday at Carmike 14, the only movie theater in Dover.

On October 12, Ms. Butler testified she noticed extra security guards in the theater. After she gave her ticket to the ticket taker, she again had to show her ticket to a security guard at the theater door. This had never happened before October 12.

Before the movie, Mr. Stewart told the audience, “don’t get out of your seats, no moving around, be quiet.” She was offended by the way the message was presented and she thought the message was made because they were people of color and the manager thought they did not know how to act.

Someone in the audience asked Mr. Stewart why he made the statement and he said that the new policy was that they make the announcement at all sold out movies. Ms. Butler had been at the movies just a week before and the announcement was not made. The theater was “packed” and the audience was “mixed.”

Ms. Butler said the tone was set when an extra security guard, a white woman, stood next to Mr. Stewart, a white man, when he made the announcement. Other theater attendants were also with him. Usually only one attendant came into the theater but that night, three or four attendants came in, stood against the wall of the theater, and went out again. Ms. Butler had never seen that previously.

Some people in Ms. Butler’s group were separated from her because the movie was being shown in more than one theater. Ms. Butler asked her friends who were in the other theater where the Tyler Perry movie was shown if the same announcement had been made. Her friends told her that no announcement had been made in their theater.

Ms. Butler believed she was discriminated against because of her race when she had to show her ticket a second time to a security guard, by the presence of extra attendants in the theater, and by the announcement. Taking all of the events together led her to believe that the conduct was racially motivated.

Ms. Jamiera Burke testified that on October 12 before the movie started, the screen showed messages saying turn cell phone off, stay seated, be courteous. Five minutes after seeing

the messages on the screen, the manager came into the theater and told them to stay seated and turn off cell phones. Ms. Burke said he treated them like children.

Ms. Burke believed that she was treated differently because she and the majority of people in the audience were African Americans. About five percent of the members of the audience were not minorities.

The manager did not use racial remarks but there was no need for him to say what the screen had already said. Everyone in the theater was an adult and knew not to stand up and walk around. Ms. Butler has attended children's movies where children were running around and the manager never came in and told them to sit down.

Ms. Burke attended the opening night of the "Halloween" movie the week before the Tyler Perry movie and no announcement was made. When Ms. Burke later saw Mr. Stewart at a convenience store, he told her he had never made the announcement before that night. She attended movies at Carmike before and after the incident and the announcement was never made.

Ms. Sharron Lowery testified that she is thirty-nine years old. She attended the movie with her mother, Lina Powell, and her twelve-year-old daughter on October 12, 2007. Ms. Lowery testified the manager came into the theater and said there was something new the theater was doing. He said there had been problems with cell phones and asked everyone to turn them off. Ms. Lowery testified she had never heard such an announcement made before October 12.

The Panel did not find credible the testimony of Thomas Bridgman, Division Manager for Carmike. Mr. Bridgman testified he sent an email on May 4, 2006 to his managers, mandating that the, "Manager or Assistant Manager must greet patron [sic] in the auditoriums with the welcome speech. This should be done for any opening week film and if time allows for busy second week shows."

Mr. Bridgman stated the announcement policy was his policy under his “system of administration.” The “culture” of the Carmike Corporation was that each division implemented their own system of operating their theaters. Mr. Bridgman wanted his managers to think for themselves, to explore, and to make decisions on their own. He didn’t “micromanage” them.

Making the announcements was not optional at the beginning but later became optional because of practicalities. He loosened up and gave the managers “a little discretion” as to how and when to give announcements. Mr. Bridgman identified the manager’s request to a patron to turn off his cell phone as the “first line of defense” but did not identify what needed to be defended.

Mr. Bridgman did not know if Mr. Stewart was making the announcements or not. District manager Anthony Sharp never gave him any feedback about specific theaters even though he had been asked to provide feedback from patrons and managers as to how the policy was being perceived out in the field.

Mr. Bridgman visited the Carmike 14 Theater in Dover when Mr. Stewart was working there but he did not recall if he asked Mr. Stewart if he was making the announcements. No manager was ever written up, reprimanded, or terminated for not doing announcements and no one ever would have been. In fact, according to Mr. Bridgman, he never looked for any evidence of as to whether managers were carrying out his mandatory announcement policy or not.

Anthony Sharp told Mr. Bridgman that the announcement was made in the Tyler Perry movies and wasn’t taken well. Without ever talking to Mr. Stewart, Mr. Bridgman and Mr. Sharp decided that Mr. Stewart had done nothing wrong. Mr. Bridgman believed Mr. Stewart did the right thing in making the announcement when he did, where he did, and in what he said even though Mr. Sharp told him people were upset because the announcement was racially

motivated. He never asked and Mr. Sharp never said why people thought the announcement was racially motivated.

Mr. Bridgman said he never heard from any member of the audience as to why anyone thought the announcement was racially motivated. When asked about the complaints filed with the Human Relations Division, Mr. Bridgman testified that he did not consider them to be “customer feedback” and that neither he nor Mr. Stewart ever received any “official complaints.” Carmike has no customer service department.

The testimony of David Stewart, manager for Carmike Theaters, as to when and why he made announcements to theater audiences was neither consistent nor credible. Mr. Stewart testified that his division had a policy in effect since 2005 that announcements to refrain from talking, refrain from moving around, and turn off cell phones were to be made at every performance attended by “more than twenty-five patrons.” The policy was established because of problems with talking and cell phones.

Mr. Stewart testified the policy was optional, not mandatory. He believed he was to use “common sense” as to when to make the policy a priority.

Mr. Stewart testified he had never before made the announcement at the Dover Carmike but had made the statement at a Carmike theater in Olean, New York where he previously worked. He used his discretion when he worked at the Olean theater and did not make the announcement unless the movie was “sold out,” meaning that ninety percent of the seats had been sold. He later testified he made the announcement at the “busiest” movies whether they were sold out or not.

For the first four months he was at the Dover Carmike, Mr. Stewart did not implement the announcement policy because he was still trying to get comfortable with larger audiences and

more employees. He finally exercised his discretion and made the announcement twice before showings of the movie "Halloween" and once before the Tyler Perry movie.

Under cross-examination, Mr. Stewart admitted that according to the December 18, 2005, email from Thomas Bridgman, the announcement policy was not optional but mandatory. Mr. Stewart also admitted that despite the instructions in the email, he never provided any feedback about the announcements to his district manager and his manager never asked for any feedback.

Mr. Stewart testified he told the audience before the Tyler Perry movie that they should refrain from talking and moving around and should turn off all cell phones and should let him know if there was anything he could do for them. After the announcement, Larry Bryant came out of the theater and told him there were many patrons who were upset and offended and that he should apologize. Mr. Stewart went back into the theater and stood near the doorway and said, "I do apologize to anyone who was offended. I did not mean to offend anyone but it was policy."

No one approached him immediately after he apologized because he ran out of the auditorium after hearing comments from the crowd to shut up and that he was making it worse. He knew the crowd was very upset.

Mr. Stewart assumed there was a large number of minorities in the other two theaters showing the Tyler Perry movie because it appealed to minorities. He had intended to make the announcement in the other two theaters showing the Tyler Perry movie but did not have time because he had to return to the largest theater to "soothe" the audience.

Mr. Stewart testified that the security guards are the first line of offense for problems in the theater. There were two guards on duty the night of the Tyler Perry movie and Mr. Stewart was in charge of where the guards patrolled. One guard was armed.

Mr. Stewart placed the armed guard in the lobby area by the manager's office. He took the other security guard "off her post" and placed her at the Tyler Perry theater because it was the biggest theater with the most people going into it. He told her to check tickets at the door to the individual theater to make sure people were going into the right theater and to prevent people from entering without a ticket. In addition to checking tickets, the guard walked into the theater to see if any seats were left.

After he made the announcement at the Tyler Perry, Mr. Stewart immediately reported the incident to Anthony Sharp, his district manager and direct supervisor. He told Mr. Sharp the audience was very upset and Mr. Sharp told him to stand at the door after the movie. Mr. Stewart did as he was told and stood at the doorway to say "Good Night." Ten people thanked him for his announcement, thirty people told him he shouldn't have made the announcement and one person told that he "might be stabbed." At first Mr. Stewart testified he was scared but he later testified he did not take the threat seriously. He told Mr. Sharp that there were good and poor reactions to him saying good night to the customers. Mr. Stewart never talked to Mr. Sharp about the incident again until the complaints were made and then Mr. Sharp told him to let the legal department handle it.

Mr. Sharp never counseled him about the matter because they both felt that the pre-show announcement was good, there was nothing wrong with the pre-show, and it was division policy. Mr. Sharp and Thomas Bridgman, the Division Manager, told him that he was to keep making the announcement. However, Mr. Stewart never made the announcement again at the Dover Carmike over the next year he continued working there.

According to Mr. Stewart, teenagers generate the most complaints for talking, cell phone use, and throwing things. He testified he never treated teenagers differently. Mr. Stewart also

testified he never treated whites differently and has never looked at the racial composition of an audience before making the announcement.

Despite his testimony that he did not treat teenagers differently, Mr. Stewart admitted he did look at the composition of the Halloween audience and after determining they were teenagers, he decided to make the announcement for the first time in Dover.

The Panel finds that Mr. Stewart, despite his insistence that he did not treat teenagers differently, decided to make the announcement before the Halloween movie because the audience were teenagers. The Panel does not find credible Mr. Stewart's testimony that he did not treat minorities differently and did not consider the racial composition of the Tyler Perry audience before making the announcement. Rather, the Panel finds that during the first four months he was the manager of the Dover Carmike, Mr. Stewart made the announcement at only two movies, one which appealed to teenagers, and one which appealed to minorities. In so doing, Mr. Stewart violated the provisions of the *Equal Accommodations Law*.

The Panel also finds that Carmike violated the provisions of the *Equal Accommodations Law*, by permitting its Division Manager, Thomas Bridgman, to put a policy in place that required announcements to be made but provided no oversight, supervision, or review as to how the policy was being implemented in its theaters.

According to Mr. Bridgman he was inspired by a business practice used at a California theater. The theater managers who were also aspiring actors, would act out the screen vision slides to the audience concerning theater etiquette. Not only was etiquette addressed, the practice was expanded to include character impersonation and provide additional entertainment to the audience. Mr. Bridgman encouraged his managers to adopt this "fun way" of making "a monotonous task more fun and exciting."

Carmike's attempt to replicate this business practice seemed to be ambitious in nature and in the Panel's opinion not well thought out relative to the training and experience level of "actors" versus "theater managers." Mr. Bridgman's policy may have been well intended but inconsistent implementation prevented it from delivering the results he wanted. Lack of oversight and training may have led individual managers to misinterpret or develop their own ideas of customer relations.

In the end, neither Mr. Bridgman nor Carmike took any action to insure that the announcement policy was being implemented by Mr. Stewart and other managers in a non-discriminatory manner.

**Evidence of a Legitimate Non-Discriminatory Reason
for Denying Complainant Access**

10. The Panel finds that the testimony of David Stewart and Thomas Bridgman was not credible concerning the announcement made by Mr. Stewart at "Why Did I Get Married?" on October 12, 2007. Respondents contended that the announcement was not discriminatory or insulting but was made to further the enjoyment of all of the movie patrons.

The Panel finds that Mr. Stewart made the announcement on only three occasions at the Dover Carmike. He made the announcement twice at "Halloween" because it was a "teenage" movie and he made the announcement at "Why Did I Get Married?" because it was a minority movie. The Panel finds no credible evidence that Respondents had a legitimate non-discriminatory reason for making the announcement at "Why Did I Get Married?".

**DECISION AND ORDER AS TO COMPLAINANTS'
REQUEST FOR ATTORNEYS FEES**

11. On October 30, 2008, Respondents submitted a request for fees and costs pursuant to

6 *Del.C.* § 4508. Matt Neiderman, Esquire provided an affidavit in support of the request for fees and costs stating that Respondents paid \$87,787.25 for legal services provided prior to the two-night hearing and estimated that Respondents would incur approximately \$30,000 in additional fees and costs during the hearing.

12. In written closing argument submitted on November 14, 2008, Complainants requested relief included attorney's fees. However, it was not until January 23, 2008, more than two months after the hearing but before the Panel issued its decision, that Complainants filed a Motion for Leave to File a Request for Fees and Costs and their counsel's Affidavit in Support of an award of fees in the amount of \$21,510 and travel expenses in the amount of \$194.

Complainants' counsel stated in the motion that the late request for fees and costs was the result of excusable neglect based on the following factors:

- a. In June 2008, when the American Civil Liberties Union of Delaware ("ACLU") offered legal representation to the unrepresented thirty-six Complainants in this case at no charge to them, thirteen Complainants accepted representation;
- b. Days before the November 6, 2008 hearing, an additional fifteen unrepresented Complainants accepted representation from the ACLU;
- c. Counsel did not make a timely request for fees and costs as she was focusing on providing the best possible representation to her clients;
- d. Counsel would not have been able to make a timely request for fees due to the difficulty in determining a reasonable estimate of fees due to changing circumstances.

13. Respondents objected to the motion and the request for fees and costs on the following basis:

- a. The request was made long after it was due pursuant to Equal Accommodation

Regulation 10.1;

b. Excusable neglect was not adequately shown as the “the newly added Complainants would thus have had little to no effect upon the preparation needed by their counsel prior to the hearing.”

c. Complainants’ counsel faced no more difficulty than did Respondents’ counsel in determining fees and costs in a timely manner;

d. Since the ACLU offered to represent the Complainants at no cost, no attorney fees or costs were incurred by Complainants;

e. An award of fees to Complainants will not serve fundamental fairness but would constitute “an unlawful penalty” as Respondents had no notice that Complainants would be seeking fees;

f. Complainants failed to adequately support the request for fees and costs with “factual statements and evidentiary support”;

g. If an award of fees is contemplated by the Panel, a public hearing must be held to give Respondents an opportunity to rebut the reasonableness of the fee request.

14. The Panel finds that Complainants late filing of the request for fees and costs was due to excusable neglect and that the request for fees of \$21,510 and costs of \$194 is reasonable and properly supported.

15. Section 4508(h) of the Equal Accommodations Law provides in pertinent part:

If the panel determines that a violation of § 4504 of this title has occurred, it shall issue an order stating its findings of fact and conclusions of law and containing such relief as may be appropriate, including actual damages suffered by the aggrieved person ‘including damages caused by humiliation and embarrassment,’ costs, expenses, reasonable attorneys’ fees and injunctive or other equitable relief.

16. Equal Accommodations Regulation 10.1 requires a party seeking fees and

expenses to file and serve “at least five (5) days prior to the hearing... a motion and affidavit detailing the time spent and fees incurred and a reasonable estimate of the fees likely to be incurred after such date through the end of the hearing.” Regulation 11.1.2. permits the Panel Chair “for good cause shown...at any time, in its discretion” to enlarge a time period “upon a motion made after the expiration of a specified period...where the failure to act was the result of excusable neglect.” Regulation 11.5 directs that the “Regulations shall be liberally construed in such a manner as to accomplish the purpose of the Equal Accommodations Law.”

In § 4501, the General Assembly announced that the purpose of the Equal Accommodations Law was “to prevent, in places of public accommodations, practices of discrimination against any person because of race, age, marital status, creed, color, sex, handicap or national origin.” The General Assembly directed that the Law “be liberally construed to the end that the rights herein provided for all people, without regard to race, age, marital status, creed, color, sex, handicap or national origin, may be effectively safeguarded.” 6 *Del.C.* § 4501.

The Panel Chair finds and the Panel agrees that under the circumstances and facts of this case, enlargement of the time to present the request for fees and costs best serves the intent and purpose of the Equal Accommodations Law. In this case, the ACLU provided representation to a large group of Complainants and in doing so helped the hearing process to proceed in an orderly, manageable, and fair manner that served the interests of all parties, the Commission, and the people of the State of Delaware.

The Panel considered Respondents’ seven-page response in opposition to Complainants’ request but did not find persuasive the reasons set forth by Respondents for denial of the request. In this case, two Respondents had three attorneys representing them while 28 Complainants were

represented by only one attorney. It is reasonable that the time necessarily devoted to preparation for the hearing with the addition of fifteen new clients shortly before the hearing would give Complainants' counsel little if any time to determine fees and costs prior to the hearing.

The Panel finds that the ACLU's offer to represent the Complainants at no cost did not mean that no attorney fees were incurred by Complainants; rather, if the claim had been unsuccessful, the ACLU would not have required Complainants to pay fees and costs. Respondents' contention that an award of fees would constitute "an unlawful penalty" is without merit as Respondents knew the Equal Accommodations Law permits successful parties to seek attorney's fees and costs.

The Panel finds that Complainants adequately supported the request for fees and costs. Umbreen S. Bhatti, ACLU counsel, is a 2005 graduate of the University of Michigan Law School, is in her fourth year of practice, is a member of the New York, District of Columbia, and Delaware bars, and has been the sole staff attorney for the ACLU in Delaware since 2007. Complainants also presented the affidavit of Barry M. Willoughby, Esquire, partner and Chair of the Employment Law Section of Young Conaway Stargatt & Taylor, LLP. Mr. Willoughby averred that he reviewed the biography and experience of Ms. Bhatti and in light of her litigation experience he believed that \$225 an hour for her services was reasonable and commensurate with local practitioners of Ms. Bhatti's skill, ability, and experience. The Panel considered the arguments raised by Respondents' in the February 5, 2009 letter submitted by Christina H. Bost Seaton, Esquire in objection to Mr. Willoughby's affidavit but found them unpersuasive.

The Panel finds and accepts as reasonable the representations in Ms. Bhatti's affidavit that she spent 95.6 hours on this case and that \$225 per hour is a fair, reasonable, and customary

rate for her services. Respondents responded in opposition and provided argument to rebut the reasonableness of Complainants' fee request. Accordingly, a hearing on the matter is not required.

17. The Panel awards Complainants attorney's fees of \$21,510 and costs of \$194.

DECISION

18. The Panel finds for Complainants Veronica Becton, Jamiera Burke, Robert Waters, Harold Dixon, Arnola Burke-Dixon, Jeff Blackledge, Andre Boggerty, Kimberly Boggerty, Barbara Bryant, Larry Bryant, Kemmeisha Burris, Kemuel Butler, Andrea Carter, De'Von Carter, Nicole Davis, Victoria Fuentes-Cox, Nicole Graves, Tracy Harvey, Chauntel Hayward, Kenneth Hutchinson, Mondaria Hutchinson, Brian Jordan, Delores Percy, William G. McCulley, Sonji McCulley, Chontel McMillan, Barbara O'Neal, Quetcy Rivera, Trisha Scott, Monica Sewell, Rosa Smith, Pamela Starling, and Theresa Williams, and against Respondents David Stewart and Carmike Cinemas, Inc. d/b/a Carmike 14.

19. The Panel orders Respondents to pay to each of the Complainants named in paragraph 11, Fifteen Hundred Dollars (\$1,500) as compensation for the humiliation they caused Complainants. Each Complainant is to be paid a total of Fifteen Hundred Dollars (\$1,500).

20. The Panel orders Carmike Cinemas, Inc. to establish a clear chain of command and procedures concerning their announcement policy because of the negative effect of the policy on the Delaware Community.

21. The Panel further orders Carmike Cinemas, Inc. who has chosen to do business in the State of Delaware, to take appropriate steps to insure that its employees and agents treat all people fairly and with respect and dignity by requiring all current and future employees, including David Stewart, to take sensitivity, diversity, and stress management training.

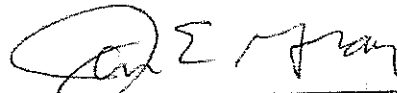
22. The Panel further orders Carmike Cinemas, Inc. to pay Five Thousand Dollars (\$5,000) to the Special Administration Fund pursuant to 6 Del.C. § 4508(h)(1) to vindicate the public interest.

23. The Panel further orders Carmike Cinemas, Inc. to pay Complainants' attorney's fees of Twenty-One Thousand, Five Hundred and Ten Dollars (\$21,510) and costs of One Hundred and Ninety-Four Dollars (\$194) directly to the ACLU of Delaware.

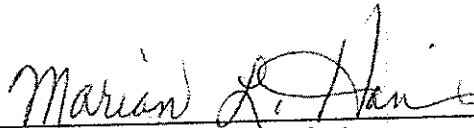
ORDER

Based on the evidence presented, and for the reasons explained above, the Panel of the State Human Relations Commission, by unanimous vote, finds in favor of the Complainants and against Respondents.

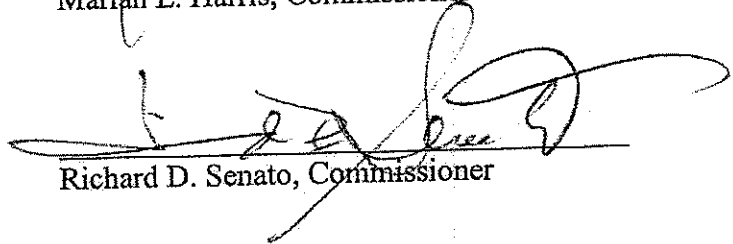
IT IS SO ORDERED this 28 day of April, 2009.



James E. Gray, Commissioner



Marian L. Harris, Commissioner



Richard D. Senato, Commissioner