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WILLIAM MORRIS ENDEAVOR
ENTERTAINMENT, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC,

Plaintiff and Counterclaim-Defendant,

v.

WRITERS GUILD OF AMERICA, WEST, INC. and WRITERS GUILD OF AMERICA, EAST, INC.,

Defendants and Counterclaimants,

and MEREDITH STIEHM,

Counterclaimant.

Case No. 2:19-cv-05465-AB-AFM

PLAINTIFF AND COUNTERCLAIM-DEFENDANT WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS COUNTERCLAIMS

Date: October 11, 2019
Time: 10:00 a.m.
Courtroom: 7B

NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND COUNTERCLAIMANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 11, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 7B of this Court, located at 350 W. 1st Street, Los Angeles, California 90012, Plaintiff and Counterclaim-Defendant William Morris Endeavor Entertainment, LLC ("WME" or "Plaintiff"), will and hereby does move this Court for an order dismissing the Counterclaims (ECF No. 27) filed by Defendants and Counterclaimants Writers Guild of America, West, Inc. ("WGAW") and Writers Guild of America, East, Inc. ("WGAE," collectively with WGAW, the "Guilds" or "WGA") and Counterclaimant Meredith Stiehm (collectively with WGA, "Counterclaimants").

WME moves on the grounds that, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Counterclaimants fail to state a claim upon which relief can be granted and the Court lacks subject matter jurisdiction over the Guilds' counterclaims.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities in support of the Motion filed concurrently herewith, the record in this action, and any evidence and argument that may be presented at or before the hearing.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on September 3, 2019.[1]

[1] WME requested to meet and confer with Counterclaimants the week of August 26, but counsel for Counterclaimants were not available to do so until September 3.

Dated: September 9, 2019

WINSTON & STRAWN LLP

By: */s/ Jeffrey L. Kessler*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[2]

Counterclaimants first sued WME five months ago. They have spent the time since dodging judicial scrutiny of their legally baseless state law claims. Now, Counterclaimants have channeled the creative talents of the Hollywood writers they represent and—out of nowhere—asserted antitrust and RICO conspiracy theories against WME. But plausibility—not creativity—is required to state a viable claim in federal court. None of the counterclaims meet this test, or even satisfy basic standing.

First, with respect to the antitrust claims, the Supreme Court and the Ninth Circuit have squarely rejected both unions' and union members' antitrust standing to assert the type of conspiracy theories that Counterclaimants assert here, and Counterclaimants cannot escape the controlling force of these on-point precedents.[3] Indeed, even if their fantastical conspiracy theories were true, their own allegations establish that any ensuing injury would have been suffered by Hollywood production studios—not the Guilds or any writer. This alone would be dispositive, but that is not all: the Ninth Circuit has also recently rejected the plausibility of the very same price-fixing conspiracy claim about talent agency packaging that Counterclaimants have tried to recast in this action.[4]

Second, Counterclaimants' RICO claims likewise fail at the threshold for want of standing because RICO applies the same standing test that dooms their antitrust claims. Moreover, and independently, Counterclaimants have failed to plausibly allege that WME engaged in any conduct that would constitute the necessary predicate, criminal acts required to state a RICO claim. On the contrary, the packaging conduct by WME that Counterclaimants mischaracterize as a criminal violation of the union "anti-kickback" statute is, in reality, the ubiquitous, industry-standard, commercial

[2] The parties are defined in the Notice of Motion and Motion.
[3] *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538 (9th Cir. 1987).
[4] *Lenhoff Enterp., Inc. v. United Talent Agency, Inc.*, 729 F. App'x 528 (9th Cir. 2018).

practice that ***Counterclaimants*** contractually authorized and benefitted from for nearly 43 years. Their about-face on the criminality of packaging is frivolous. WME is not aware of any prosecutor or private litigant who has ever before contended that the long-standing, industry-wide practice of packaging is a criminal violation of labor law.

Third, Counterclaimants' state law claims—resurrected from their abandoned state court action—should finally be put to rest. At the threshold, the Guilds (once again) lack standing because they are the wrong parties to bring these claims. For starters, their attempt to bring highly-individualized damages claims on behalf of 14,700 member-writers fails under bedrock principles of associational standing. And, the Guilds do not even possess constitutional (Article III) standing to bring their Unfair Competition law ("UCL") claim. On top of all of this, neither the Guilds nor Stiehm offer a single non-conclusory allegation about a single WME agent harming a single WME client with respect to a single WME package. There is thus no plausible claim for breach of fiduciary duty or constructive fraud, or under the UCL.

All of the counterclaims against WME should be dismissed with prejudice. The standing defects cannot be cured and Counterclaimants have now tried three times to assert a cause of action against WME for engaging in packaging.

II. SUMMARY OF COUNTERCLAIM ALLEGATIONS

WGAE and WGAW are the labor unions that represent motion picture writers in *collective* bargaining with the multi-employer bargaining representative of television and film studios. Answer & Counterclaim, ECF No. 27 ("A&C") ¶¶ 183–184.

WME is a talent agency that, until April 2019, the Guilds had franchised to represent *individual* writers in their *individual* negotiations with studios. *Id.* ¶ 21. Counterclaimants refer to WME as one of the "Big Four" talent agencies. *Id.* ¶ 5.

Meredith Stiehm is a writer-showrunner who is a member of WGAW and was represented by WME from "approximately 2011 until April 2019" when she fired WME at WGAW's direction. *Id.* ¶¶ 183, 185, 308. She is a "showrunner" and "producer," *e.g.*, she acts in an executive capacity, managing production budgets and hiring and

firing writers. *Id.* ¶¶ 200, 233.

WGA's and Stiehm's counterclaims all concern "packaging"—a "practice by which talent agencies assemble various elements of a television or film production." *Id.* ¶ 45. Packaging allows writers to save paying their agencies the standard 10% (or any) commission. Instead, the talent agency(ies) service their clients by assembling the "writers and other artists" so that the television show or film can be staffed and produced; the agencies negotiate with *studios* over the "packaging fees" that *studios* will pay to the agency(ies) for providing the package; and the agency-clients (writers) who are included in the package do not pay any commission. *Id.* ¶¶ 4, 5, 45, 52, 203, 210, 257. As such, if talent agencies were conspiring to inflate packaging fees, as Counterclaimants allege, then it would be the studios—not the Guilds or the writers—who would be paying the overcharge.

Packaging is a standard industry practice—"[a]pproximately 90% of all television series are now subject to such packaging fee arrangements." *Id.* ¶ 210. It became ubiquitous because, "for approximately 43 years," the Guilds contractually authorized (formerly) franchised agencies like WME to include writers in packages through the Artists' Manager Basic Agreement of 1976 ("AMBA") entered into between WGA and the agencies' trade association (the Association of Talent Agencies, or "ATA"). *Id.* ¶¶ 39, 67-69, 295-97; ECF No. 1-3, AMBA, § 6(c), Rider W.[5] Writers want to be included in packages and their unions affirmatively approved talent agency packaging from 1976 up until they terminated the AMBA in April 2019. A&C ¶ 307.

Against this backdrop, it is implausible for the Guilds and Stiehm to now contend that each-and-every package arranged by WME during the AMBA's 43-year existence was a criminal act. Their position not only implicates every Hollywood studio in criminal behavior, but the Guilds themselves for contractually sanctioning packaging. Furthermore, the contention that all packaging harms all writers is belied by

[5] The Court may consider the AMBA at this stage even though not attached to the counterclaims because it is incorporated-by-reference (A&C ¶ 295) and attached to WME's Complaint. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

Counterclaimants' own averments which demonstrate how writers *benefit* from packaging. *E.g.*, A&C ¶ 245 (agencies forego 10% commissions in packaging arrangements and "use their leverage to steer film projects to their own clients"). Indeed, nowhere in the Counterclaim is there a single allegation, about a single WME package, that purportedly harmed a single writer—Stiehm or otherwise.[6]

III. SUMMARY OF PROCEDURAL HISTORY

In April 2019, shortly after the Guilds ordered their members to fire WME and every other agency that would not agree to the new WGA Code of Conduct banning packaging, the Guilds (and Stiehm and a few other writers) sued WME and the other "Big Four" talent agencies in state court to "end packaging." WGA and Stiehm accused WME of breaching fiduciary duties and violating the California UCL. Just days before WME was set to demur, WGA and Stiehm amended their complaint to add a constructive fraud count and thereby put-off judicial review. After WME subsequently demurred against the amended complaint, WGA and Stiehm again tried to evade judicial review, and when Judge Highberger strongly rejected their request for an adjournment, they dismissed their own amended complaint.

WME initiated the instant action on June 24, accusing the Guilds of orchestrating a *per se* unlawful group boycott of WME and other talent agencies who would not submit to WGA's Code of Conduct banning, among other things, agency packaging. On August 19—immediately after dismissing their state court case—WGA and Stiehm filed the Answer & Counterclaim. In addition to recycling their twice-abandoned state law claims (Claims Five through Seven), Counterclaimants now assert that WME and other talent agencies have been violating the Sherman and Cartwright Acts by (i) jointly agreeing to price-fix the fees that *studios* pay for packages (Claims One and Three) and (ii) jointly agreeing to a group boycott whereby the agencies refuse to negotiate with WGA and "blacklist" any agency who signs the Code of Conduct (Claims Two and

[6] *E.g.*, A&C ¶ 185 (merely alleging that Stiehm served as a writer, creator, or showrunner on the packaged shows *Homeland*, *Cold Case*, and *The Bridge*).

Four). Counterclaimants have also conjured up RICO theories based on the legally erroneous premise that packaging violates federal labor law's criminal prohibition on union kickbacks (Claims Eight through Eleven).

IV. LEGAL STANDARD

A cause of action cannot survive a Rule 12(b)(6) motion without "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 547 (2007). Allegations must contain "more than labels and conclusions" (*id.* at 555), and a court should not accept unreasonable inferences or unwarranted deductions of fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And when a party makes a facial challenge to jurisdiction under Rule 12(b)(1), the Court makes that determination from the face of the pleadings. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

V. ARGUMENT

A. Counterclaimants' Antitrust Claims Should Be Dismissed

1. Directly On-Point Ninth Circuit Authority Demonstrates That the Guilds and Stiehm Cannot Plead Antitrust Standing

Antitrust plaintiffs must satisfy a "demanding" test for showing antitrust standing—a far more stringent hurdle than Article III standing. *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). The Ninth Circuit has applied these "antitrust standing" requirements to dismiss the claims of a union and its members in a case remarkably similar to the one at hand. *Id.* at 540-43.

The Supreme Court issued its seminal decision on antitrust standing in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). The Ninth Circuit's application of *AGC* considers: (1) the nature of the plaintiff's alleged injury, *i.e.*, whether the injury is an "antitrust injury" of the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Eagle*, 812 F.2d at 540; *Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998). Significantly, the

Supreme Court applied these factors to the union-plaintiff in *AGC* and observed that, "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect." *AGC*, 459 U.S. at 540.

The first and most critical factor in the Ninth Circuit's *AGC* standing analysis is "antitrust injury." *Bhan v. NME Hospital, Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985). To have suffered antitrust injury, "the injured party [must] be a participant in the same market as the alleged malefactors." *Id.* at 1470. "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle*, 812 F.2d at 540. This marks the beginning-and-end of Counterclaimants' antitrust claims here.

Counterclaimants allege agency price-fixing of packaging fees (Claims One and Three) but, critically, neither the Guilds nor Stiehm buy or sell packages *or* compete with the agencies. It is the *studios* who buy the packages from the talent agencies in exchange for packaging fees. Counterclaimants' price-fixing claim thus fails at the threshold. *Sacramento Valley, Chapter of the Nat. Elec. Contractors Ass'n v. Int'l Bhd. of Elec. Workers, Local 340*, 888 F.2d 604, 606 (9th Cir. 1989) (affirming dismissal of union's counterclaims where "claims allege anti-competitive behavior in a market (contractor's services) in which Local 340 does not itself participate").

The Ninth Circuit's decision in *Eagle* is directly on-point and establishes that Counterclaimants lack antitrust standing here. In *Eagle*:

> The central argument [was] that the canneries conspired to set tuna prices at artificially low levels resulting in a reduction of the wages paid to [union] crewmembers and a loss of employment opportunities by them. The reduction in the crewmembers' wages, in turn, reduced the dues paid to the union.

Eagle, 812 F.2d at 539. The Ninth Circuit affirmed dismissal because the plaintiffs—the union and its members—were not "buyers or sellers of raw tuna" and their claimed injuries were "merely derivative" of the injuries suffered by the *direct victims* of the putative conspiracy, *i.e.*, the vessel owners who sold tuna to the canneries at artificially

depressed prices. *Id*. at 540-42.

Here, too, no Counterclaimant is a buyer or seller of packages, and any injuries they claim would be "merely derivative" of any overcharges paid by the studios for packages. Just as "[t]he crewmembers did not negotiate the prices with the canneries, the vessel owners did" (*id.* at 541), neither Stiehm nor the Guilds negotiated packaging fees with the studios, the talent agencies did. A&C ¶¶ 203, 210, 257. And "[w]hen the employer"—*e.g.*, a studio—"reacts to a loss by terminating employees, or when employees receive diminished salary or commissions, as a result of the employers' weakened market position, these employees suffer *derivative* injury only." *Eagle*, 812 F.2d at 541-42 (citation omitted).[7]

WGA's secondary antitrust theory—a group boycott by the agencies (Claims Two and Four)—fails for similar reasons. Counterclaimants assert that the purported boycott "artificially reduced choice of agents and agencies to represent" the Guilds' *members*. A&C ¶ 354. But the *Guilds* do not seek representation from talent agents and thus are not "consumer[s] of the alleged violator's goods or services." *Eagle*, 812 F.2d at 540. Moreover, even if writers might allegedly be harmed by a boycott which reduced the number of franchised agents, that would not confer antitrust standing on the Guilds because "[t]he chain of causation between the injury and the alleged restraint in the market should lead directly to the 'immediate victims' of any alleged antitrust violation." *Id.* at 541. This is a barrier to any federal antitrust claim by the Guilds not only under *AGC*, but also under *Illinois Brick* which bars indirect purchasers from recovering antitrust damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

With respect to Stiehm's boycott claim, she does plausibly allege that she is a buyer of talent agency employment procurement services (but not of packages). However, the other remaining *AGC* factors demonstrate that she too lacks antitrust standing to pursue the group boycott claim. The only way Stiehm could have been

[7] Under Counterclaimants' overreaching injury claim, *anyone* a studio pays for *anything* (*e.g.*, set-builders or concessionaires) would have standing to challenge *any* price-fixing conspiracy that caused the studios to pay higher prices for *anything*.

injured under her theory about having a reduced choice of agents is if, *but for* the putative boycott, WME and other talent agencies would have reached new franchise agreements with WGA that banned packaging *and* she would have retained one of those agents. But this chain of events not only rests on rank speculation, it is flatly contradicted by Counterclaimants' own allegations that WME and the other major talent agencies have always opposed WGA's Code of Conduct and thus would not agree to it even absent the alleged boycott. *E.g.*, A&C ¶ 309. Moreover, Stiehm herself fired WME—at her union's direction—and Counterclaimants cannot claim antitrust injury under *AGC* from a reduction in agents that *they* caused. *Id.* ¶¶ 185, 308. Indeed, even under the less rigorous Article III standing requirements, "self-inflicted injuries. . . do[] not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

Independently, antitrust standing also cannot be shown because Stiehm's (and the Guilds') boycott claim presents impossible "problems of identifying damages and apportioning them among [direct victims] . . . and indirectly affected employees and union entities." *AGC*, 459 U.S. at 545; *Eagle*, 812 F.2d at 542-43. The question of how the Court or a jury would identify or apportion damages under an injury theory based upon the alleged boycott creating a smaller pool of agents is imponderable and would by itself defeat Counterclaimants' antitrust standing under *AGC*. *Id.* Counterclaimants' packaging price-fixing claims present the same problems.

Finally, the Guilds' claims about "receiv[ing] less in dues payments than they otherwise would have received" (*e.g.*, A&C ¶ 373) were *expressly rejected* in *AGC* and in *Eagle*. *AGC*, 459 U.S. at 541 n.46 (a reduction in union dues payments because members lost jobs or wages has been held to be "even more indirect than the already indirect injury to its members."); *Eagle*, 812 F.2d at 542–43 ("lost union dues" were derivative of "any injury suffered by the vessel owners").

2. On-Point Ninth Circuit Authority Also Demonstrates That Counterclaimants Have Failed to Plausibly Allege Any Conspiratorial Agreement

Counterclaimants not only lack antitrust standing, they have failed to plead facts

plausibly alleging the most fundamental element of an antitrust conspiracy: an agreement. On this point, the Supreme Court explained in *Twombly* that:

> [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful.

Twombly, 550 U.S. at 553-54 (internal quotations and citations omitted).

(a) Counterclaimants Have Not Pleaded the Facts Required to Prove a Price-Fixing Conspiracy

Counterclaimants aver that the Big Four talent agencies have "conspired to raise … the price of agency services" by "agreeing to the structure of packaging fees," "negotiating with studios from a common '3-3-10' starting point," and "utilizing the standard range for the base license fee applicable to the up-front 3% package fees." A&C ¶¶ 332, 335. But these conclusory allegations do "not answer the basic questions: who, did what, to whom (or with whom), where, and when?" and thus do not support a conspiracy claim. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008).

Indeed, there is dead-on Ninth Circuit authority rejecting virtually identical conclusory allegations of parallel behavior and trade association communications by the Big Four agencies about packaging as being insufficient to state a conspiracy claim. In *Lenhoff*, the plaintiff alleged, among other things, that "the [Big Four] Agencies conspired to fix a '3-3-10 packaging fee.'" 729 F. App'x at 530. The Ninth Circuit affirmed dismissal, holding the preceding allegation to be "a bare, conclusory allegation of parallel conduct." *Id.*[8] The *Lenhoff* plaintiff further alleged that the ATA's Strategic

[8] *See also Kendall*, 518 F.3d at 1048 (dismissing Sherman Act conspiracy claim that banks "merely charg[ed], adopt[ed] or follow[ed] the fees set by a Consortium").

Planning Committee (the "who") met in the ATA's offices (the "where") from 1999 forward (the "when") to reach this agreement. *Id.* But the Ninth Circuit rejected these allegations as insufficient too because they "amount to nothing more than an allegation that defendants participated in a lawful trade organization, and 'mere participation in trade-organization meetings … does not suggest an illegal agreement.'" *Id.* (citing *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015)).[9]

Lenhoff is dispositive. Here, too, the price-fixing counterclaims set forth only conclusory allegations that WME and the other agencies have "exchanged competitively sensitive information" through the ATA and "agreed to a standard range of 'base license fees' upon which to calculate the initial 3% fee" in the so-called "3-3-10." A&C ¶¶ 274-81. Counterclaimants' only even arguably concrete allegations are that "on March 17, 2019, the ATA published a study that purports to analyze the economic impact of eliminating front-end packaging fees" and that "the data used to prepare the March 17 Report was made anonymous to protect the disclosure of competitively sensitive information." *Id.* ¶¶ 282-83.[10] On its face, this allegation suggests nothing about a price-fixing conspiracy, let alone something that might "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. And, probing deeper, because Counterclaimants allege that the price-fixing conspiracy began "[w]ell before 2015," their one specific allegation about anonymized data sharing in March 2019 is irrelevant. A&C ¶ 331.

(b) Counterclaimants Also Have Not Pleaded the Facts Necessary to Support a Group Boycott Claim

When it comes to the "who, did what, to whom (or with whom), where, and when?" (*Kendall*, 518 F.3d at 1048), Counterclaimants' group boycott conspiracy

[9] *See also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) ("[P]articipation in trade organizations provides no indication of conspiracy."); *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999); *Consol. Metal Prod., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988).

[10] Although Counterclaimants couch their allegation as "the ATA *claims*" it used anonymized data to prepare the report, Counterclaimants cannot—consistent with Rule 11—allege that the ATA's "claim" is not true.

theory is just as barren as their price-fixing theory. None of their three categories of factual allegations state a plausible group boycott conspiracy claim.

First, they offer allegations about the myriad opportunities that WME and other agencies had to conspire through the ATA. *E.g.*, A&C ¶ 278. But, as shown above, alleging mere opportunities to conspire at a trade association is legally insufficient to support a conspiracy claim. The second category of facts is a series of alleged statements (A&C ¶ 321) by *individual* ATA members and the ATA Executive Director expressing variations of the view that it would be "best" for WGA to negotiate through the ATA. The expression of individual views by different agency or ATA employees that WGA ought to continue its 43-year history of negotiating a franchise agreement with the ATA for its members is classic parallel conduct and does nothing to nudge the group boycott conspiracy theory from conceivable to plausible. The third category of allegations concerns wholly conclusory and unspecified "threats of retaliation" by WME and other Big Four talent agencies against any other talent agency that agreed to the Code of Conduct. *Id.* ¶¶ 287-89, 322. But WGA does not allege a single specific retaliatory act taken against any one agency, let alone one of the "at least 70 talent agencies [that] have signed the Code of Conduct." *Id.* ¶ 105.

On top of all of this, according to Counterclaimants, there could be no allegedly illegal group boycott in violation of antitrust law until after June 19, 2019 when "the Guilds formally withdrew their consent to collective negotiation through the ATA" (*Id.* ¶ 317)—"[t]hat revocation of consent meant that the ATA and its members, including the Big Four, were *no longer* covered by federal antitrust law's 'labor exemption,' which immunizes certain labor union conduct and grants a limited derivative exemption to non-labor entities to negotiate with labor unions." *Id.* ¶ 14 (emphasis added); *see also id.* ¶ 349(a) (alleging an unlawful boycott "after the Guilds had revoked their consent to collective negotiations"). Counterclaimants thus claim an unlawful group boycott only after June 19, but allege virtually no facts after that date. The lone allegations during that period concern individual agencies independently objecting to

WGA's withdrawal from negotiations with the ATA. *Id.* ¶ 321. This parallel behavior does not come close to pleading a group boycott conspiracy for any time period.

(c) The Cartwright Act Claims Fail for the Same Reasons

Counterclaimants' Cartwright Act claims fail for the same reasons as their federal claims: (i) lack of antitrust standing (*Pool Water Prod. v. Olin Corp.*, 258 F.3d 1024, 1034 n.6 (9th Cir. 2001); *In re Dynamic Random Access Memory (Dram) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1093 (N.D. Cal. 2007) (applying *AGC* factors to Cartwright Act)); and (ii) failure to allege facts to show any conspiratorial agreement. *Lenhoff*, 729 App'x at 531 (determination that conduct does not violate Sherman Act "necessarily implies that the conduct is not unlawful under the Cartwright Act").

B. Counterclaimants' RICO Claims Should Also Be Dismissed

Counterclaimants allege four claims under the federal racketeering laws (Claims Eight through Eleven): for "investment of racketeering income" under Section 1962(a); "maintenance of a racketeering enterprise" under Section 1962(b); "control of a racketeering enterprise" under Section 1962(c); and a "racketeering conspiracy" under Section 1962(d). All four RICO claims, however, are predicated on the same unprecedented legal position that—despite the longstanding, industry-wide adoption of packaging, and Counterclaimants' own authorization of packaging through the AMBA for 43 years—each time WME was paid packaging fees by a studio or production company, that commercial transaction constituted a RICO predicate act because it purportedly was an illegal "kickback" (or union bribe) in violation of Section 302 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186. A&C ¶¶ 426, 445, 459, 470. These allegations fail both for lack of standing and proximate cause and because packaging cannot constitute a predicate criminal act.

1. Counterclaimants Do Not Have Standing, And Have Not Pleaded Proximate Causation, To State Any RICO Claim

Counterclaimants' RICO claims, like their antirust claims, are based upon the studios' payment of fees to the agencies for packages that neither the Guilds nor Stiehm

buy or sell. A&C ¶¶ 424-476. As shown in Section V.A.1 above, both the *AGC* and *Eagle* decisions make it clear that the attenuated causal chain of injury from packaging fees alleged by Counterclaimants fails to meet the *AGC* test, which applies with equal force to RICO. The remote and speculative injury claims of the Guilds and Stiehm fail RICO in three separate but related ways.

First, the Supreme Court noted in *Holmes v. Securities Investor Protection Corp.* that "Congress modeled § 1964(c) [the RICO private action] on . . . § 4 of the Clayton Act" and therefore the standing requirements of *AGC* were found to be applicable to the facts in that RICO case. 503 U.S. 258, 267-68 (1992). As the Ninth Circuit has explained: "[t]he requirements for standing to maintain a civil action under RICO and the antitrust laws are similar," and both require that the plaintiff's harm be tied directly to the defendant's wrongful conduct. *Oregon Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999); *Ass'n of Washington Pub. Hosp. Districts v. Philip Morris Inc.*, 241 F.3d 696, 701–03 (9th Cir. 2001) (applying the *AGC* test to determine both RICO and antitrust standing); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (applying standing principles from antitrust cases to determine that the plaintiff had no RICO standing).

If anything, Counterclaimants' RICO theory of injury is even *more* attenuated than the remote injury claims they assert for their antitrust claims. Specifically, even if there were any legal merit to their implausible claim that packaging fees can be predicate criminal acts—such purportedly illegal union "bribes" between studios and agencies would not plausibly cause any harm to the Guilds or Stiehm because they do not buy or sell packages or compete with the agencies as *AGC* requires.

Second, Counterclaimants have not and cannot plausibly allege that any injury they claim to have suffered was proximately caused by a RICO violation. "Proximate causation requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 981 (9th Cir. 2008) (citations omitted). But there is no "direct relation" between a packaging fee paid

to WME by a production studio in purported violation of labor law and any claimed injury to Stiehm (much less to her union). Courts routinely dismiss RICO claims with the type of attenuated causal chains alleged here.[11]

Third, "[t]o demonstrate injury for RICO purposes, plaintiffs must show proof of *concrete financial loss*, and not mere injury to a valuable intangible property interest." *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1086–87 (9th Cir. 2002) (emphasis added); *Fireman's Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001). The types of amorphous damages alleged here—unidentified "lost opportunities" and "lost wages" for Stiehm, and "lost dues" and "monitoring" costs for the Guilds—do not qualify as a "concrete financial loss" under RICO. *Keel v. Schwarzenegger*, 2009 WL 1444644, at *6 (C.D. Cal. May 19, 2009) (finding no RICO injury where plaintiff failed to allege that he "actually lost employment or employment opportunities" because "prospective damages . . . are not compensable, absent concrete financial loss").

2. Counterclaimants Have Not Plausibly Alleged a Pattern of Criminal Racketeering Acts

To allege "racketeering activity," a plaintiff must plausibly allege *a violation* of criminal law as the pattern of predicate acts—here, the claim is that packaging constituted a criminal violation of Section 302, *i.e.*, the LMRA's "anti-kickback" provision for unions. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986); *Rothman v. Vedder Park Mgmt.*, 912 F.2d 315, 318 (9th Cir. 1990).[12] Section 302, however, has no application to packaging fees as a matter of law.

[11] *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-60 (2006) (plaintiff failed to allege proximate cause because its loss of sales revenue was attenuated from defendants' alleged RICO violation of defrauding the New York tax authority and using the proceeds to undercut competitors like the plaintiff); *Holmes*, 503 U.S. at 265-66 (financial injuries asserted by a corporation with responsibility to reimburse customers of broker-dealers who could not meet their financial obligations were not proximately caused by a RICO conspiracy to manipulate stock prices).

[12] Subsection (a) of Section 302 makes it unlawful for "any employer or association of employers . . . to pay, lend, or deliver, or agree to pay lend, or deliver, any money or other thing of value . . . to any representative of any of his employees who are employed in an industry affecting commerce." 29 U.S.C. § 186(a). Subsection (b) makes it unlawful for "any person to request, demand, receive, or accept or agree to receive or accept, any payment, loan, or delivery of any money or other things of value prohibited

First, Section 302 is intended to protect the integrity of *collective* bargaining by prohibiting bribes to union officials—not the commercial practice of purchasing packages from talent agents in exchange for a fee. As the Ninth Circuit recently explained, the statute "target[s] practices harmful to the collective bargaining process, including bribery by employers during collective bargaining, extortion by employee representatives, and abuse of power by union officers who have sole control over welfare funds." *Oregon Teamster Employers Trust v. Hillsboro Garbage Disposal, Inc.*, 800 F. 3d 1151, 1157 (9th Cir. 2015) (quotations omitted); *Turner v. Local Union No. 302*, 604 F. 2d 1219, 1227 (9th Cir. 1979) ("[t]he dominant purpose of [§] 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."). But—as Counterclaimants plead and concede—talent agents do *not participate in and thus are powerless to undermine the collective bargaining process* as they are not union officials or employees. A&C ¶¶ 183-84. They procure employment on an individual, client-by-client basis, and have no authority to engage in collective bargaining with the studios' multi-employer bargaining representative. *Id.*[13]

Accordingly, Section 302 does not apply to the receipt of packaging fees by talent agents. Indeed, WME has been unable to identify a single case applying Section 302 to anyone other than union leaders or union managed retirement funds (and employers who pay bribes to such persons). Nor do—or could—Counterclaimants allege that any government enforcer has ever adopted their legally baseless "interpretation" of Section 302 as a criminal ban on packaging fees. Indeed, one would be left to wonder why the

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by subsection (a)." 29 U.S.C. § 186(b).

[13]The text of Section 302 further confirms that its focus is union collective-bargaining activities, as opposed to the individual, client-by-client negotiations handled by WME. 29 U.S.C. § 186(a)(1) applies only to payments by an "employer" to a "representative of any of his employees." Under federal labor law, "representative" has been defined as an "individual or labor organization." 29 U.S.C. § 152(4) (National Labor Relations Act). But WME is neither an individual nor a "labor organization," which means an organization "in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5).

Guilds authorized packaging fees for four decades if Counterclaimants had a good faith basis to believe that each act of packaging during that period constituted a criminal kickback (which the Guilds were condoning and encouraging).

Second, even if their legal argument about Section 302 were not baseless, Counterclaimants' factual averments about WME packaging are so conclusory that they still could not state a predicate racketeering act. Not only does Stiehm fail to allege which shows were packaged by WME, there are no facts pled in the Counterclaim from which the Court could divine whether these transactions could even theoretically violate Section 302. For example, Section 302 requires that a defendant "act with knowledge that the payments are from a person acting in the interest of an employer and are intended to influence the defendant's duties as a union employee"—but no such facts are pled with respect to WME. *U.S. v. Bloch*, 696 F. 2d 1213, 1216 (9th Cir. 1982).

Third, Counterclaimants have failed to plead any facts to show that the "prevailing market price" exception to Section 302[14] would not apply to the prevailing market price payment of packaging fees by the studios to WME.[15]

C. Counterclaimants' Recycled State Law Claims Should Be Dismissed

The Counterclaim includes three state law claims (breach of fiduciary duty,

[14] Sales or purchases "of an article or commodity at the prevailing market price in the regular course of business" does not violate Section 302. 29 U.S.C. § 186(c)(3).

[15] Counterclaimants' RICO claim under Section 1962(a) fails for the additional reason that they "have not alleged an investment injury separate and distinct from the injury flowing from the predicate act." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1149 (9th Cir. 2008). Here, Counterclaimants allege that "WME receives substantial income from packaging fees; WME necessarily uses those same resources when coordinating its activities with the production companies, such that WME has either directly or indirectly used the proceeds of its pattern of racketeering activity to obtain an interest in or to establish or operate a RICO enterprise." A&C ¶ 433. But Counterclaimants cannot have a second bite at the RICO apple simply by arguing that they were injured when WME reinvested its profits into its operations to continue the purportedly illegal practice of packaging. *Sybersound*, 517 F.3d at 1149. And the RICO claim under Section 1962(b) fails for similar reasons—Counterclaimants have not alleged that they suffered any injury due to WME's "acquisition or control" of a purported RICO enterprise separate and apart from the injury they claim to have suffered due to the predicate acts themselves. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) ("In order to recover under [Section 1962(b)], a plaintiff must show injury from the defendant's acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate act.").

constructive fraud, and violation of the UCL) which Counterclaimants have resurrected from their abandoned state court litigation. But the Guilds have no standing to assert any of these claims, and, neither the Guilds nor Stiehm have come close to pleading non-conclusory facts to support these causes of action.[16]

1. The Guilds Lack Standing to Assert the State Law Claims

The Guilds try to assert breach of fiduciary duty and constructive fraud claims "on behalf of their members" (Claims Five and Six), and the UCL claim "on their own behalf" (Claim Seven). They lack standing every which way.

(a) The Guilds May Not Assert Associational Standing to Claim Damages on Behalf of Their Members

An organization has associational standing to bring suit on behalf of its members only if, among other things, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, both the damages "relief requested" and the "claim asserted" would necessarily require the participation of 14,700 writer-members which makes associational standing impossible. *Id.*

To begin with, WGA's request for individual damages for 14,700 writers dooms the Guilds' assertion of associational standing at the threshold because "[i]t is generally accepted that associational standing is precluded where the organization seeks to obtain damages on behalf of its members." *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997) (citing *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553–54 (1996)). This "generally accepted" principle applies with particular force here to the fiduciary duty and constructive fraud claims (and the previously discussed antitrust claims) because it is difficult to conceive of more individualized damages claims than, *e.g.*, "lost wages," "valuable lost opportunities," and being "required to spend money to retain other

[16] In the event that any of the state law counterclaims are not dismissed in their entirety, the Court should, upon dismissal of the federal claims, decline to exercise supplemental jurisdiction and remand the case to state court—where these claims originated.

professionals to provide services [their] agents should have been providing." A&C ¶ 401 (fiduciary duty), ¶ 408 (constructive fraud), ¶ 342 (antitrust).[17] Such claims necessarily require "individual Union members [] to participate at the proof of damages stage" and thus defeat the Guilds' invocation of associational standing. *United Union of Roofers v. Insurance Corp. of America,* 919 F.2d 1398, 1400 (9th Cir. 1990); *Lake Mohave Boat Owners Ass'n v. Nat. Park Svc.,* 78 F.3d 1360, 1367 (9th Cir. 1995).

The "claims asserted" by the Guilds vis-à-vis associational standing are just as individualized as the "relief requested." *Hunt*, 432 U.S. at 343. Where the alleged injury "is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof," courts reject associations' attempts to sue on their members' behalf. *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975)). Here, each claim for which the Guilds assert associational standing rests upon harm to individual writers from packaging, yet under WGA's own allegations, the determination of whether particular writers would be helped or hurt by WME's packaging would require case-by-case analysis. A&C ¶ 217 (packaging fees "often" exceed writers' pay), ¶ 243 ("at times," agencies have "actively suppressed the wages of their own clients to secure packaging fees"); ¶ 249 (packaging "may" reduce writers' profit participation), ¶¶ 247, 250, 253 (agencies lack "incentive" to increase writers' pay).

For example, under both the fiduciary duty and constructive fraud counterclaims, the Court would first have to assess who of WGA's 14,700 members were represented by WME, when they were represented by WME, if they were ever included in a package by WME, the details of the package, whether they consented to the arrangement, and if there was any ensuing net injury (*e.g.*, if a writer saving a 10% commission or getting a writing job for a show that would not otherwise exists offset any purported injury from

[17] The Guilds also assert associational standing to bring the federal and state antitrust damages claims on behalf of their members (Claims One through Four). This fails for the same reasons shown above.

being part of a package). Each and every one of these determinations—multiplied by 14,700 WGA members—"would require individualized proof," *i.e.*, mini-trials. *Brock*, 477 U.S. at 287. As another example, it is utterly implausible for *showrunners* like Stiehm—who *manage production budgets*—to profess ignorance about "the material terms of [] packaging fee arrangements" for the shows that they managed. *Compare* A&C ¶ 399 *with* ¶¶ 200, 233. This lack of knowledge would need to be proven writer-by-writer, package-by-package—rendering any claim of associational standing legally void. *Id.* ¶¶ 399, 405.

(b) The Guilds Lack Article III Standing to Assert a UCL Claim

Counterclaimants' four theories under their UCL count comprise a rehash of their other causes of action. They claim that WME violated the UCL's "unlawful" prong by virtue of the alleged (i) breach of fiduciary duty (A&C ¶ 413), (ii) constructive fraud (*id.* ¶ 414), and (iii) violation of Section 302 (*id.* ¶ 416). And Counterclaimants further contend that (iv) WME violated the UCL's "unfairness" prong by failing to provide "conflict-free representation." *Id.* ¶ 415. The Guilds cannot satisfy even Article III standing for any permutation of their UCL claim.[18]

To plead Article III standing, a plaintiff must "clearly . . . allege facts demonstrating" (1) an "injury in fact" (2) that is "fairly traceable to the challenged conduct of the defendant" and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (citation omitted). Conclusory allegations of injury are insufficient. *Schmeir v. U.S. Ct. of Appeals for the Ninth Cir.*, 279 F.3d 817, 820 (9th Cir. 2002).

Here, three of the four permutations of the Guilds' UCL claim allege that packaging "constitute[s] a breach of the Agencies' fiduciary duty *to their clients*," "constitute[s] constructive fraud" to *clients*, and "deprive[s] *writers* of loyal, conflict-

[18] For the same reasons, the Guilds additionally lack Article III standing to assert their antitrust and RICO claims.

free representation." A&C ¶¶ 413, 414, 415. Thus, in Counterclaimants' own words, all of this alleged harm would at most be "fairly traceable" to individual writers, not to the Guilds. *Spokeo*, 136 S. Ct. at 1547. And WME has established why the Guilds do not have standing to assert any injury from the fourth iteration of their UCL claim concerning WME's purported violations of Section 302. *See infra*.

Tellingly, the only types of harm that the Guilds allege *they* suffered under their UCL claim—or, for that matter, any of their claims—concern derivative and speculative injuries like the possibility of recouping less dues from members, "devot[ing] substantial resources to monitoring packaging," "educating members about packaging fees," and "enforcing writers' contractual rights." A&C ¶¶ 261, 373, 422. But speculative increases in union administrative expenses and lost dues because of agency packaging are precisely the type of uncertain and remote injuries that do not establish the type of concrete causal chain necessary for Article III standing. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012).[19] When a claimant's alleged injury requires that "a litany of speculative events come about," the harm "is too attenuated to constitute a qualifying injury in fact for standing." *Stelmachers v. Verifone Sys.*, 2016 WL 6835084, at *3-4 (N.D. Cal. Dec. 17, 2015).

Finally, Article III standing aside, a UCL claim should be dismissed if the "Plaintiff has not pled any economic injury, nor has he pled any injury that is *clearly attributable* to Defendant's alleged violation of the [statute]." *Sepehry-Fard v. MB Fin. Servs.*, 2014 WL 2191994, at *5 (N.D. Cal. May 23, 2014) (emphasis added); *In re Actimmune Mktg. Litig.*, 2010 WL 3463491, at *7 (N.D. Cal. Sept. 1, 2010), *aff'd*, 464 F. App'x 651 (9th Cir. 2011). Three of the four UCL theories—fiduciary duty, constructive fraud, and absence of "conflict-free representation"—exclusively concern harm to *writers*. The Guilds thus have not and cannot plausibly plead injury "clearly attributable" to these alleged violations. And as for the payment of packaging fees in

[19] Even if these administrative costs were real, unions incurring expenses to monitor agencies, and to educate and protect their members, is simply what labor law requires unions to do—it is not a consequence of any alleged conduct by WME.

purported violation of Section 302, the Guilds have not identified any non-speculative economic injuries they have suffered as a result of the payment of such fees.

2. Stiehm Has Not Pleaded a Plausible Breach of Fiduciary Duty or Constructive Fraud Claim

Fiduciary Duty. A claimant must plausibly allege facts sufficient to establish (1) the existence of a fiduciary duty; (2) a breach of the duty; and (3) damages proximately caused by the breach. *Tribeca Companies, LLC v. First American Title Ins. Co.*, 239 Cal. App. 4th 1088, 1114 (2015). This is typically an individualized, fact-specific determination. *Brown v. California Pension Adm'rs & Consultants, Inc.*, 45 Cal. App. 4th 333, 348 (1996); *Mueller v. MacBan*, 62 Cal. App. 3d 258, 276 (1976); Restatement (Third) of Agency § 8.01 (2006). Here, Counterclaimants' own allegations establish that whether packaging benefits or allegedly harms a particular writer may only be determined on a case-by-case basis. *Supra*, § V.C.1(a). Indeed, *every* packaging arrangement cannot plausibly comprise a breach of fiduciary duty or the Guilds would not have authorized packaging through the AMBA for more than forty years.

Stiehm, however, alleges no facts—zero—about WME breaching any fiduciary duty or proximately causing her injury on any package. Assuming, *arguendo*, that Stiehm has pleaded the existence of a fiduciary relationship with WME, she alleges *no* facts concerning any *breach* of that duty. Stiehm alleges only that she "has written, created, or served as showrunner" on three packaged television shows, without identifying which were packaged by WME. A&C ¶ 185. She does not allege that either package constituted a fiduciary breach or caused her any harm. Instead, she rests upon vague allegations that she was "injured by the payment of packaging fees to Agencies on … packaged shows"—but such conclusory labels are insufficient to stave off a motion to dismiss. *Twombly*, 550 U.S. at 555.

Stiehm's effort to plead proximately caused damages fares no better. For example, she avers unspecified "lost wages" and "lost employment opportunities." A&C ¶ 400. But one is left to guess what, if anything, comprises those supposedly lost

wages or employment opportunities, how WME supposedly caused them, if such conduct was within the statute of limitations, if Stiehm was better off saving the 10% commission for being part of a package, or if Stiehm's (unidentified) packaging projects with WME would have even existed if not for WME assembling a package of talent. Stiehm's fiduciary duty claim is not only implausible, it fails to satisfy the most rudimentary requirements of notice pleading.

Constructive fraud. In essence, Stiehm's constructive fraud claim is the same as her fiduciary duty claim, plus she must plead an "intent to deceive." *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 516 n.14 (1980); Cal. Civ. Code § 1573.[20] The consequence is that her constructive fraud claim is defective for the same reasons as her fiduciary duty claim (*supra*), and *additionally* because it was not pled with heightened particularity. "[F]acts supporting a claim for constructive fraud must be alleged with particularity under Rule 9(b)." *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F.Supp.2d 1009, 1021(N.D. Cal. 2007). Fraud allegations must be accompanied by "the who, what, when, where, and how" of the misconduct charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (citation omitted). In a fraud action against a corporation, as here, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Khan v. CitiMortgage, Inc.*, 975 F. Supp. 2d 1127, 1140 (E.D. Cal. 2013) (quoting *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991)).

As already demonstrated, Stiehm has pleaded her claim with conclusory facts only—a far cry from the specificity required of a claim sounding in fraud. For example, Stiehm has not pleaded *any* facts that she relied on anything WME did or did not say with respect to packaging, or whether or how she was injured by such conduct. These omissions are dispositive. *Tindell v. Murphy*, 22 Cal. App. 5th 1239, 1249-50 (2018).

[20] Constructive fraud requires (1) a fiduciary or confidential relationship, (2) nondisclosure, (3) intent to deceive, and (4) reliance and resulting injury. *Id.*

And, in any event, it would be implausible for Stiehm—a *showrunner*—to profess ignorance about her inclusion in a package on shows for which *she* managed the budget.

3. Counterclaimants Have Not Plausibly Alleged A UCL Claim

(a) Counterclaimants' "Unlawful" UCL Claims Must Be Dismissed Because Their Predicate Claims Are Not Actionable

Counterclaimants allege three "unlawful" UCL violations: (i) fiduciary duty, (ii) constructive fraud, and (iii) Section 302. A&C ¶¶ 413, 414, 416. Because "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong[,]" *Berryman v. Merit Property Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007), "[i]f the borrowed violations of law or predicate claims lack merit, then the [UCL] claim necessarily fails." *Portney v. CIBA Vision Corp.*, 2009 WL 305488, at *7 (C.D. Cal. Feb. 6, 2009).[21] WME has already demonstrated that Counterclaimants' fiduciary duty and constructive fraud claims, and their Section 302 theory, are all legally defective. The corresponding UCL claims thus fail as well.

(b) Counterclaimants' "Unfair" UCL Claim Also Fails

Counterclaimants' clam under the UCL's "unfairness" prong is that "packaging fees are an 'unfair' practice because they deprive writers of loyal, conflict-free representation; divert compensation away from the writers and other creative talent that are responsible for creating valuable television and film properties; and undermine the market for writers' creative endeavors." A&C ¶ 415. This claim fails as a matter of law.

First, although Counterclaimants conspicuously plead-around invoking another law as a predicate, it is impossible to discern how this theory—sparse as it is—differs substantively from their fiduciary duty, constructive fraud, or antitrust claims. Put another way, it is an "unlawful" claim masquerading under the "unfairness" prong. And, as shown above, there is no "unlawful" claim that can stave off dismissal.

[21] *See also Vargas v. JP Morgan Chase Bank, N.A.*, 2014 WL 3435628, at *5 (C.D. Cal. July 11, 2014) ("If unable to state a claim for the underlying offense, the plaintiff similarly cannot state a claim under UCL for unlawful practices."); *Watkinson v. MortgageIT, Inc.*, 2010 WL 2196083, at *5 (S.D. Cal. 2010); *Frison v. WMC Mortg. Corp.*, 2010 WL 3894980, at *10 (S.D. Cal. Sept. 30, 2010).

NorthBay Healthcare Grp.-Hosp. Div. v. Blue Shield of California Life & Health Ins., 342 F. Supp. 3d 980, 989 (N.D. Cal. 2018) (a "claim under the 'unfair' prong [that] overlaps entirely with the 'unlawful' prong…cannot survive if…the unlawful prong does not survive").

Second, Counterclaimants provide no facts in their pleading to support the "unfairness" claim. This is another ground for dismissal. *Carter v. Bank of Am., N.A.*, 2012 WL 12887542, at *11 (C.D. Cal. Dec. 12, 2012) (dismissing UCL unfairness claim where plaintiff failed to "plead any facts . . . beyond[] conclusory allegation[s]").

Third, even if Counterclaimants had actually pleaded a distinctive "unfair" claim with supporting facts, they have still failed to satisfy any of the potentially applicable tests for "unfairness" under the UCL:

Balancing test. Some courts apply a balancing test under the "unfairness" prong, which requires "weigh[ing] the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) (internal quotes omitted). Counterclaimants do not address this test at all, which is fatal considering their *own* allegations about the *benefits* of packaging. *E.g.*, A&C ¶ 245 (admitting that talent agencies forego 10% commissions and "use their leverage to steer film projects to their own clients …").

Public policy test. Other courts have held that "unfairness must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) (internal quotes omitted). But Counterclaimants do not so much as try to allege any nexus between WME's conduct and any "legislatively declared policy." *Palmer v. Apple Inc.*, 2016 WL 1535087, at *6 (N.D. Cal. Apr. 15, 2016) (dismissing UCL claim where plaintiff "fail[ed] to identify which constitutional, regulatory, or statutory provision to which the alleged violation is tethered") (internal quotes omitted).

FTC test. Finally, other courts have applied what is called the "FTC test," necessitating facts establishing that "the consumer injury is substantial, is not

outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1137 (N.D. Cal. 2010) (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839 (2006)). Counterclaimants, however, do not allege plausible facts of any substantial injury to *consumers*, nor that any such injury would not be outweighed by "countervailing benefits to consumers." *Id.* Counterclaimants also do not allege facts to show that they could not "reasonably have avoided" the injury. *Id.* On the contrary, Stiehm remains free to engage any of the "70 talent agencies [that] have signed the Code of Conduct" and agreed not to engage in packaging. A&C ¶ 105; *McGee v. Diamond Foods, Inc.*, 2016 WL 816003, at *7 (S.D. Cal. Mar. 1, 2016) (injury was reasonably avoidable where the plaintiff could have chosen to purchase another product without the ingredient at issue).[22]

D. The Declaratory Relief Claim Should Be Dismissed

Finally, where, as here, a claim for declaratory judgment is merely duplicative of other claims, it should be dismissed as redundant and unnecessary.[23] Moreover, "[a] declaratory relief cause of action cannot survive a motion to dismiss when the substantive claims on which it is based are dismissed […]." *Bates v. Suntrust Mortg., Inc.*, 2013 WL 6491528, at *2 (E.D. Cal. Dec. 10, 2013).

VI. CONCLUSION

For all of the foregoing reasons, this Court should dismiss all of the counterclaims against WME under Rules 12(b)(1) and/or 12(b)(6), without leave to amend.

[22] Nor have Counterclaimants established that they are entitled to any available UCL remedy. Recovery for "lost opportunities" is not "restitution." *Kelton v. Stravinski*, 138 Cal.App.4th 941, 949 (2006). Nor is recovery of money allegedly spent "to retain other professionals," *i.e.*, payments to third parties. *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1156 (C.D. Cal. 2005). And there is no future packaging conduct to enjoin because Stiehm fired WME and the Guilds revoked WME's franchise.

[23] *Swartz v. KPMG LLP*, 476 F.3d 756, 765-66 (9th Cir. 2007); *Huweih v. US Bank Tr., N.A.*, 2017 WL 396143, at *6 (N.D. Cal. Jan. 30, 2017); *Minn. Life Ins. Co. v. Philpot*, 2012 WL 4486311, at *11 (S.D. Cal. Sept. 27, 2012); *Castillo v. Wells Fargo Bank, N.A.*, 2015 WL 13425101, at *2 (N.D. Cal. July 17, 2015); *Sharma v. BMW of N. Am., LLC*, 2014 WL 2795512, at *7 (N.D. Cal. June 19, 2014) (same).

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