UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC, ET AL., PLAINTIFFS AND COUNTERCLAIM DEFENDANTS, vs. WRITERS GUILD OF AMERICA, WEST, INC., ET AL, DEFENDANTS AND COUNTERCLAIMANTS, AND PATRICIA CARR, ET AL., COUNTERCLAIMANTS.	No. CV 19-5465-AB-AFM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, DECEMBER 6, 2019

10:27 A.M.

LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA; FRIDAY, DECEMBER 6, 2020

10:27 A.M.

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THE CLERK: Calling Civil Case 19-5465, William Morris Endeavor Entertainment versus Writers Guild of America West, Inc., et al.

Counsel, state your appearances.

MR. KESSLER: Good morning, Your Honor. Jeffrey Kessler, Winston & Strawn, for William Morris Endeavor.

THE COURT: All right. Good morning.

MR. GREENSPAN: Good morning, Your Honor. David Greenspan also for WME.

THE COURT: All right. Good morning.

MR. LEVIN: Good morning, Your Honor. Adam Levin of Mitchell Silberberg & Knupp for UTA.

MR. KENDALL: And good morning, Your Honor. Richard Kendall, Kendall Brill & Kelly on behalf of CAA.

THE COURT: Good morning. All right. So is that everyone here for the plaintiff, at least that's going to be talking?

All right. Let's shift to the defense, please.

MS. LEYTON: Good morning, Your Honor. Stacey Leyton from Altshuler Berzon on behalf of the defendants.

THE COURT: All right. Good morning.

MR. PITTS: Good morning, Your Honor. Casey Pitts

from Altshuler Berzon on behalf of the defendants.

MR. LITWIN: Good morning, Your Honor. Ethan Litwin of Constantine Cannon for the Writers Guild.

MR. SEGALL: Good morning. Anthony Segall, Rothner, Segall & Greenstone for the defendants.

THE COURT: All right. Good morning you all. I did issue a tentative in this case. I'm assuming, based on the hour, that the parties have had a chance to review the tentative, but if I'm incorrect, please let me know.

I have a number of questions that I wanted to ask the parties, and, obviously, at the conclusion, if there are any issues that either side wishes to raise that wasn't covered by the questions, I'll give you some time to deal with those.

So why don't we start with the plaintiffs. Who's drawn the short straw from the plaintiffs' side, or does it depend on the question?

MR. KESSLER: Well, Your Honor, I'm handling the labor exemption points and the first antitrust points, not the Count 2 points, Your Honor.

THE COURT: The statutory exemption --

MR. KESSLER: I am, Your Honor.

THE COURT: All right. So why don't you step to the lectern. We'll start with there.

MR. KESSLER: Thank you.

THE COURT: So I guess the first question I have is that, when we're talking about the issue of whether the guilds have combined with a nonlabor group, if I understand correctly, you argue that the showrunners are nonlabor groups even though they're members of the Guild and their work often involves writing.

The question I have is why aren't the showrunners in job or wage competition with Guild member writers, assuming that there is such some overlap in their function?

MR. KESSLER: Your Honor, so we have specifically alleged in paragraphs 118 to -30, 7 to 59, and 195 of the Complaint that the showrunners --

THE COURT: I'm sorry. Say those paragraphs again.

MR. KESSLER: Okay. The key ones are 7, 59, and 195, and then there's a general discussion of it in 118 to 130.

And in those allegations, Your Honor, we specifically allege that a number of the showrunners who are participating in the boycott are doing so in their capacity as producers where they actually hire and fire writers and in some cases do not even work as writers at all, perform any writing services.

Obviously, in that capacity, they're much more like management and come squarely in the type of nonlabor

party as Your Honor notes in your opinion.

To give you one real life example, Your Honor, you may be familiar with the show "Law and Order." There's a very famous showrunner who's done all of that called Dick Wolf. He's a great showrunner.

He now creates all these shows and doesn't perform writing services on those shows. He is part of this boycott.

He has exercised his termination notice of an agent as part of this boycott. So that's exactly the type of person here who takes them out of being nonlabor parties -- who makes them nonlabor parties.

THE COURT: And so I guess related to that, so, even when you've got these showrunners that act in a producer-only capacity and they don't perform any writing services -- I guess in the case of Dick Wolf, for example -- isn't there some economic interrelationship, though, between the showrunners and the writers where the showrunner -- I think you even allege in the Complaint they hire writers; right? So why isn't that relationship sufficient to deem them a labor group?

MR. KESSLER: Because that's not the type of economic relationship that the case law talks about.

And to give you a perfect example, Your Honor, the classic nonlabor party is an employer. An employer has an

economic relationship with the union. They employ the members. In fact, they can be directly dependent.

The type of economic interrelationships that's discussed is like the interrelationship between a franchised agent and the union which has been sustained in H.A. Artists and so that a franchised agent, we know, is a labor party for these purposes, but it's not just any type of interconnected economic relationship.

What the Carroll case does, which is the case that the defendants rely on, is you look at whether or not they're in different function so they're not in wage competition.

And what we have alleged, Your Honor, is, if you're a producer, says you are not in wage competition with a writer. And so they don't have the correct economic interrelationship there.

THE COURT: All right. The next question, I guess, is can the Guild in this case, can they really have been said to have combined with showrunners if, as you allege, what's really happening is that the showrunners are being coerced by the Guild with enforcing this -- these Code of Conduct?

MR. KESSLER: So a combination are two people working together in an agreement. It doesn't matter if one person is coerced or not. In fact, since we're talking

about an antitrust case, it's very well established in the antitrust laws that you can have a participant in a conspiracy and restrain a trade who is an unwilling participant. There's is lots of case law on that fact. It's just a question of whether they both are participating in the same activity.

Here, because the showrunners we've alleged -- and, obviously, we're on a motion to dismiss. Our allegations have to be taken as true -- because the showrunners acting as producers have agreed, whether they wanted to or not -- you know, they agreed to participate in it. That makes it part of a nonlabor group in combination with respect to that. And there's nothing in the case law to suggest that the fact that they are coerced into agreement would make any difference to that analysis.

THE COURT: I guess the converse -- is there any case law that supports the position that this, what we're talking about here, constitutes combining or combination?

MR. KESSLER: Yes, Your Honor, because most of the cases that are involved involve things like group boycotts. In fact, even the POSCO case that Your Honor relies upon heavily is a classic type of group boycott case.

H.A. Artists is in effect a group boycott because they wouldn't deal with the agents there unless they paid the franchise fee.

And your Honor, I wanted to point out that H.A. Artists is really an important case. And the reason it's important is that, even though in H.A. Artist they were found to be labor parties on the factual record there, the Supreme Court remanded on the issue of whether or not the franchise fees were covered by the exemption. And they did that because they said just because a union says they have a legitimate motive -- and even though there they said the franchise fees were used to support union operations, that was there, the Court said that's a fact issue, and they had to determine whether or not it was -- those franchise fees were actually necessary to support the union operations or whether they could have just done that through union dues or something else. In fact, the dissent objected to that, but that was the dissent. We live by the majority.

And the whole point there, Your Honor, is that it's very clear here that we have a case where we're alleging this combination is to in effect restrain competition in a product market, the market for movies with the content affiliates, the elimination of packaging.

And whether or not they agree with that, that's what lawsuits are about, but it's not what motions to dismiss are about or we have well pled all those allegations.

And under H.A. Artists, it directly supports

Your Honor's ruling that these are fact issues, as does the original William Morris case Your Honor cited, although that was not a motion to dismiss. It was a preliminary injunction. The Court went through the statutory objection and the nonstatutory labor defense -- this was Judge Pregerson -- and he specifically said both of them regarding packaging in particular was the same practice, would raise issues of fact that had to be tried as to whether it was affecting the product market or the labor market and how that would play out.

THE COURT: I guess related to that, the Guild's argument, if I understand correctly, is that, look. All they did was merely encourage managers and lawyers to enforce this Code of Conduct.

Where would you say in the Complaint does it show that the Guild's actually combined with these managers and lawyers or that there's been some sort of concerted action between the two?

MR. KESSLER: Okay. So we have a very unusual situation here. This is not a Complaint where we're trying to infer that is conspiracy, if you will, from parallel conduct on circumstantial evidence. We had the Guild put on their Website -- and we quoted this in the Complaint -- specific indemnification agreements inviting the agents and managers to take over these representations and that they

would indemnify them for doing so. We then specifically allege that 7,000 of their members then fired the agents and that there are a number of agents and managers who have, in fact, joined this combination.

Imagine, Your Honor, if this was a price-fixing case and one of the defendants put on their Website saying, "I will indemnify anyone who joins me in agreeing to fix these prices -- don't worry about it" -- and then the prices in effect all go up. There'd be no question that all we have to plead under Twombly is a plausible basis for this combination. This is more than plausible. I mean, this is compelling.

THE COURT: Let me ask -- do you have to allege that, or do you need to allege that in fact a lawyer or manager took the Guild up on this indemnification?

MR. KESSLER: We have to allege to show a combination, that there were not -- we don't have to put in the names. If Your Honor wanted us, we could put in names. But we don't have to put in the name.

We have to plausibly allege there are managers and agents who have done that, and we've done that in specific allegations of the Complaint.

And, again, Your Honor, if you take a look at paragraph 148, paragraph 145, paragraph 147 of the Complaint, you'll see we specifically allege that they join

them in that combination.

Their criticism is, well, we didn't say who were the specific people. Your Honor, that's not required when you have this type of public invitation.

And we've alleged that 7,000 writers have now fired their agents, and what they're doing is they're using the lawyers and managers.

THE COURT: Well, okay. Just give me one moment. I just want to look at some of those paragraphs.

Do you allege specifically that a lawyer took the Guild up on this indemnification offer or just that it existed?

MR. KESSLER: Okay. So what we alleged, Your Honor, is that -- in paragraph 148, is that WGA has combined with certain unlicensed managers and lawyers, i.e., nonlabor parties, in violation of various state licensing laws. This is after the paragraphs about the indemnification.

WGA believes such actions has the purpose and effect of inducing these nonlabor parties to replace plaintiffs and other nonfranchise talent agents or to force a nonfranchise agent to submit to the Code of Conduct.

So, Your Honor, we believe we have sufficiently alleged that. And again, if Your Honor told us you'd like us to amend to add names, we could, but I don't think that's

necessary in light of your decision in any way.

THE COURT: All right. I want to shift, if I could, to this whole illegitimate purpose of enforcing this Code of Conduct. You talk heavily about the intent to, quote/unquote, conquer and grab power from the agencies.

Could one make the argument that every dispute between a union and a company is really an attempt to shift power? And if that's the case, why is it so pernicious in this case as to constitute an illegal purpose?

MR. KESSLER: So, Your Honor, if all we alleged was a desire for power alone and that was our entire complaint, that wouldn't be enough to allege an illegitimate purpose. The question is what did we allege this power shifting and conquering was intended to do?

And what we allege through numerous paragraphs in the Complaint is that this was to restrain competition in the product markets by completely eliminating packaging, which is our allegation, and by eliminating these content affiliates who are movie production companies. That is something that is an illegitimate union purpose.

And the fact that it might have some other reasons that the union says they also take a legitimate -- doesn't get them past the exemption. And then I go back to H.A. Artists again and to POSCO.

When you use nontraditional means -- and this is

clearly a nontraditional mean like the franchise fee was -- to go at your objective this way, even if you say this is going to benefit our workers, you have to show that it is a necessary means to do so. That's why H.A. Artists threw it back for their -- that was on the purpose prong of the exemption.

So here they have to show -- if they really believe it's in their interest to eliminate all packaging in a product market, to eliminate all content filling in those jobs, they have to show that it was necessary for their members' interests because this is not a traditional means. It's not a traditional objective.

Now, they're going to dispute all that -- we understand that -- but that's just a fact issue. And so we're clearly within that.

And the key here, Your Honor, is the fact that they're going after product market practices. That's very, very important to this.

THE COURT: All right. I want to shift to the nonstatutory exemption. Is that your assignment as well?

MR. KESSLER: Yes. I get that too.

THE COURT: Okay. So one could make the argument, I think, that this case is precisely what that nonstatutory exemption was created for. You've got three of the largest talent agencies alleging these antitrust violations against

a writers union for their -- from the union's perspective, all they're trying to do is try to eliminate some conflict of interest provisions.

So I guess the question is why isn't this just a classic case of a union undertaking an effort to protect its benefits -- protect its members that's immune from antitrust enforcement?

MR. KESSLER: Well, as Your Honor points out in your tentative, whether you look at this under Phoenix Electric, which we believe is the standard, or Safeway, which they argue is the standard based on Brown versus Pro Football, it doesn't matter for these purposes because both of those formulations of the test have two very important things in common here.

One is you look under each of those whether or not the conduct is going to have significant effects on other parties not to the agreement or in the product market as opposed to just the core labor market.

And so, again, what we've alleged in our Complaint is that this is going to have very adverse effects on directors, on actors who will not be able to do packaging any further, this will have an adverse effect in the production market of motion pictures and television shows because of the elimination of the content affiliates who, by the way, Your Honor -- and we've alleged this in the

Complaint -- these content affiliates have been leaders in taking pro competitive action to provide better terms for the writers, which is -- to our mind, it's a great irony they have been this pro competitive force. That's our allegation. They could accept that as true or not. It's right in our Complaint.

When you look at those effects, which really can't be disputed, those effects, it is a classic, I would say, Your Honor, to use your words, example of when the nonstatutory labor exemption doesn't apply because it's having those effects outside of just regulating wages hours.

And the second point, Your Honor, it's undisputed that under the nonstatutory labor exemption there is a less restrictive alternative test that has to be applied. This comes from the Supreme Court's decision in Jewel Tea, but it's widely accepted in all the courts. And it's very clear -- we have pled -- there are less restrictive ways to address conflict of interest. There are less restrictive ways to address any concerns about the content affiliates.

This, by the way, is evidence that for 43 years they have used those less restrictive means. So at the very minimum, that gives us a fact issue here.

And, again, it's like H.A. Artists where the Court said go back and see. Did they really need to have these franchise fees to serve your objectives?

So again, no matter which test you're applying, Your Honor, we don't think the nonstatutory exemption applies, and we agree with your tentative on that.

THE COURT: Now, speaking of ironies, I mean, is there some irony that you have, basically, the three biggest agencies alleging an antitrust violation against a union of writers? I mean -- and maybe -- you know, maybe this is unfair question, but I'll ask nevertheless.

MR. KESSLER: I don't think so, Your Honor.

THE COURT: Is it unfair -- I mean, is it really the right cause of action?

MR. KESSLER: Well, it's clearly the right cause of action. Obviously, every company, every person in the United States has equal rights under the antitrust laws. But remember what we're alleging. You know, the Writers Guild is not some mom-and-pop shop.

The Writers Guild represents all the writers in the United States, basically, who write, plus they also represent people who don't write, like the showrunners.

Putting that aside, they represent all of this, and you judge power in an antitrust sense by market power.

And as we've alleged, in the labor market, they have the power. They clearly have market power in the labor market. There can't be any doubt about that.

In fact, that's why, if you read the early cases

on the creation of the statutory and nonstatutory exemptions, they all talk about the fact that, if not for these exemptions, much of the conduct that unions engage in would be antitrust violations. And in fact, they were held to be antitrust violations prior to the Clayton Act being passed. And even after the Clayton Act was passed, they were still held to be antitrust violations, which is why the Norris-LaGuardia Act was passed to try to further curtail that.

The point here is they have the economic power in this labor market which they are allowed to exercise in the labor market for their employees. But here -- going back to the issue -- they're trying to use it to also restrain trade in the product markets.

And that's where these cases go after and say, when you do that, you're outside your lane of proper authority that you're exempt for.

That, by the way, doesn't mean that they've committed an antitrust violation. We still have to prove that. We have pled that, but it means they don't get the protection of this exemption.

And one thing we know about all antitrust exemptions -- they're to be narrowly construed, not to be expansively construed because, while labor policy's important, antitrust policy's important.

And what the exemption requirements do is they carefully kind of set a balance between labor policy on the one hand and antitrust policy on the other. And all Your Honor has to decide now, as you have, is that we've raised sufficient fact issues about all these limitations on the exemptions, that we're entitled to get discovery and try to prove our case.

THE COURT: All right. And then I guess the question on this issue is just -- if you could, walk me through what are the factual allegations in the Complaint that show -- you've talked about this a little bit -- the primary -- the effects of this Code of Conduct are on the studios, the actors, and directors, and other individuals as opposed to the writers themselves.

MR. KESSLER: Okay. So, Your Honor, I'm going to give you a variety of citations to this. Okay.

Take a look, Your Honor, at Allegation 73, Allegation 71, Allegation 169, Allegation 60 to 76, Allegation 58, Allegation 10, 84, 93, and 166.

It actually was a very extensive argument in our Complaint, and all of these allegations stand for the proposition that product markets are being affected, consumers are being hurt, the directors and actors are being hurt, all of these parties outside of the relationship in terms of that. And, again, they dispute that in their

papers, but that is exactly what we need to try as a matter of fact.

THE COURT: All right. I want to shift, if I could, to the Sherman Act, Section 1 of the Sherman Act. Is that still your assignment?

MR. KESSLER: It may go past it, but I think I can cover it. Let's see.

THE COURT: All right. We'll find out. All right.

So if I understand correctly, your argument is, in essence, that the adoption of this Code of Conduct constitutes an agreement, a conspiracy or a combination in restraint of trade.

MR. KESSLER: Yes.

THE COURT: What cases have held that union's internal rules adopted by its members constitute such an agreement for antitrust purposes? That's what I was struggling with.

MR. KESSLER: So, Your Honor, it's -- the first point I want to make is we're not challenging just the adoption of the Code of Conduct.

THE COURT: Okay.

MR. KESSLER: We're challenging the boycott of all the members and the showrunners and others who have participated into it to enforce the Code of Conduct and --

THE COURT: But is that really a difference? I mean, you say "the boycott." I mean, is it a boycott, or is it just we are agreeing with the union rules to enforce this Code of Conduct? You know we're not going to play ball.

MR. KESSLER: So an agreement to fire your agents is clearly an agreement. It's a classic boycott. And again, if Your Honor wants to know how do we know these are restraints of trade, prior to the Clayton Act, all of this conduct, even union rules requiring strikes and boycotts of employers were all held to be antitrust violations under the Sherman Act. So absent the exemption, no one even disputed that these were agreements of the workers together in order to do this.

And all the case law that you look at -- if you look at the POSCO case, the POSCO case was union rules passed whereby its members -- that they were going to boycott one particular, you know, business to get them to take action against another.

And so this is classic. No one is -- no case has ever questioned even that it wasn't an agreement. Now, you're going to have to get to is it a per se lawful agreement? Is it a rule of reason analysis? But the fact that it's an agreement is clear. And if Your Honor wants a Supreme Court case that deals with this -- so all of the labor exemption cases in the Supreme Court, whether it's

Jewel Tea or whether it's Pennington, or whether it's Connell, all those cases treat them as agreements. In other words, there's never any question that they are in agreement with respect to that.

And Your Honor, the question then becomes what kind of agreement it is. And what we've alleged -- and this is important too -- this is really an easy issue because we haven't just alleged this per se. We will alternatively allege it's a rule of reason violation.

So all we have -- Your Honor does not have to rule today whether it's per se or it's rule of reason. All you have to do is rule that we've stated a claim.

And we've stated a claim both ways: Under the per se offer group boycott, we've cited that many cases holding -- and I think the one that's actually quite interesting and analogous is the -- there are two types. One is the Klor's case in the Supreme Court because that was an appliance store, if you will -- okay? -- who went to its competing appliance customers through people who gave them the products, like GE, Westinghouse, other appliance companies, and got them to agree not to do business with another appliance store.

So it's what we call a hub and spokes conspiracy. The hub was Klor's and the spokes were the various appliance companies who compete with each other.

Here we have -- the WGA in effect is the hub, and what they do is they get all of the spokes, which is all their members, together to agree not to do business with someone in order to accomplish something.

The other cases I point out is the St. -- give you an exact title in a second, Your Honor. I'm sorry. One second -- the St. Paul Fire Marine Insurance case in the Supreme Court a 1978. The reason that's important, that was a boycott to try to force someone to accept terms of a contract that they didn't want to accept. And that was held to be a per se unlawful boycott. That's exactly what we have here.

Another one to go in the entertainment industry, there's an old Supreme Court case which is still good law we cited called First National Pictures, the Supreme Court, which again was a boycott to enforce customers, if you will, people you are doing business with to accept terms in a contract that they didn't want to accept.

So you put those cases together and I believe we have we are directly in the per se rule. And Your Honor cited PowerTV Media, which is -- puts all this law together.

But even if we weren't, if this was rule of reason, we have pled market power, we've -- in the labor market, we have pled the anticompetitive effects that this is a resource necessary for us to even exist and compete.

Look at our content affiliates -- the content affiliates would be driven out of business if this boycott succeeds -- that we clearly fall under the type of rule of reason requirements.

But most importantly -- and I'm going here to Your Honor's tentative -- as you pointed out, there's no plausible pro-competitive effect alleged. In all the cases that they try to rely upon which is a legitimate standard setting group or something like that, they have some plausible pro-competitive effect.

Here, even if you accept their claim that this is to benefit their writers, that's not a pro-competitive effect. A pro-competitive effect has to be to do something to enhance competition. And there's nothing that they have identified -- and more importantly we've alleged, as Your Honor points out, that this is in effect -- their purpose is to gain power and restrain trade in the product market, which is the opposite of a pro-competitive effect.

So at a minimum, again, I'm not asking Your Honor to rule liability, just say we stated a claim, as you have, and we move on.

THE COURT: If I could, I wanted to shift into the LMRA.

MR. KESSLER: That is clearly not my --

THE COURT: That's not? Okay.

MR. KESSLER: Thank you.

THE COURT: Thank you.

And I'm sorry. Just please state your name for the record because there's a lot of names, and I just want to make sure I know who's talking.

MR. LEVIN: Good morning, Your Honor. Adam Levin of Mitchell Silberberg & Knupp, counsel for UTA.

THE COURT: Okay. Great. All right. So here are the questions I have on that point. All right.

For purposes of this -- the 303 claim, can the Court really consider showrunners to be these neutral third parties?

MR. LEVIN: Your Honor, we believe that the Court can. The Guild has argued that, as a matter of law, independent contractors like the showrunners, who are members of a union, are primaries to a labor dispute. But as the Ninth Circuit held in Harrah's and as the National Labor Relations Board held in Tennessee Glass, that is not the law. The --

THE COURT: Even though the showrunners are subject to this Code of Conduct?

MR. LEVIN: Well, Your Honor, the showrunners are subject to the Code of Conduct, which is the exact problem. The showrunners are independent contractors. In many instances, they have their own employees that are writers.

In instances, they do nothing but producing services.

The Writers Guild is not responsible for negotiating the terms and conditions of employment for producers. And, as a result, they are neutrals to the dispute.

And there are many facts that need to be developed on that point, and we're not standing before the Court right now asking for summary judgment. We're simply saying that we have pled sufficient facts to demonstrate that those showrunners, as well as other independent contractors and employers that the Guild pressured, are neutrals; and, as a result, the Guild's pressure violated Section 8(b)(4) and 303.

THE COURT: And let me ask you, what other third parties do you believe were purportedly threatened or coerced by the Guild?

MR. LEVIN: Well, a variety of independent contractors, Your Honor. There would be those independent contractors that have their own businesses. They develop scripts. They write scripts on spec. They are sometimes engaged by studios solely as producers. All of those sorts of folks have been pressured by the Guild to terminate their agents, in violation of Section 8(b)(4).

THE COURT: What threats or coercive behavior do you believe is alleged against the unlicensed managers and

lawyers? I know we talked about this a little bit.

MR. LEVIN: So in terms of the unlicensed managers and lawyers, Your Honor, we're not really relying upon that for our 8(b)(4) claim. We're alleging three theories for our 8(b)(4) claim.

One is that there's been pressure put on these independent contractors who, again, in many cases are themselves employers;

Second of all, that the Guild put pressure on its members vis-à-vis terminating or ceasing services for producers in order to impact on the dispute with the agents. And so those are the two principal theories.

There's also a third theory, Your Honor, that the Guild has put pressure on the agencies vis-à-vis the relationship with certain affiliated production companies like Civic Center and WiiP.

THE COURT: Just bear with me one moment, please.

I think those are all the questions that I had for the plaintiffs.

If we could, let's shift to the defendants. And then, after I'm done with my questions, if there are other issues that either side wishes to raise that hasn't been covered, I'll allow some time for that.

So who's drawn the short straw for the defendant?

Ms. Leyton.

MS. LEYTON: That would be myself, Your Honor. Stacey Leyton.

THE COURT: Okay. So I mean, I think you'll get a sense of -- I'm going to ask you some of the similar questions. So purposes of this statutory labor exemption -- so what is this economic interrelationship that exists from your standpoint between these showrunners and the Guild members and the writers when the showrunners are seeking employment as producers only?

MS. LEYTON: Your Honor, the Code of Conduct does not cover showrunners when they're acting only in a producer capacity. That is absolutely clear from the terms of the Code of Conduct. The only contrary allegations that the agencies make are based on frequently asked questions, answers that the Guild put out where certain statements are taken out of context.

In the example that Mr. Kessler gave, Dick Wolf, if he's acting as a producer only on the "Law and Order" shows, he is not subject to Working Rule 23 with respect to those shows and does not have to follow the Code of Conduct. He can be represented by an unfranchised agent.

THE COURT: In that scenario, the showrunners who act only as producers, are they really in job or wage competition with writers according to the allegations in this Complaint?

MS. LEYTON: They are not in competition when they're only acting as producers. The hyphenate status in Hollywood is a very common status. People will work as writer/producers, as producer/directors.

And the Collective Bargaining Agreement covers showrunners only when they are working as writers/producers or writers/directors.

If they are only working as producers, they are not covered by the Code of Conduct, and the frequently asked questions make that clear. I'd like to actually point to a couple of provisions just to make that clear.

THE COURT: All right.

MS. LEYTON: The Code of Conduct is attached as Exhibit A to the agency's Complaint. The preamble to the Code of Conduct says --

(Reading:) This Code of Conduct has been established by the Guild to regulate the conduct of talent agents in the representation of writers with respect to the option and sale of literary material or the rendition of writing services in a field of work covered by a WGA Collective Bargaining Agreement.

The Collective Bargaining Agreement, as Your Honor's tentative ruling correctly pointed out, only covers individuals when they are acting in a writing

capacity -- maybe writing and something else but a writing capacity.

And then Section 1, purpose and scope of the regulation, says something similar and then says --

(Reading:) The provisions of the Code shall not apply to the agent's representation of a writer with respect to the writer's nonwriting services or other services not covered by the Guild CBA.

So the Code itself makes very clear that, if you are working as a producer only, you are not subject to the Code.

I'd also like to turn to -- you know, Mr. Kessler cited a number of paragraphs of the Complaint that supposedly allege that the Guild is attempting to apply the Code to showrunners when they are working only as producers, but that is not actually the case. And if one actually looks at the frequently asked questions that they relied on, that is clear.

There are two FAQ documents that are attached as exhibits to the agency's Complaint. The first is Exhibit E and -- Exhibit E; so it's Docket 42-5.

The agencies quote that in their Complaint, but that is specifically responding to a question about writers/producers. It's not responding to a question about

people who are only working as producers.

The question says that, if you're a writer/producer -- I'm a writer/producer. An agency is saying that they can keep representing me just only as a producer. And the answer is that, when you're working as a writer/producer, those functions are inextricably linked and deemed to be covered under the MBA, which is actually very clear in the MBA, which is the Collective Bargaining Agreement with the studios.

Later in the same document, there's a question about what does it mean if a writer is represented for another area of work not covered by the Guild? And the answer is that we encourage you to use a franchised agent, but we can't require you to do so.

I think that distinction is even clearer in another FAQ that the agencies attached to their Complaint, and that's Exhibit K, which is the 42-11. And if Your Honor were to turn to page 3 -- and I'll actually just quote here.

The question is "Can an unfranchised agency represent me as a producer?"

The answer is "The employment of TV writers/producers is specifically covered in the MBA." And then the answer goes on to explain that, with respect to those hyphenate services, the Code of Conduct applies.

But then in the same answer, the FAQ says --

(Reading:) The working rule doesn't cover other producing. Of course, anything additional a member is willing to do to support the goal of eliminating agency conflicts of interest will help the campaign, and many producers who are Guild members have gone above and beyond the working rule obligations.

The Guild has not required any members simply by virtue of their membership to follow Working Rule 23 and the Code of Conduct except when they're acting in a writing capacity.

THE COURT: Except when they're -- okay. All right. So then tell me -- I'm curious as to your views that this combination -- okay? -- is it different than Carroll with the orchestra leaders and the musicians? And if so, tell me why you think they're different.

MS. LEYTON: No, Your Honor. It's exactly on all fours with Carroll. And what Carroll makes clear is that, as long as the person is performing some job duties that make them in competition with the individuals who are indisputably employees -- here people who are working only as writers -- that is sufficient. It doesn't matter if they're independent contractors.

In Carroll, the band leaders were independent

contractors. It doesn't matter if they hire other employees like showrunners may sometimes do.

In Carroll, the band leaders -- and they were also booking agents -- they hired the other band members, and they had their own offices and their own employees to book jobs.

The Carroll Court didn't ask "Well, what's predominant? Are they mainly booking agents and band leaders, or are they mainly performers?"

The Court said they sometimes perform. And because they sometimes perform, they are sometimes in job competition with band members. And that's exactly true here. So --

THE COURT: But don't the plaintiffs here allege that, when showrunners act as producers only, they don't displace the writers? They're responsible for hiring these writers along with other staff. Isn't that different than Carroll?

MS. LEYTON: Your Honor, if a showrunner were only acting as a producer -- presuming -- I don't know if what Mr. Kessler said about what Dick Wolf is true. But if that were true and Mr. Wolf is only acting as a producer, then he is not in competition with the writers, but he's not covered by the code. He can have an agent represent him as a producer only as a showrunner. Even if he's a Guild member,

even if he writes for some other show and is represented by the Guild for some other purpose, when he's making a deal for his work as a producer only, he is not subject to the Code and not subject to Working Rule 23.

THE COURT: Okay. The next question I have is can this Court conclude that this stated desire -- okay? -- it's out there -- to conquer or grab power is a legitimate union objective?

Look, I get, you know, every union, when you're in this dispute, it is about power ultimately. But aren't really the legitimate union objectives tied more with benefiting the workers rather than -- you know, when you use words "conquer" or "grab power," one might argue it's harming another entity.

MS. LEYTON: Your Honor, I would point to the language about the power grab and about conquering other agency -- other -- and conquering others comes from a specific speech that was given by the Guild president, David Goodman. That speech is incorporated into the Complaint because it's referred to and quoted, and we've attached it to a declaration that we submitted. So it's Docket 43-2.

And if you look at that speech, it's actually very clear what Mr. Goodman is referring to. The speech begins with five pages discussing what the problem is that the

Guild is addressing.

The problem is agents have conflicts of interest, agents are enriching themselves, and writer compensation is stagnating because the agents do not have an interest in maximizing writer compensation.

Then the speech proceeds with a page and a half on the solution -- the Code of Conduct to eliminate conflicts of interest. And this is a Code that is very similar to codes that are used in the entertainment industry and in the sports industry throughout.

And then in the conclusion, Mr. Goodman says, "I've asked myself is the Guild making a power grab?" And I think that the answer is, yes, we are making a power grab, a necessary, proper, and fair power grab. As the agencies have taken up collective power and used it to maximize their power and income, we have to take our power back and make sure it is used to maximize our incomes.

So it is absolutely clear that what Mr. Goodman was talking about was a grab of power and conquering the agencies that would not agree to get rid of their conflicts of interest in order to maximize writer income, which is absolutely the central function of a union.

THE COURT: All right. Shifting to the nonstatutory exemption, if I could, for a moment. You know, you're asking the Court to adopt this totality of the

circumstances approach.

I'm just curious, and maybe I missed this. What's the case law that you submit supports the position that these prohibitions on packaging are, in essence, an extensively regulated and accepted practice in labor negotiations?

MS. LEYTON: Your Honor, it's not the regulation of packaging. Just to correct one thing -- and this was actually something in the tentative ruling as well. When the agencies -- when Mr. Kessler, at the end of his responses to your questions, pointed to the allegations of the Complaint that supposedly show that this is to interfere with other markets, those allegations are all about the practice of packaging, bringing together talent and presenting that to a studio. That is not prohibited in any way by the Code, the practice of bringing together talent and getting it to a studio.

What is prohibited -- the Code prohibits packaging fees. An agent can do that, but an agent can't be compensated for representing a writer on a deal by receiving packaging fees from a studio.

That's actually very similar to the Codes of Conduct in sports where agents can't get money from a team or can't get money from the league because that presents a conflict of interest. And it's targeting that conflict of

interest that is a very traditional union function.

We have two Supreme Court cases about this. We have the Collins decision upholding the use of conflict of interest code in the sports industry. And, notably, the agencies do not even cite the Collins decision.

And actually what the union is doing here in fact is really prohibiting agents who are exercising the delegated authority of the union from doing things that if the union did it would be illegal.

If the union were to accept money from a studio, that would violate 302 because the union would be accepting a thing of value from an employer.

If a union invested in an employer, that would violate its duty of fair representation and would probably be employer domination because the union would have an interest in the employer's success. So the union can't do that.

The union is saying that we don't want those who we are delegating our authority to to do those practices either because they present inherent conflicts of interest.

THE COURT: Okay. And I'd like to hear your views, again, looking at this totality of the circumstances approach.

Do the facts as alleged, do they really show that the Guild's packaging -- well, I guess you're saying the

fees. I guess the -- not packaging prohibition necessarily but the fees, that it primarily affects the labor market as opposed to the business market?

MS. LEYTON: Your Honor, under the Bodine Produce case, which is a Ninth Circuit decision, the effects are not enough to disqualify a combination from the nonstatutory exemption.

What matters is is the combination intended to affect the other market, and does it restrict the parties' dealings with respect to other independent actors?

Here, there's no real allegation that the purpose of this was for the Guild to gain some -- was to gain some advantage for itself. There's no allegation that the Guild was trying to promote certain agencies over others.

The terms of the Code are equally available to everyone. And so there's no real allegation that the Code or the implementation of the Code was designed to drive others out of the market.

In terms of the allegation that this will affect actors and directors, again, this does go back to the point that the Code of Conduct does not ban packaging itself. It only bans packaging fees.

The agencies in their Complaint, they cite frequently -- another frequently asked questions document about whether this will affect actors and directors. But in

that FAQ, there was a question a -- the question was, you know, I'm hearing that agencies are still going to package, they're just going to do it with directors and actors, they're going to make this irrelevant.

And the Guild's answer was not they can't to that. The Guild's answer was, we think that's unlikely. And the reason that's unlikely is because writers are the ones who are adding value to those deals, to those packages, and so the Writers Guild did not think that was likely.

And the mere fact that writers are what the agents are being paid for by that packaging fee can't itself mean that the writers can't take action because they're the ones bringing the value to this deal.

THE COURT: Okay. I want to shift, if I could, to deal with the Sherman Act issue.

MS. LEYTON: That would be Mr. Litwin. I will cover the LMRA if Your Honor -- when Your Honor gets to that issue.

THE COURT: Is it Mr. Litwin?

MR. LITWIN: It is, Your Honor.

THE COURT: Mr. Litwin. All right.

So I think I got this right, that you seem to argue that the Code of Conduct is a quality control standard. Haven't the plaintiffs alleged that this Code was adopted as predatory device to injure the plaintiffs?

MR. LITWIN: Your Honor, let me refer to two cases on this. The first case I'd like to talk about is the Adaptive Power Solutions case from the Ninth Circuit, and this case is right on point here.

It's -- and it's also important to note that this is a monopsony case. We're talking about a situation where sellers of representational services are seeking to enforce the antitrust laws.

And what the Seventh Circuit said is, when you have sellers trying to enforce the antitrust laws and consumers are silent, the Court needs to be very careful in analyzing those claims.

And what Adaptive Power Solutions was about, it was about a dispute in the defense industry. The plaintiff, APS, was one of two suppliers of the A3 power supply to the defense industry. There were only two suppliers of this power supply, and there were only two buyers -- Raytheon and Hughes.

And APS tried to raise prices to Raytheon; Raytheon rejected it. And to make matters worse, they went to Hughes, and they said, "You don't deal with them either," and they agreed.

And as a result, APS was driven out of the market. And because of that, the defendant's actions in the case actually produced a monopoly position on the supplier side.

By any definition, Raytheon and Hughes had boycotted APS. They refused to deal with them. But as the Supreme Court said in National Wholesalers, not all concerted refusals to deal are really anticompetitive, and the Ninth Circuit dismissed the antitrust claim.

And the reason they did it is they said it just doesn't make any economic sense. APS, like the agencies do here, say that the conspiracy harmed competition in the product market, the market for these A3 power sources.

But APS had not alleged -- and this is the Ninth Circuit's own words -- that the defendants had done anything other than boycott APS to punish APS for trying to raise prices. That's just not an antitrust concern.

This is a quote from the decision:

(Reading:) The evidence is uncontroverted that this did not injure competition even if we accept APS's contention that there was only one A3 manufacturer supplying A3s. The harms to competition that APS had alleged to create a monopolous supplier for themselves was something that was against the economic interests of the defendants to do.

And that's the same thing here. And that's why the DM Research case out of the First Circuit is so

appropriate. It just happens to be a certification body for Pathology Laboratories that was at issue there, but it's not really a standard setting organization.

In that case, an association of laboratories agreed with a certification company that the member labs, in order to be certified, had to in effect produce their own purified water in-house and they couldn't buy reagent waters from third parties like they were doing. DM Research was one of those third parties. And as a result of the adoption of that guideline, DM Research and all of the suppliers of reagent water were excluded from the market.

Again, we're talking about a monopsony case, a very rare type of antitrust case. And, you know, like the agencies here, they say "Hey, we've been excluded from the market. We've got an antitrust claim."

But in ruling on the motion to dismiss -- so this was a Rule 12 motion -- the Court assumed that DM Research could prove that this guideline about purification of water was unnecessary -- they didn't need to do it -- and that the labs were coerced into following it because they needed the certification. And, of course, all the suppliers were excluded. That's exactly what we have here.

But the Court dismissed the antitrust claim because an organization's quality control standards, when used as part of a certification process, are not

anticompetitive even if the substance is disputable.

That's exactly what we have here. This Court should dismiss the agencies' antitrust claims which challenge the Guild certification standards even though the agents dispute their necessity.

And if you look at the First Circuit's reasoning -- I'm just going to quote this one paragraph. It's at 170 F.3d at 56.

(Reading:) But no antitrust lawyer could help but ask almost immediately why the defendants would conspire since it was highly implausible to suppose that the defendants and their members had any reason to agree to adopt a faulty standard whose main effect would be to raise the costs for the member laboratories that found it cheaper to buy bottled reagent water rather than make it on-site.

That's what the agencies have alleged here. They say, "Hey, these packaging practices -- these affiliated production companies provide great benefits, and you're eliminating them." That is exactly the same case, and that's why they haven't stated a valid antitrust claim.

THE COURT: Okay. All right. That was the only question I had with respect to the Sherman Act.

If I could, I want to I want to shift back to the

LMRA claim.

So, Ms. Leyton, if you wouldn't mind.

MS. LEYTON: Yes, Your Honor.

THE COURT: So I keep coming back to these showrunners. Okay? You know, why doesn't the showrunners' capacity as independent contractors and producers not subject them -- not subject to the MBA make them neutral parties for the purposes of the 303 claim?

MS. LEYTON: To begin, we know that simply the fact that they are independent contractors, that does not mean that they are secondary parties as opposed to primary parties. And we know that from the Chipman decision in the Ninth Circuit.

You look at who the dispute between. Here the dispute is between the agencies and the writers. The writers include people who are writers/producers, who are showrunners if they are performing writing services. If the showrunners are not performing writing services, then they are not covered by the Code of Conduct.

And I would actually -- I think that the Harris case and the Tennessee Glass case are very useful here. Your Honor cited the Tennessee Glass case in the tentative ruling.

In both of those decisions, there were union members in operating in dual capacities but for -- in

separate contexts.

So in Tennessee Glass, sometimes the guy worked as an employee for some employers and other times he worked as an independent contractor for a different entity and specifically for Tennessee Glass.

The union was trying to make that individual comply with its boycott, essentially, with respect to Tennessee Glass, but that persons only relationship to Tennessee Glass was that he was an independent contractor who wasn't affected by the disputed issue because the disputed issue was only over employment terms. It wasn't over the terms as independent contractors.

So in Tennessee Glass, that individual had no stake whatsoever in the resolution of the controversy. He was being compelled only because he was a union member.

That would be analogous here. Say Dick Wolf wrote for a show and so he was a member of the Writers Guild in that capacity. But then on "Law and Order," he was only acting as a producer.

If the Guild were to try to force him to comply with the Code of Conduct and institute membership discipline against him only with respect to his representation on "Law and Order," that might be more analogous to Tennessee Glass.

But the union is not doing that. The union is only saying that, when he is acting in some way as a

writer -- if it's writer/produce, writer/director, writer/actor, he has to comply with the Code of Conduct. And in that context, he is absolutely a primary party.

Harris and Tennessee Glass do not apply because he's not an disinterested person. He's the one that directly has an interest at sake.

THE COURT: So anyone covered by the Code of Conduct or the MBA, in your view -- just I want to make sure I'm clear on this -- could they never be a neutral party?

MS. LEYTON: That is not our position, and this Court does not need to go that far, Your Honor, because you can be a neutral party with respect to some disputes and a nonneutral with respect to others.

That was what the case was in Tennessee Glass. If they had been -- if he had had an employment relationship, even though he was an independent contractor on the side but he had an employment relationship with Tennessee Glass, the union could have compelled him to participate in their boycott of Tennessee Glass. Here we're only covering writers when they're acting as writers.

THE COURT: Okay. And then so why wouldn't the other talent agencies -- okay? -- who have agreed to this Code of Conduct be neutral third parties for purposes of Section 303? Because it seems to me that -- are they really parties to this dispute if they didn't have any role in the

Code or anything like that?

MS. LEYTON: I'm sorry, Your Honor. The agencies who have signed the Code of Conduct? Is that the question?

THE COURT: Who have agreed to the Code of Conduct, yes.

MS. LEYTON: There's no allegation that there is a -- that there is any secondary activity against agencies who have signed the Code of Conduct.

The only allegations are agencies that haven't signed the Code of Conduct, and that's who the Writers Guild dispute is absolutely with.

THE COURT: Okay.

MS. LEYTON: And then the agencies and the showrunners.

THE COURT: Okay. Great. All right. I think those are all the questions that I had. We've been at this for almost an hour.

While you're at the lectern, Ms. Leyton, are there any other points that you wish to make? Again, I've got other cases that I have to deal with so -- and I want to give you time. But I mean, I've really taken a lot of time and effort in this case and tried to ask the questions that I was struggling with, and both sides have been very helpful.

So if you need a few more minutes to cover any

points that we haven't discussed, I'll give you that opportunity now.

MS. LEYTON: I appreciate that, Your Honor, and I will try to be brief.

One point I would like to make is I would just like to go back to the pleading standard because the agencies are grossly overstating what they have plausibly alleged. Under Iqbal and Twombly, they can't just make conclusory allegations like there has been a combination with managers and lawyers or the Guild is applying this to people who are only acting as producers. They have to plead specific facts that nudge their allegations from the possible into the plausible.

And in the Ninth Circuit's application of the Iqbal-Twombly test, it is also clear that, when there are two explanations for a possible fact, one which would make a defendant liable and the other that would not, they have to plead facts that would tend to exclude the explanation that would render the defendant innocent of any wrongdoing.

And that's in cases like in re Century, which is 729 F.3d at 1108. And the agencies have not done that here even with respect to their allegations about showrunners who don't write or with respect to their allegations about managers and lawyers.

I'd also like to point out just very briefly, with

respect to managers and lawyers, even if this Court did conclude that the agencies had plausibly alleged an actual combination in their Complaint, the only allegation is that the Guild is combining with them so that they can replace the agents in their role.

And we know H.A. Artists that, if they're acting as agents, they're acting as a labor party. And so that would not disqualify the Guild from the statutory exemption. In H.A. Artists and in Carroll, the people who are arranging the work, who are functioning in the role that the union would ordinarily function in are absolutely labor parties. So even if there were a combination alleged, that would be sufficient.

Your Honor's tentative ruling also discussed the fact that this practice has occurred for 40 years. And I would just like to point out there that the Guild did challenge the practice of excessive packaging fees in 1976. That's what the Adams case was about.

Eventually a compromise was reached in the AMBA, but the Guild did not endorse packaging in that AMBA. The Guild did not prohibit packaging in the AMBA and imposed certain conditions.

But if Your Honor takes a look at Exhibit C at page 8, there the parties reserved their positions on packaging, and the Guild reserved its position that it had

the right to restrict packaging --

THE COURT: Back in 1976.

MS. LEYTON: This was back in 1976. The union has the absolute right --

THE COURT: That's a long time to reserve, 40-some-odd years.

MS. LEYTON: That's a long time to reserve. The packaging and the effect of packaging fees, now that we're in the second golden age of television, has gotten worse and worse for writers.

And the agent -- the union has every right to decide enough is enough, we have not been able to raise writer compensation because of these practices, and we are now going to stop this practice.

And all of the sports unions' Code of Conduct, at one point they didn't exist and the agents ran roughshod over the players, and then at some point the unions decided we're going to adopt the Code of Conduct, we're going to go to the employers and get this put in the Collective Bargaining Agreement. So there's no reason that the union cannot do that here.

I'd also just like to point out one point in response to Mr. Kessler's argument about Jewel Tea. I think that case does not stand for the proposition that the union has to show that the least restrictive means would apply.

In that case, the Supreme Court looked at the -- it was a butcher's union that restricted the hours of operation of meat markets, including meat markets that had prepackaged meats.

And the Court was looking to whether the union had an explanation for why it had done that, or if the union was really just trying to favor some employers over others, if the union's intent was to interfere with the market there.

And there, because the union had plausibly said that somebody's got to be there to help the customer, whether it's a butcher or somebody who's displacing a butcher, that's enough, and so the Court accepted that.

Here we have no allegation of an improper purpose like H.A. Artists where the Court deemed that it was a money grab, the fees -- the union gave no explanation. And in both Carroll and H.A. Artists, the phrasing of the way that the Court looks at the union's interest is does the union explain what its legitimate interest is here? There's not a strict scrutiny or intermediate scrutiny-type explanation.

So I don't know if Mr. Litwin has anything else that he needs to address, but I would just like to conclude and urge this Court not to be the first Court to hold that a union is constrained when it delegates its representational authority in terms of the conflict of interest prohibitions that it can adopt and to uphold this and to hold that the

statutory labor exemption absolutely applies.

THE COURT: All right. Thank you, Counsel.

Mr. Litwin.

MR. LITWIN: Thank you, Your Honor. I will be very brief.

In your tentative ruling, Your Honor, you cite the Paladin Associates case, and it's a great quote. What the quote is is that it's "... per se illegal for firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle."

What that means, Your Honor, and many cases in the joint boycott -- group boycott area have made this point is that the boycott has to be designed to favor one set of competitors over another.

There's no discrimination among competitors here. The Guild, as the agencies concede, have not only offered the same terms to all agencies, they have committed to providing all agencies with the best terms agreed to by any agency.

This is decidedly not the Klor's case that Mr. Kessler referred to. He recited the facts correctly, Your Honor. I'm not going to repeat them here. But in the Klor's case, the antitrust violation lied in the act of a large chain of department stores excluding a smaller

appliance competitor from the market by coercing suppliers not to deal with their smaller competitor.

That's what Paladin Associate's saying. They denied Klor's the relationship that it needed to compete with Broadway-Hale, the department store chain.

Here the agencies made a calculated business decision to reject the very same deal that dozens of their competitors had accepted. Any injuries that the agencies have suffered here arises from their business decision to prioritize their conflicted representations on packaging deals and affiliated productions over signing the Code of Conduct.

As the Court says on page 15, the agencies have plausibly alleged a reduction in competition in the sale of representational services, but agents don't buy representational services. Writers do.

The agencies argue in their briefs that competition's been armed because a significant number of agents have been excluded from the market and this has, quote, deprived writers of the option to work with the agents of their choice.

But the agencies' injuries don't arise from the fact that the remaining agents enjoy a greater degree of market power, nor from the fact that writers can't work with the agent of their choice. That's the issue that was in the

Ninth Circuit's decision in Adaptive Power. The agencies cannot claim an antitrust injury based on harms to competition that affect others.

Thank you.

THE COURT: All right. Thank you.

Mr. Kessler, do you wish to respond.

MR. KESSLER: Your Honor, very --

THE COURT: Mr. Kendall, do you want to justify your existence here today? Is that --

MR. KENDALL: I did have hopes to do so, Your Honor?

THE COURT: All right.

Well, Mr. Kessler and then Mr. Kendall.

MR. KESSLER: Your Honor, I'm going to be very respectful of the Court's time. Very briefly, to start from the end first. Okay.

The case that's on point is St. Paul Fire Marine Insurance in the Supreme Court 1978 when a group of companies get together and boycott customers to accept terms that is a per se unlawful boycott that creates antitrust injury.

Here -- and Your Honor asked this question, but counsel didn't answer it -- we have alleged facts that the purpose and effect here was to coerce us to accept the Code of Conduct terms which we did not want to accept, which

restrained competition.

He's right. It's called the monopsony side. They have the power of the labor because we have to -- we are the agents who represent that labor. They took away all of that business. That is a classic direct antitrust violation, and in any event, it's just an issue of fact.

And when Your Honor said, "Haven't we alleged that the purpose -- that there's no legitimate objective and here are all these anticompetitive purposes?" he never answered the question. And Your Honor knows the answer is we have alleged it, and it's a fact issue whether he denies it or not.

Moving on to the labor exemption issues. All of counsel's argument raised fact issues. That's all they do. Okay? They're all fact issues, and I'll give you a perfect example.

So counsel's first big point was, well, the Code of Conduct doesn't apply if you're just being a producer. But we specifically allege in 59 that, regarding the boycott -- okay? -- citing their own FAQ, which they now say, well, maybe we didn't write it so well. What it said is what if I'm a TV writer/producer? Some unsigned agencies have been telling clients they can still represent them as producers. Answer, this isn't true.

Mr. Wolf, by the way, they said they haven't

coerced him. Well, whether they coerced him are not, he thinks they have because he fired his agent. Okay?

And the point here is whether or not they're going to punish him or not or punish someone else is not the point. The point is we have alleged facts. We have alleged clearly facts that they are -- have in their boycott, and they even said we encourage you if you want to do it. That's enough to create a conspiracy. You don't have to punish somebody to be there.

They have, in our allegations, showrunners who are just producers, who are not writing at all, who are in this boycott, and they have others who are primarily hiring other writers. As Your Honor said, and at a minimum, we've raised issues of fact.

They cite the Carroll case. The Carroll case was after a trial. There was a full factual finding. That is not applicable in terms of this.

Now, finally, Your Honor -- because I really do want to be brief. There's two more things. The Collins case, because they say we don't mention it, we didn't mention it in our brief. Why? Because it has nothing to do with this dispute.

Collins was a case where a single agent was not certified and challenged the right to have any certification system at all. He was not certified because he was accused

of committing fraud against the people he represented. Okay? What does that have to do with this?

There was no instance of the NBA Players Association regulating the commercial market for some practice, going in and -- by the way, they say they're not stopping all packaging.

We allege that this will end packaging. That's our allegation. It will do that, and we allege that the power grab is to destroy packaging. They could dispute it, but that's just a disputed fact.

The elimination of the content affiliates -- there's nothing like that in the Collins case. So if this was a case where a single agent had been robbing his client and lost that certification, believe me, none of these agencies would be here, and they would have fired that agent. That's not what this is about.

This is about a union going into product markets, and they're not entitled to any single exemption about that.

And I would say it's interesting to hear the argument that Jewel Tea didn't create a less restrictive alternative standard because every other lower court authority thinks that it has. And as does the Areeda treatise with Mr. Hovenkamp that's been cited to Your Honor.

So, Your Honor, again, I'm very respectful of your time. Unless you have any other question for me, I think

it's very clear this is a fact issue.

Oh, one more point. Counsel -- it's always one more.

THE COURT: Be brief. Okay?

MR. KESSLER: Oh, very brief.

Counsel ended by saying don't be the first Court to rule that the labor union is not entitled to this exemption. Obviously, Your Honor, there have been many Courts who have ruled that.

But putting that aside, all we're asking for you to rule is let the case go forward. Someone else will decide whether or not the labor exemption applies, probably a jury. So, Your Honor -- so with all due respect to counsel, that's not even an issue on this motion.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Kendall.

MR. KENDALL: Very brief, Your Honor.

Ms. Leyton makes the point that the Code of Conduct doesn't apply to a showrunner who acts only as a producer. But that, first of all, is not the issue here. The issue is whether the boycott coerces a showrunner.

Secondly, it's not -- this is a factual question that's going to have to be developed during the course of discovery and at trial. The Carroll case was decided -- on

which they rely was decided after a trial on a full factual record.

A showrunner, Your Honor, is like the United States Attorney. Writers are like the AUSAs. They are not interchangeable. One could say that the U.S. Attorney, because he's a lawyer, is interchangeable with a writer if the United States Attorney writes a brief, but that's the tail wagging the dog of the United States Attorney's job because the United States Attorney has many, many other functions -- he hires, he fires. He's the -- he or she is the definition of management. And that's the distinction here.

At the end of the day, we're going to have, if we need to, a trial in which the factual record on the effect on showrunners who are providing almost entirely producing services. A showrunner may not know going in whether some writing would be required, yet he cannot use an agent who hasn't signed.

It isn't the showrunners who are fired here. It is the agents. The showrunners can't use their agents now because they are in a position of being coerced not to do so by the union on pain of discipline. That's the situation.

THE COURT: Tell me -- walk me through why you believe they are being coerced into doing so.

MR. KENDALL: Because if they defy the union and

hire my client, CAA, and they are found to have engaged in any writing services during the course of the engagement, they're subject to union discipline. They could be thrown out of the union. That would have a consequence that they could never write again.

THE COURT: Okay. All right. Thank you.

MR. KENDALL: And then I won't say much about Adaptive Power. Mr. Litwin went through all of the facts or most of them.

What I would point out is that was a rule of reason analysis because Judge Hupp in that case had found no per se violation. That analysis does not apply to what we have here because this is clearly a per se violation if it is not saved by the exemption.

Thank you, Your Honor.

THE COURT: Thank you.

Ms. Leyton, you're chomping at the bit. All right. And so two minutes just because I have another case and a lengthy afternoon calendar.

MS. LEYTON: I understand, Your Honor.

Just first I would like to respond to the latter point about a writer, somebody maybe not knowing if they're going to be engaging in writing services.

The MBA of the Collective Bargaining Agreement with the studios has very detailed provisions about when

someone is deemed to be acting as a writer because it has a whole host of implications for benefits, for wages, for everything else.

We didn't submit the entire MBA, but we did include a link to the MBA with the declaration of Mr. Segall. They're provisions 1(a)(11) which explain that bona fide producers are not covered but the people engaging in non-negligible writing services are. If you occasionally do something to cut time or to rewrite doesn't make you covered.

That in turn refers to two other provisions of the Collective Bargaining Agreement, and then there's an entire Article XIV called "Writers also Employed in Additional Capacities." This is a very common status, to be a hyphenate.

And that is what the FAQs were addressing was, when somebody is a hyphenate, when somebody is a writer/producer, can the agency then represent that person only as a producer? And the answer was, they can't do that to evade, they can't do that if you're a writer/producer hyphenate, but they can do it if you are really only acting as a producer.

Mr. Kessler suggested that -- I believe it was Mr. Kessler suggested that, even if the Writers Guild were only encouraging showrunners acting as producers to

participate in the group boycott, that would be an antitrust violation. That would be absolutely be protected by the First Amendment, simply encouraging members to honor the boycott. And we've cited the NLRB v. Servette decision that covers a similar situation of merely attempting to persuade.

And I would just like to conclude by saying the agencies keep falling back on the argument that these are fact questions. Just because something relates to facts doesn't mean that it's been plausibly alleged.

The Ninth Circuit has held that you have to allege when, where, how. They have to be specific enough to nudge the possible into the plausible, and they can't be conclusory. So that by itself does not get them past a motion to dismiss.

THE COURT: All right. Well, thank you,counsel, on both sides. I appreciate the arguments. I'm going to take this under submission to kind of go through the cases again, go over the argument. It's not likely I'll issue an order on this case. I start another trial next week. So it may not be until the end of next week, if not the following week.

So the matter will remain under submission until the Court issues its final order.

Please leave the tentatives here in the courtroom before you leave. Have a good weekend, everyone. Thank

you.

THE CLERK: All rise. This Court is in recess.

(Proceedings concluded at 11:47 A.M.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: January 29, 2020.

/S/ CHIA MEI JUI

Chia Mei Jui, CSR No. 3287