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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ANDRE BIROTTE, JR., JUDGE PRESIDING

WILLIAM MORRIS ENDEAVOR)
ENTERTAINMENT, LLC ,)
)
)
)
)
)
Plaintiff,)

) No. CV 19-5465

VS.)

WRITERS GUILDS OF AMERICA, WEST, INC.,)
et al.,)
)
)
)
)
Defendants.)

_____)

Reporter's Transcript of Proceedings
MOTION HEARING
Los Angeles, California
TUESDAY, JANUARY 24, 2020

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1 TUESDAY, JANUARY 24, 2020

10:43 A.M.

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3 P R O C E E D I N G S

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5 COURT CLERK: Calling civil case 19-5465. William
6 Morris Endeavor Entertainment, LLC versus Writers Guild of
7 America.

8 Counsel, please state your appearances for
9 the record.

10 **THE COURT:** Why don't we start with the
11 plaintiffs.

12 **MR. SOMERS:** Good morning, Your Honor. Patrick
13 Somers on behalf of CAA, Your Honor.

14 **THE COURT:** All right, good morning.

15 **MR. MARENBERG:** Good morning, Your Honor. Steve
16 Marenberg on behalf of the United Talent Agency.

17 **MR. GREENSPAN:** Good morning, Your Honor. David
18 Greenspan for WME.

19 **THE COURT:** Good morning.

20 **MR. KESSLER:** Good morning, Your Honor. Jeffrey
21 Kessler also on behalf of WME.

22 **THE COURT:** All right, good morning.

23 For the defense.

24 **MS. LEYTON:** Good morning, Your Honor. Stacy
25 Leyton on behalf of defendants and counter claimants.

10:44:28 1 **THE COURT:** Good morning.

10:44:29 2 **MR. BERZON:** Good morning, Your Honor. Stephen

10:44:31 3 Berzon on behalf of WGA and defendants and counter claimants.

10:44:35 4 **THE COURT:** Good morning.

10:44:35 5 **MS. LEE:** Good morning, Your Honor. Rebecca Lee

10:44:38 6 on behalf of the counter claimants.

10:44:42 7 **MR. LITWIN:** Good morning, Your Honor. Ethan

10:44:44 8 Litwin on behalf of defendants and counterclaims.

10:44:49 9 **MR. SEGALL:** Good morning, Your Honor. Anthony

10:44:53 10 Segall on behalf of defendants and counter claimants.

10:44:53 11 **THE COURT:** All right, good morning to you all.

10:44:54 12 We're here on this motion to dismiss the
10:44:56 13 counterclaims.

10:44:58 14 I did not issue a tentative in this case.
10:45:01 15 I've got a number of questions that I wanted to ask, try to
10:45:05 16 get some clarity on some things. Why don't I start with the
10:45:12 17 plaintiffs.

10:45:13 18 Who from the plaintiff has drawing the short
10:45:17 19 straw? Would that be you, Mr. Kessler?

10:45:21 20 **MR. KESSLER:** Well, Your Honor, we have divided it
10:45:22 21 up. So I'm doing the standing arguments of both the
10:45:22 22 antitrust and RICO.

10:45:22 23 **THE COURT:** All right.

10:45:24 24 **MR. KESSLER:** I don't know if want to start there,
10:45:26 25 but we have each of the subjects divided up.

10:45:29 1 **THE COURT:** All right, that's exactly where I want
10:45:31 2 to start with, antitrust and RICO. So, why don't step to the
10:45:31 3 lectern please.

10:45:31 4 **MR. KESSLER:** Very good, Your Honor.

10:45:42 5 **THE COURT:** All right. So, just assume, just for
10:45:46 6 the sake of this discussion, and I'm making this --
10:45:48 7 admittedly, it's a big assumption.

10:45:49 8 But let's assume, okay, that I -- that
10:45:54 9 somehow the guilds don't have standing to bring this
10:45:58 10 antitrust claim, wouldn't the individual writers, though,
10:46:01 11 have standing? I mean, because it strikes me that --

10:46:06 12 Aren't they selling their own talent in the
10:46:09 13 same labor market as the agencies, and then -- and wouldn't
10:46:11 14 they have a claim that there was some sort of -- that these
10:46:15 15 collusive packaging agreements restrained their ability to
10:46:18 16 trade.

10:46:19 17 **MR. KESSLER:** So, Your Honor, we need to break it
10:46:21 18 up for the price-fixing conspiracy and the boycott
10:46:27 19 conspiracy.

10:46:27 20 **THE COURT:** Okay.

10:46:27 21 **MR. KESSLER:** I get to the same place, but the
10:46:29 22 analysis is a little bit different for each one.

10:46:33 23 **THE COURT:** Okay.

10:46:33 24 **MR. KESSLER:** With respect to the alleged
10:46:35 25 price-fixing conspiracy, the market participants are the

10:46:43 1 agents who sell the packages and the studios who purchase the
10:46:48 2 packages.

10:46:49 3 The alleged claim of injury to the individual
10:46:53 4 writers is that the studios will have less resources
10:47:00 5 available because they're overpaying on a package fee, and
10:47:05 6 therefore there will be an indirect effect on the writers in
10:47:10 7 their separate transaction for their compensation.

10:47:16 8 That takes them out of the market under
10:47:20 9 Eagle, which is the case that's directly on point. Your
10:47:24 10 Honor may remember in Eagle there was a Union plaintiff and
10:47:29 11 there were seamen plaintiffs. The seamen are the writers.
10:47:35 12 And the claim there was that the seamen actually were paid a
10:47:45 13 percentage of -- based on the amount of tuna that was sold on
10:47:48 14 the ship that was allegedly being price-fixed. So their
10:47:53 15 compensation was actually indirectly but tied to the very
10:47:57 16 claim of the price-fixing.

10:47:59 17 And the Ninth Circuit said: No, both the
10:48:03 18 Union and the seamen are not the right plaintiffs in this
10:48:09 19 market, because when you do the AGC analysis, they clearly
10:48:13 20 were direct victims. The direct victims here allegedly would
10:48:17 21 be the studios who are fully capable of bringing their won
10:48:22 22 claims, and you don't give standing to the other parties who
10:48:25 23 claim injury because as a matter of antitrust policy, they're
10:48:30 24 just considered to be too remote, it's too complex to divide
10:48:34 25 up the injury between them, it's --

10:48:37 1 You know, there is another doctrine called
10:48:41 2 Illinois Brick about preventing indirect purchases in federal
10:48:45 3 cases for passthrough. All of these are related.

10:48:48 4 And, importantly, Your Honor, this analysis
10:48:52 5 applies not just to the damages claims but to the injunctive
10:48:56 6 relief claims as well because under the Cargill case in the
10:49:02 7 Supreme Court, the very same antitrust injury market
10:49:07 8 participation requirement that applies for the damages
10:49:10 9 portion of their claim would also apply to the injunctive
10:49:15 10 relief portion of their claim.

10:49:16 11 So, I think that takes care of the
10:49:19 12 price-fixing conspiracy analysis, unless Your Honor has more
10:49:22 13 questions on that particular part of it.

10:49:25 14 **THE COURT:** I guess the question I have is:
10:49:26 15 Should the Court perhaps take a more wholistic view?

10:49:32 16 I mean, you're saying that the market should
10:49:34 17 be restricted to just those. I think you said you buy the
10:49:38 18 packages and you sell the packages; but given sort of the
10:49:43 19 relationship here with the talent, shouldn't that market be
10:49:49 20 expanded to include them or --

10:49:51 21 **MR. KESSLER:** So, under their own allegations,
10:49:53 22 Your Honor, these are entirely separate transactions. And,
10:49:58 23 in fact, I would direct your -- Your Honor's attention to
10:50:02 24 paragraphs 270 and 71 of the Complaint and also 333 and 278
10:50:11 25 of the Complaint.

10:50:13 1 In 333, the allegation is that these
10:50:19 2 transactions are so separate -- and I'm now quoting the
10:50:23 3 Complaint: "That virtually no writer had ever seen a
10:50:27 4 packaging agreement."

10:50:29 5 So, in other words, they allege entirely
10:50:32 6 separate transactions, which is what they are, that there is
10:50:35 7 a --

10:50:36 8 **THE COURT:** I'm sorry, you're saying that that
10:50:38 9 paragraph suggests that they allege a separate transaction?
10:50:42 10 I thought they were saying basically they're just kept out of
10:50:45 11 the loop.

10:50:46 12 **MR. KESSLER:** What they're saying, Your Honor, is
10:50:48 13 that there is a sale of a package that is separate -- if
10:50:52 14 you'll look at all these paragraphs -- from their agreement,
10:50:57 15 which they sign as a writer, you know, to perform their
10:51:01 16 services there, and that they don't even see this separate
10:51:06 17 transactions. Not that it's --

10:51:09 18 It's not that they don't see their own deal
10:51:12 19 that they're party to; they are literally not a participant.
10:51:17 20 And you can see this, Your Honor, because the package
10:51:20 21 involves putting together the directors, the actors, you
10:51:24 22 know, others who are there all in this thing.

10:51:27 23 And so, the writers, they're not a party to
10:51:30 24 that sales transaction. They --

10:51:32 25 It's not that they have no relationship to

10:51:35 1 it. They're just like the seamen in the Eagle case. The
10:51:40 2 Eagle case, they had a direct --

10:51:42 3 In fact, the seamen, frankly, had a more
10:51:46 4 direct connection than the writers do here. In that case the
10:51:50 5 claim was, the buyers of tuna from the ship were fixing low
10:51:57 6 prices to purchase the tuna. The Union claimed this was
10:52:01 7 therefore providing less money to the ship, the vessel
10:52:05 8 owners, and this would have two effects: It would create
10:52:09 9 less money available for their members and fewer jobs, and so
10:52:13 10 there would be indirect effects of the Union. And Eagle said
10:52:17 11 that that's not at all within the AGC standing; and, second,
10:52:22 12 with respect to the ship owners, of the seamen, even though
10:52:29 13 their compensation was linked to how much was sold and less
10:52:34 14 was going to be sold, they were out of it.

10:52:37 15 And here is the important point of the Ninth
10:52:39 16 Circuit, just handed out to me by my colleague. They noted
10:52:41 17 that generally -- I'm quoting, Your Honor, from Eagle:
10:52:45 18 "Employees have been denied standing where their injuries
10:52:50 19 were merely derivative of that of the employer."

10:52:56 20 And that's exactly what we have here. If
10:52:58 21 there is a packaging fee overcharge and it's the way they
10:53:01 22 make their claims, it's derivative of the injury to the
10:53:06 23 employer, because they're saying the employer paid too much,
10:53:09 24 and therefore there was less for me. That's derivative.

10:53:14 25 Now, let me be very clear, Your Honor. They

10:53:17 1 have other claims in this case, the employees, about
10:53:20 2 packaging. They claim it's a conflict of interest, they
10:53:23 3 claim it's a breach of fiduciary duty. None of that is
10:53:28 4 linked to this price-fixing allegation.

10:53:30 5 In other words, whether or not the agents
10:53:33 6 overcharged on the price of the package in a conspiracy or
10:53:39 7 whether they completely competed and had separate prices,
10:53:43 8 there would be no linkage to the actual claims of the writers
10:53:49 9 here. The only linkage they claim for the price-fix is
10:53:54 10 *there will be less money available for me.* That's what's in
10:53:57 11 their allegations. That is exactly what the Ninth Circuit
10:54:01 12 has rejected as being sufficient injury.

10:54:05 13 So, on the price-fixing one, I don't think,
10:54:07 14 frankly, it's a close question in this circuit because of
10:54:11 15 Eagle. Although I think AGC, which applies in all circuits,
10:54:16 16 leads to the same conclusion. But Eagle is so squarely on
10:54:20 17 point to this that I don't see how they could have standing
10:54:24 18 individually for that.

10:54:25 19 Would Your Honor like me to move on to the
10:54:27 20 group boycott part of it, because that's --

10:54:27 21 **THE COURT:** To the RICO part?

10:54:29 22 **MR. KESSLER:** Well, no, the group boycott of the
10:54:31 23 antitrust.

10:54:34 24 **THE COURT:** Go ahead.

10:54:35 25 **MR. KESSLER:** Because that's the second element .

10:54:35 1 **THE COURT:** Yes.

10:54:37 2 **MR. KESSLER:** So, the writers' problem with the

10:54:39 3 group boycott claim, this is the claim, Your Honor, that

10:54:45 4 there was a conspiracy by the agents after June 19, 2019, to

10:54:54 5 not individually bargain on a new code of conduct with the

10:54:58 6 Union.

10:54:59 7 Now, that date is extraordinarily

10:55:04 8 significant. They do not allege any conspiracy before June

10:55:08 9 19th. It's only on June 19.

10:55:12 10 Why is that significant for the individual

10:55:14 11 counter claimants? Each of the counter claimants in their

10:55:19 12 allegations fired their agents in April of 2019, because

10:55:27 13 that's in the Complaint in their allegation. That's every

10:55:32 14 single, individual counter-claimant because they were

10:55:35 15 following what we've claimed, and Your Honor knows, we

10:55:39 16 believe was a -- on a lawful group boycott of us.

10:55:40 17 But the point here for standing is that once

10:55:43 18 they've made the decision, there was nothing that we did that

10:55:49 19 required them to fire us as their agents three months before.

10:55:55 20 So, they abandoned us in April.

10:55:58 21 When they allege we engaged in a conspiracy

10:56:01 22 in June, we were no longer representing them. So that

10:56:07 23 anything that they would be claiming can't be connected --

10:56:12 24 And again, the case law is very specific on

10:56:15 25 this in terms of: You make your own decisions, you inflict

10:56:19 1 your own consequences, you then can't blame it on an alleged
10:56:24 2 boycott that took place months later.

10:56:27 3 But even if they were to somehow convince
10:56:30 4 Your Honor that: *Oh, but we want them to do a code of*
10:56:34 5 *conduct, and they we'll hire them back,* which I guess is what
10:56:38 6 they would say. The problem with that is there is no AGC
10:56:44 7 connection to this. Why? Because if you assume there was a
10:56:50 8 conspiracy that ended, all that would mean is that we would
10:56:55 9 then individually negotiate with the Union.

10:56:58 10 There is no way to know what deal we would
10:57:00 11 make. There is no way to know individually whether --

10:57:05 12 In fact, they're independently, the agencies
10:57:09 13 have said they won't agree to this code of conduct. So, you
10:57:12 14 might negotiate, and you might never still agree to a code of
10:57:17 15 conduct, or you might negotiate a different deal.

10:57:21 16 The uncertainty of how this would affect a
10:57:25 17 particular writer who may or may not in the future decide to
10:57:29 18 rehire one of these agents or not, there have been other
10:57:34 19 agencies who have signed the code of conduct, they may switch
10:57:37 20 to that. This is the exactly the indirect, remote,
10:57:42 21 outside-the-realm injury that AGC would not allow with
10:57:51 22 respect to the group boycott claim for the individual
10:57:53 23 writers.

10:57:53 24 And, frankly, it's not even clear what their
10:57:56 25 antitrust injury claim is. The allegations is by having

10:58:02 1 fewer writers in their brief, it reduces the quality of agent
10:58:07 2 representation. That's sort of what they identify. But when
10:58:12 3 you look at their Complaint, there are no such allegations in
10:58:15 4 the Complaint. And we pointed this out in our brief.

10:58:19 5 Their allegations are that the conspiracy is
10:58:22 6 going to affect the quality of the studio productions, you
10:58:28 7 know, that there will be, you know, worse product for
10:58:32 8 Hollywood whether it's TV or --

10:58:33 9 There is no quality allegations even linked
10:58:36 10 to this in terms of the writers. So, I think for both
10:58:43 11 antitrust claims, Your Honor, there is no individual standing
10:58:44 12 on the antitrust claims.

10:58:44 13 Does Your Honor have any other questions on
10:58:49 14 that? Or I'll move to the RICO standing.

10:58:49 15 **THE COURT:** No, I don't on that.

10:58:49 16 **MR. KESSLER:** Okay.

10:58:50 17 **THE COURT:** With respect to RICO, if I understand
10:58:52 18 correctly, you're arguing the injury to the guilds and the
10:58:57 19 writers hasn't been proximately caused by the agencies and
10:59:02 20 the packaging fees. But the question that comes up in my
10:59:05 21 mind is, isn't it foreseeable, though, I mean, that these
10:59:10 22 packaging practices would reduce the production's overall
10:59:20 23 profit, and that arguably would reduce the compensation for
10:59:23 24 the writers.

10:59:23 25 What's your response to that?

10:59:25 1 **MR. KESSLER:** Okay. So, I'll first, Your Honor,
10:59:29 2 break this up, their claim for injunctive relief and their
10:59:33 3 claim for damages. The first most important, the point on
10:59:36 4 injunctive relief is, in the Ninth Circuit there is no
10:59:40 5 injunctive relief available under RICO. So, we don't even
10:59:43 6 have to discuss it, but they make that a big part of their
10:59:47 7 relief. So, we're only talking about the damages.

10:59:50 8 Now, on the damages in RICO, there are two
10:59:53 9 parts to that. The Union claims they can assert
10:59:59 10 associational representation for the writers damages from
11:00:03 11 RICO. They don't claim their own damages.

11:00:06 12 We submitted in our case for Your Honor, for
11:00:09 13 damages claims, there's no associational standing. So, since
11:00:15 14 there is no injunction and there's no associational standing
11:00:17 15 for damages, the Union is out. So, now we're down to the
11:00:20 16 writers on their individual claims.

11:00:23 17 So, the claim at issue in RICO is that AGC
11:00:30 18 applies, that's in this circuit clear and under the Holmes
11:00:36 19 case in the Supreme Court but with a twist: There is no
11:00:45 20 antitrust injury requirements. The antitrust injury is only
11:00:47 21 for antitrust. So, it's the rest of RICO, we're talking --
11:00:55 22 of AGC. It's about remoteness, proximate cause, specificity.

11:00:55 23 The problem you have here is the alleged RICO
11:00:58 24 Act, which my colleagues will address we do not think is
11:01:01 25 remotely a criminal act, but assuming, for my purposes, that

11:01:04 1 a package fee could be the RICO predicate act. Have any of
11:01:10 2 these individual writers met the Twombly pleading standards
11:01:18 3 to suggest a specific injury to them from a RICO criminal
11:01:26 4 predicate act? And the answer is no. And I'll use the
11:01:28 5 example --

11:01:29 6 And, by the way, you have to assess this,
11:01:31 7 Your Honor, writer by writer, because now we're not in a
11:01:34 8 class, we're not -- the group that's there.

11:01:36 9 So, if you look at my client, for example,
11:01:39 10 Ms. Stiehm, who alleged, there is nothing -- and, again, I
11:01:43 11 would challenge counsel to identify anything Ms. Stiehm has
11:01:49 12 pled in her Complaint to say: Here is a package fee that was
11:01:54 13 paid -- which would be the criminal act -- and here is the
11:01:58 14 adverse consequence that has come to me, Ms. Stiehm, as a
11:02:03 15 result of that package fee.

11:02:05 16 It doesn't -- there is nothing in the
11:02:08 17 Complaint like that.

11:02:08 18 **THE COURT:** Isn't the response: We can't, because
11:02:10 19 we didn't know what the packaging agreements were beforehand.

11:02:14 20 **MR. KESSLER:** Well, then, in all due respect, Your
11:02:17 21 Honor, they have no basis to plead injury under RICO in
11:02:20 22 other words, you have to have a basis to meet the -- a
11:02:26 23 combination of the RICO proximate cause standard, which
11:02:29 24 applies to damages, you know, it's very familiar, Your Honor,
11:02:32 25 because it's derived -- the AGC derives it actually from the

11:02:37 1 common law. It's: Remoteness, proximate cause, derivative,
11:02:43 2 you know, types of injury. They have to combine that with
11:02:46 3 Twombly to give some specifics.

11:02:48 4 It's not enough to make a conclusory
11:02:52 5 assertion. And here, Your Honor, I come back to where I
11:02:55 6 started. The assertions that it's a conflict of interest,
11:02:58 7 that it's a breach of fiduciary duty, that doesn't stem from
11:03:05 8 the fact that this is an alleged criminal act to pay the fee.

11:03:09 9 If you look at what the criminal act has to
11:03:13 10 be, and my colleague will talk about why this doesn't make
11:03:17 11 sense, it has to be an interference in the collective
11:03:20 12 bargaining process.

11:03:21 13 So, again, for these individual claimants to
11:03:25 14 somehow argue this alleged criminal interference in the
11:03:30 15 collective bargaining process, assuming had some impact on
11:03:34 16 them individually that they can trace, then even assuming
11:03:40 17 they could plead that, there is nothing in the Complaint like
11:03:42 18 that. There is nothing that tries to say instead what you
11:03:48 19 get is -- we think it's a breach of fiduciary duty, we think
11:03:52 20 it's a conflict of interest, I think I've been hurt. Some of
11:03:56 21 them say: I think my agents made more money than I did.
11:04:00 22 Assuming all those are true, none of them meets the RICO
11:04:04 23 standard.

11:04:05 24 And the RICO standards in this court in
11:04:09 25 particular, in the Central District, in terms of proximate

11:04:13 1 cause had been applied quite strictly. I mean, frankly, Your
11:04:16 2 Honor, I know that because I've actually lost a RICO case in
11:04:19 3 the Central District at the motion to dismiss stage because I
11:04:23 4 didn't have sufficient proximate cause pled with regard
11:04:27 5 to that. I got leave to replead, and I did something else.

11:04:30 6 But the point is, Your Honor, it is
11:04:33 7 completely their burden to do that. So, again, Your Honor, I
11:04:38 8 think on standing that it simply doesn't exist either for the
11:04:44 9 antitrust claims or for the RICO claims.

11:04:47 10 And one last point, Your Honor, unless you
11:04:50 11 have another question, both AGC and Eagle were granted on
11:04:53 12 motions to dismiss. And I think that's important because
11:05:01 13 what that shows is that these type of determinations really
11:05:03 14 can easily be made on the face of the pleadings. It's not
11:05:03 15 like this is something --

11:05:07 16 Nothing is going to change the factual
11:05:09 17 relationship here based on -- based on discovery, for
11:05:18 18 example.

11:05:18 19 **THE COURT:** Okay. Thank you.

11:05:20 20 Let me just see, what else did I have?

11:05:24 21 I had a question. My next question dealt
11:05:27 22 with the supplement jurisdiction.

11:05:29 23 So, who's drawing the short straw on that, if
11:05:32 24 anyone?

11:05:32 25 **MR. MARENBERG:** I have, Your Honor.

11:05:34 1

Steve Marenberg.

11:05:34 2

THE COURT: Okay.

11:05:39 3

MR. KESSLER: Thank you, Your Honor.

11:05:39 4

THE COURT: Thank you. I suspect you'll be back

11:05:41 5

up again.

11:05:42 6

But, Mr. Marenberg, so, again, if I were to

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dismiss all of the Guilds's federal claims as you request,

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okay, shouldn't the Court still exercise supplemental

11:05:55 9

jurisdiction? Because you still have federal claims that are

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at issue in the case, and wouldn't these state law claims --

11:06:03 11

aren't they compulsory counterclaims that have to stay with

11:06:08 12

the case?

11:06:09 13

MR. MARENBERG: So, Your Honor, the answer to the

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last question, specific question is no, they are not

11:06:14 15

compulsory counterclaims. Under Rule 13, because they were

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pending in state court at the time that our claims, that you

11:06:24 17

rightly mention would stay, were filed, the counterclaims are

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not -- the -- the counterclaims are not compulsory

11:06:33 19

counterclaims, they are permissive counterclaims.

11:06:37 20

Now, in either --

11:06:37 21

THE COURT: Okay. So, they're permissive

11:06:40 22

counterclaims. But they come from the same transacting

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requirements.

11:06:41 24

Look, it's not like I'm wanting for

11:06:44 25

additional work. But, I mean, why would it makes sense to

11:06:49 1 litigate all this and then say: Oh, you know what? We're
11:06:53 2 all done here after who knows how many years of going back
11:06:59 3 and forth. Go back across the street and deal with the state
11:07:02 4 claims.

11:07:02 5 **MR. MARENBERG:** So, let's assume whether they're
11:07:04 6 compulsory or they're --

11:07:04 7 **THE COURT:** Permissive.

11:07:05 8 **MR. MARENBERG:** -- or they're permissive, there is
11:07:08 9 some nexus between the two.

11:07:08 10 **THE COURT:** Right.

11:07:08 11 **MR. MARENBERG:** And so then we're into
11:07:09 12 considerations such as economy, convenience, fairness and
11:07:16 13 comity.

11:07:16 14 **THE COURT:** Well, I can address the convenience
11:07:18 15 part of it, but I don't think anyone wants to hear that
11:07:20 16 answer. But go ahead.

11:07:20 17 **MR. MARENBERG:** So, let's take the issue that you
11:07:22 18 just mentioned, which is: Is there some overlap that really
11:07:24 19 makes it more efficient to litigate those claims here along
11:07:28 20 with our claims? And I think the answer is: Although there
11:07:32 21 is a surface similarity, when you get -- dive below the
11:07:37 22 waves, there is very little.

11:07:39 23 Our antitrust claims focused on the conduct
11:07:43 24 of the WGA and whether they've conspired with show runners,
11:07:49 25 with artisan managers, with others, and with their writer

11:07:52 1 members to boycott us. The focus is on the conduct of the
11:07:57 2 WGA and these third parties.

11:08:00 3 The focus of their counterclaims is on the
11:08:03 4 question of whether the agencies have breached some duty. I
11:08:08 5 mean, when you get to the core of their claims, the core of
11:08:12 6 their claims is, that the agencies have a conflict of
11:08:16 7 interest and have breached their fiduciary duties to the
11:08:20 8 writers. And that's not really involved at all in our
11:08:28 9 antitrust claims against the writers Guild.

11:08:31 10 So, can I say that there is no nexus? No, I
11:08:34 11 wouldn't say that there is not any overlap, but when you
11:08:37 12 start analyzing what these claims are, they are very
11:08:40 13 different.

11:08:40 14 Now, it's actually even worse here in terms
11:08:44 15 of efficiency, because in addition to the --

11:08:46 16 What you'd be talking about retaining under
11:08:49 17 your hypothetical are the individual claims of seven
11:08:54 18 individual counter claimants, all of whom have claims that
11:08:59 19 will vary on their individual circumstances.

11:09:03 20 There will be issues like what was disclosed
11:09:05 21 to them in their individual circumstances? What injury did
11:09:09 22 they suffer? And so we will be trying, in addition to our
11:09:15 23 straightforward antitrust claims against the WGA, what would
11:09:21 24 be left are a panoply of seven different complaints on the
11:09:25 25 basis -- brought by seven different individuals against three

11:09:30 1 different agencies, all of whom have very different
11:09:34 2 relationships with their clients. And so there is no
11:09:38 3 efficiency when you really get down to thinking about it.

11:09:43 4 And now let's talk about the issue of
11:09:46 5 fairness, which is one of the other considerations. What's
11:09:49 6 unfair about sending the individual plaintiffs back to the
11:09:53 7 forum that they initially chose to raise these claims when it
11:09:58 8 all started?

11:10:00 9 The first to sue in this case were not the
11:10:03 10 plaintiffs in this case but the counter -- the counter
11:10:05 11 claimants. They chose the Superior Court of Los Angeles as
11:10:11 12 their appropriate venue when they brought what their core
11:10:17 13 claims are, breach of fiduciary duty and constructive fraud.
11:10:21 14 They thought that that was a perfectly fine venue, and it was
11:10:26 15 only when that case got assigned to Judge Highberger in the
11:10:29 16 complex division, that they started back-peddling, seeking to
11:10:34 17 bring these cases -- bring these claims somewhere else.

11:10:38 18 There is nothing unfair about sending them
11:10:42 19 back to the superior court to Judge Highberger where their
11:10:49 20 claims will get very specific attention in the complex
11:10:52 21 courthouse.

11:10:54 22 **THE COURT:** Is there a risk of inconsistent
11:10:55 23 rulings and decisions? I mean --

11:10:57 24 **MR. MARENBERG:** I don't think there really is a
11:10:59 25 risk of inconsistent rulings here. In other words --

11:11:03 1 Well, I'm sorry, I got distracted by --
11:11:06 2 I don't think there is a risk of inconsistent
11:11:09 3 rulings here. Our claims of a group boycott are very
11:11:14 4 different.

11:11:14 5 Now, it may be, and I don't believe that this
11:11:16 6 is true, that some individual plaintiff, for example, take
11:11:19 7 Barbara Hall has sued my client for failing to refund
11:11:25 8 commissions that she allegedly paid to UTA. I don't believe
11:11:31 9 that's true, but maybe she wins that. I don't believe she
11:11:34 10 will, but it's not inconsistent with the result of our
11:11:39 11 antitrust claims of a group boycott against WGA. And so when
11:11:45 12 you get down to that factor, it also doesn't favor in terms
11:11:50 13 of keeping those claims.

11:11:51 14 And then there is comity concerns. And all
11:11:56 15 of these are state law issues, whether it's the UCL -- the
11:12:00 16 unfair competition claims, whether it's a breach of fiduciary
11:12:01 17 duty claims, whether it's the constructive fraud claims where
11:12:04 18 there is a variation on the elements and what's required
11:12:07 19 among California courts of appeal. The better solution in
11:12:11 20 terms of comity is to send them back to the California courts
11:12:19 21 where a good California judge can resolve issues of
11:12:20 22 California law.

11:12:21 23 **THE COURT:** All right. Thank you, Counsel.

11:12:22 24 The other area I wanted to discuss, at least
11:12:25 25 from my notes --

11:12:26 1 Who's dealing with the breach of fiduciary
11:12:26 2 duty? Is that --

11:12:32 3 You're getting some exercise.

11:12:32 4 **MR. MARENBERG:** I drew that straw as well, Your
11:12:35 5 Honor.

11:12:36 6 **THE COURT:** All right. So, if I understand
11:12:37 7 correctly, your -- the core of your --

11:12:40 8 Well, one of the arguments that you make is
11:12:43 9 that the decision by the agencies not to disclose these
11:12:47 10 package in terms of the writers, it's not a breach of
11:12:50 11 fiduciary duty because the AMBA expressly allowed for
11:12:58 12 packaging. Okay, I get that. But does --

11:13:00 13 Is there anyone at AMBA that specifically
11:13:03 14 says that those terms of the packaging not be disclosed to
11:13:06 15 the writers?

11:13:08 16 **MR. MARENBERG:** The answer to that is the AMBA
11:13:11 17 does not affirmatively say you don't have to disclose these
11:13:15 18 terms, it just says you can engage in this.

11:13:17 19 The point that we're making on the breach of
11:13:20 20 fiduciary duty claims is -- are really twofold. One, the
11:13:23 21 premise of the fiduciary duty claim, the way it is pled in
11:13:27 22 the Complaint is that packaging is always a conflict of
11:13:31 23 interest. Right? And there is no basis for that assumption.

11:13:35 24 So, there is no breach of fiduciary duty if
11:13:39 25 packaging is not always a conflict of interest.

11:13:43 1 And, second, they're speculative. We don't
11:13:46 2 know on the basis of any individual plaintiffs whether they
11:13:50 3 were harmed or not by packaging.

11:13:52 4 **THE COURT:** That's because they don't know what
11:13:54 5 the terms of the packaging deal are.

11:13:57 6 **MR. MARENBERG:** No, because of the nature of the
11:13:58 7 transaction.

11:13:59 8 For example, let's assume that UTA did a
11:14:02 9 package with ABC studios for a show on ABC network, and the
11:14:10 10 allegation is, as Mr. Kessler explained is, because of
11:14:13 11 packaging, and we took a fee out of the front -- out of the
11:14:17 12 budget for each show, there is less for everybody else.

11:14:21 13 **THE COURT:** Right.

11:14:22 14 **MR. MARENBERG:** Right? Well, how do we know who's
11:14:24 15 suffering from that, quote, "less"? It may be that ABC might
11:14:29 16 have hired more grips on that show, or they might have filmed
11:14:34 17 it in a different location, or they might have paid an actor
11:14:38 18 more or the director more. It is too speculative to suggest
11:14:42 19 that the writer would have gotten more. And that's the
11:14:45 20 problem with these claims.

11:14:48 21 **THE COURT:** All right, thank you.

11:14:52 22 All right, if we could just for a moment --
11:14:52 23 I'm going to shift over to the writers Guild. I think last
11:14:52 24 time Ms. Leyton drew the short straw, but I don't know if
11:15:01 25 that's changed this time around.

11:15:01 1 **MS. LEYTON:** Your Honor, I'll be addressing all of
11:15:03 2 the claims except the antitrust claims, and Mr. Litwin will
11:15:06 3 be addressing --

11:15:07 4 **THE COURT:** Okay. Great. All right, so, then why
11:15:09 5 don't we start with -- I'm sorry, Mr. Litwin, on the
11:15:12 6 antitrust. Okay?

11:15:14 7 **MR. LITWIN:** Yes.

11:15:17 8 **THE COURT:** You've heard Mr. Kessler talk about
11:15:20 9 why the writers still don't have standing. I'd like to hear
11:15:25 10 your response.

11:15:25 11 And I will tell you, the reason why I didn't
11:15:30 12 do a tentative is because I'm torn on this issue. Does the
11:15:35 13 Guild have standing? I mean, given their, sort of,
11:15:40 14 representation. I get it that they are representing the
11:15:43 15 writers, but can they have standing to go forward with these
11:15:46 16 claims? I have some trouble getting my head around that,
11:15:50 17 so...

11:15:50 18 **MR. LITWIN:** Yes, Your Honor, and Ms. Leyton will
11:15:52 19 address in her presentation associational standing in greater
11:15:56 20 detail, but the guilds certainly have associational standing
11:16:00 21 to bring claims for injunctive and declaratory relief on
11:16:05 22 behalf of Guild members.

11:16:07 23 And I just need to correct a couple of
11:16:09 24 misstatements that the agencies have made both here today and
11:16:12 25 in their briefing. First, they allege that the guilds are

11:16:16 1 bringing treble damages claims as part of their antitrust
11:16:19 2 claims. That's just manifestly untrue.

11:16:22 3 We set forth our remedies at paragraphs 429,
11:16:28 4 450, 476 and 498 of the Complaint. It is solely whether
11:16:31 5 under state law or under federal law claims for injunctive
11:16:35 6 and declaratory relief only. Only the individual
11:16:39 7 counterclaimants are seeking damages in this case. And
11:16:42 8 that's a very important distinction.

11:16:44 9 Secondly, Mr. Kessler argued here today, as
11:16:48 10 he did in the Reply brief that we've somehow concocted this
11:16:52 11 new theory of harm. What they write in their brief at page 4
11:16:56 12 of the Reply brief they say, quote: "Counterclaimants have
11:17:01 13 concocted a new theory that the agency's support for supposed
11:17:05 14 packaging model caused reduced quality of representation
11:17:09 15 services." This quality of representation injury is not pled
11:17:12 16 in the answer and counterclaim. Mr. Kessler said as much
11:17:17 17 today.

11:17:17 18 I would point Your Honor to paragraph 424 of
11:17:21 19 the answer in counterclaim where we induce plead that Guild
11:17:26 20 members have suffered an antitrust injury due to the illegal
11:17:31 21 conspiracy because, quote: "The quality of the talent
11:17:34 22 representational services available to Guild members has been
11:17:38 23 substantially reduced."

11:17:39 24 Can't be clearer than that.

11:17:41 25 And before Mr. Kessler gets up and says

11:17:44 1 that's a conclusory allegation, Your Honor, let me say that
11:17:49 2 that's based on several specific allegations in the
11:17:51 3 Complaint.

11:17:51 4 I'd point Your Honor to paragraph 313 where
11:17:54 5 we say that the agents are incentivized to protect the
11:18:00 6 studio's interests at the expense of their clients and
11:18:03 7 detailing the ways in which the agencies, quote, "priorities
11:18:07 8 their relationships with the studios over the interests of
11:18:11 9 their clients, including by failing to negotiate the highest
11:18:13 10 possible compensation for their clients."

11:18:15 11 At paragraph 314, we note that the head of
11:18:19 12 William Morris Endeavor said that the top executives at
11:18:24 13 Warner Brothers, the studio, was his most important client.

11:18:27 14 And at 321 we say that packaging fees have
11:18:31 15 deprived television writers of conflict-free and loyal
11:18:36 16 representation in their negotiations with studios.

11:18:38 17 And that is clearly a reduction in quality
11:18:42 18 pled.

11:18:42 19 **THE COURT:** As it relates to all of those
11:18:44 20 paragraphs that you just discussed, what's your response? I
11:18:46 21 think Mr. Kessler said that's all speculative. How do you
11:18:50 22 know any of this?

11:18:52 23 **MR. LITWIN:** Well, first of all --

11:18:53 24 **THE COURT:** I mean, I know you say that president
11:18:55 25 of WME says that's a statement, I get that. But how do you

11:18:59 1 know that -- that the agents are incentivized to -- to
11:19:04 2 protect the studios and not the client? How do you know that
11:19:08 3 the talent is not getting the funds or benefits that they
11:19:13 4 should?

11:19:13 5 **MR. LITWIN:** So, the first reason, Your Honor, is
11:19:15 6 that many writers have complained to the Guild and given
11:19:19 7 specific examples, including one that we cite in the
11:19:24 8 Complaint where the agent affirmatively said to the studio:
11:19:29 9 I'll get my client to accept less money than he was currently
11:19:34 10 making. I can --

11:19:36 11 Give me a minute, Your Honor.

11:19:38 12 **THE COURT:** Take your time.

11:19:39 13 **MR. LITWIN:** That was at paragraph 318 of our
11:19:43 14 Complaint. And that's just one of several examples of how we
11:19:47 15 know that the packaging model is costing our clients money.

11:19:54 16 But if I can turn to the standing issue in
11:19:58 17 the main, Your Honor, the agencies have said, both here and
11:20:05 18 in their papers, that these are separate transactions. And
11:20:11 19 they're entitled to argue that. They're entitled to develop
11:20:14 20 evidence. That's not what we plead. And that's just the
11:20:17 21 disputed issue of fact for discovery.

11:20:20 22 But what's pretty clear, and what we do
11:20:23 23 allege in our pleadings and argue in our briefs is that
11:20:27 24 packaging isn't a market. They say we lack standing because
11:20:30 25 we don't participate in a packaging market, but a market is

11:20:36 1 created when somebody sells something to a buyer, and agents
11:20:42 2 can't sell packages because they don't own any of the
11:20:48 3 constituent elements of that package.

11:20:50 4 They don't own the writing services, they
11:20:52 5 don't own the scripts. For that matter, they don't own the
11:20:57 6 director services, acting services or anything else that
11:21:01 7 they're selling. And I think it's generally acceptable under
11:21:03 8 U.S. law: You can't sell what you don't own.

11:21:07 9 The agents provide intermediary services.
11:21:12 10 They broker transactions between the writers who are selling
11:21:15 11 their writing services and the studios who purchase those
11:21:21 12 writing services.

11:21:26 13 The agencies do not buy the writing services
11:21:28 14 and then resell them to the studios. They're simply retained
11:21:33 15 by writers to sell on the writer's behalf what the writers
11:21:37 16 already own. And this is true regardless if a project is
11:21:42 17 packaged or not.

11:21:44 18 The relevant transactions at issue here in
11:21:48 19 our claims are the sale of writing services by writers to the
11:21:56 20 studios. The packaging fee is simply how the agent is
11:22:01 21 compensated for brokering that deal.

11:22:03 22 The agents are hired to negotiate the sale of
11:22:06 23 the client's writing services only. But for brokering the
11:22:11 24 sale of a writer's services to a studio, they have nothing
11:22:15 25 else to sell unless they're working for some other talent.

11:22:20 1 They don't get a packaging fee unless they're selling a
11:22:25 2 talent services to a studio.

11:22:27 3 Mr. Kessler also said, and he misrepresented
11:22:32 4 what our injury claim here is, he said: I think that studios
11:22:37 5 have less resources to pay writers. That is not what we
11:22:42 6 allege, and this is absolutely critical to the standing
11:22:45 7 argument.

11:22:45 8 What we allege is that the budgets for a
11:22:48 9 project are fixed, and that a packaging fee reduces dollar
11:22:53 10 for dollar the money in that budget that could go to anything
11:22:59 11 else, including paying writers.

11:23:01 12 **THE COURT:** But is that an important point that
11:23:02 13 the budget could go to anything else? So, it could go to
11:23:06 14 writers, but it could not go to writers, right?

11:23:11 15 **MR. LITWIN:** That is true, but we have alleged,
11:23:12 16 Your Honor, not only in specific cases where it hasn't gone
11:23:16 17 to writers but also we have shown through macro evidence that
11:23:20 18 writer salary is stagnated during the period the packaging
11:23:24 19 fees were exploding. And that is certainly an issue that we
11:23:28 20 would seek discovery on to -- and, you know, later on in this
11:23:32 21 case. But that is the key allegation here, and that's what
11:23:37 22 distinguishes this case from Eagle.

11:23:40 23 I want to turn to Eagle for a minute, Your
11:23:43 24 Honor. The agencies are completely distinguished from the
11:23:46 25 vessel owners in that case.

11:23:48 1 The vessel owners were the employers. Here
11:23:51 2 the agents are the intermediary. They work for us. The
11:23:58 3 vessel owners owned the fish that they were selling to the
11:24:03 4 canneries. The agents, as I just said, don't own the writing
11:24:07 5 services they're selling to the studios.

11:24:10 6 Similarly, the Guild members are in a
11:24:13 7 completely different position from the seamen and the Eagle
11:24:16 8 crew. The crew had no direct dealings with the defendant
11:24:21 9 canneries. The crew only dealt with their employer, the
11:24:25 10 vessel owner. And indeed in that case, the crew argued they
11:24:29 11 should be deemed to be quote, "indirect sellers." That's not
11:24:33 12 what we're alleging here.

11:24:34 13 We allege specifically and repeatedly that we
11:24:36 14 deal directly with both the studios and the agents because
11:24:40 15 the agents are the intermediaries.

11:24:44 16 Here, the writers specifically retained the
11:24:47 17 agents to broker the deals on their behalf. The agents are
11:24:52 18 the writer's agents. The writers also deal directly with the
11:24:57 19 studios because the studios are their employers.

11:25:01 20 The crew of the Eagle had no ownership
11:25:04 21 interest in the fish. They had at best the derivative
11:25:09 22 interest in the proceeds of any sale. Here it's undisputed
11:25:13 23 that the writers own their services and their scripts.

11:25:17 24 In fact, Your Honor, this entire case can be
11:25:19 25 summed up by the fact that the agency so vociferously argue

11:25:28 1 that the Eagle case applies. They rely on Eagle because they
11:25:28 2 don't see the writers as their clients. They see the studios
11:25:33 3 as their clients, and they see the writers, quiet frankly,
11:25:36 4 Your Honor, as the fish who they get to sell at their whim at
11:25:41 5 their discretion.

11:25:42 6 **THE COURT:** So, let me ask you --

11:25:44 7 Well, I think I know some of the answer. But
11:25:47 8 we talked about Eagle, a case that I think one side likes to
11:25:53 9 talk about, the other side doesn't. What about Lenhoff
11:25:57 10 Enterprise? In that case, it sounds eerily similar, you
11:25:57 11 know, talking about, you know, this meeting that occurred
11:26:08 12 back in the '90s, a 3-3-10 rate. So, how is that --

11:26:12 13 You know, in that case, these allegations
11:26:13 14 were not sufficient. How is that different?

11:26:17 15 **MR. LITWIN:** It's differently only because the
11:26:20 16 agencies have totally misrepresented what happened in that
11:26:23 17 case. So if I could walk Your Honor through it.

11:26:23 18 **THE COURT:** Okay.

11:26:27 19 **MR. LITWIN:** The agents' argument, as they say on
11:26:30 20 page 6 of their Reply brief, the Lenhoff dismissed the exact
11:26:34 21 same price-fixing claim. Counterclaimants assert here that
11:26:39 22 the agencies conspired to fix a 3-3-10 packaging fee.

11:26:43 23 But Lenhoff only asserted one antitrust
11:26:47 24 claim. It's at pages 20 to 23 of the Third Amended
11:26:52 25 Complaint. In that claim he sets forth a claim for

11:26:55 1 exclusionary conduct. There is no reference to price-fixing
11:27:00 2 in that sole antitrust claim.

11:27:03 3 In fact, if you look through the entirety of
11:27:06 4 the Third Amended Complaint, the term "price-fixing" never
11:27:09 5 comes up. An allegation of price-fixing never comes up in
11:27:15 6 the entire Complaint, and I challenge Mr. Kessler to come up
11:27:18 7 here and quote from the Third Amended Complaint where it
11:27:22 8 refers to price-fixing.

11:27:24 9 Now, on page 76 -- on paragraph 76 of the
11:27:33 10 Lenhoff claim, he sets forth his allegation, and it's an
11:27:38 11 allegation among UTA and ICM, two agencies, to jointly
11:27:43 12 monopolize the scripted TV market and exclude smaller
11:27:47 13 agencies. That is not anywhere close to this case.

11:27:50 14 Now, after the Third Amended Complaint was
11:27:54 15 dismissed, Lenhoff moved the Court to reconsider its ruling.
11:28:01 16 In support of that motion, Lenhoff submitted a sworn
11:28:05 17 declaration that recounted details of a confession that was
11:28:08 18 made by Sam Haskel, who was the former TV head at William
11:28:16 19 Morris, and that's pled in detail at paragraph 350 of our
11:28:20 20 Complaint.

11:28:21 21 Now, importantly, the substance of that
11:28:24 22 declaration, which was submitted on the motion for
11:28:27 23 reconsideration was not before the Ninth Circuit. What the
11:28:31 24 Ninth Circuit said, and I quote from the Lenhoff decision:
11:28:35 25 "The district court's denial of Lenhoff's motion for

1 reconsideration is therefore not properly before us."

2 And Lenhoff noted specifically in its
3 appellate brief, quote: "The Complaint did not plead this
4 1990s agreement to fix the price -- to fix the package series
5 price. That's at page 14, footnote 8 of his opening
6 appellate brief.

7 Most importantly, Lenhoff didn't move to --
8 to amend his pleadings to make a price-fixing claim at any
9 point. The only relevance that he asserted in argument, both
10 in his brief and before the Ninth Circuit was that this new
11 evidence of a price-fixing conspiracy only was relevant to
12 show the cozy relationship among the agencies, nothing more.

13 So, it was completely irrelevant to the issue
14 before the Ninth Circuit, which is whether Lenhoff had stated
15 a cognizable antitrust claim about a conspiracy among the
16 agents to eliminate a specific paragraph about outside
17 funding in the Screen Actors Guild contract. It had nothing
18 to do with this case.

19 The Ninth Circuit's ruling in fact was
20 specifically limited to the pleadings, and the Ninth Circuit
21 never opined on the sufficiency of any allegation regarding
22 price-fixing because there was no price-fixing claim to opine
23 on.

24 What the Court said is, with respect to
25 Lenhoff's argument that the Uber agencies conspired to fix

11:30:24 1 the 3-3-10 packaging fee. The Third Amended Complaint makes
11:30:31 2 only a passing reference to the Uber agency's charging such a
11:30:35 3 fee. Those allegations are at paragraph 53 of the Lenhoff
11:30:41 4 Third Amended Complaint, and in that paragraph, he only
11:30:43 5 alleges that they charged that fee.

11:30:46 6 There is no reference to any conspiracy, any
11:30:50 7 price fixing or any antitrust violation associated with the
11:30:55 8 charging of a packaging fee.

11:30:58 9 **THE COURT:** All right, thank you.

11:30:59 10 Let's talk about the group boycott claim for
11:31:03 11 a second.

11:31:03 12 **MR. LITWIN:** Yes, Your Honor.

11:31:06 13 **THE COURT:** What do you allege are the specific
11:31:09 14 factual allegations that show that these agencies actually
11:31:12 15 conspired not to bargain with the Guild?

11:31:18 16 It strikes me that, if anything, that people
11:31:23 17 didn't want to negotiate. But what would you contend are the
11:31:26 18 factual allegations to show that they conspired not to
11:31:29 19 bargain?

11:31:31 20 **MR. LITWIN:** Your Honor, and before I go into the
11:31:34 21 specific factual allegations, let me say you're exactly
11:31:37 22 right. When the guilds --

11:31:38 23 **THE COURT:** Should I mark that down?

11:31:40 24 **MR. LITWIN:** Please. I'm happy to specify if you
11:31:43 25 like.

11:31:44 1 The guilds revoked consent to collective
11:31:49 2 negotiations on July 19th. From that point on, any
11:31:53 3 coordinated negotiation among the agencies regarding the
11:31:56 4 negotiation of a contract with the guilds was an antitrust
11:32:02 5 violation.

11:32:04 6 They could have done many different things,
11:32:07 7 here, Your Honor. They could have said individually: We
11:32:11 8 want to negotiate, but we're not negotiating on these
11:32:14 9 packaging fees.

11:32:15 10 **THE COURT:** What authorities supports the notion
11:32:16 11 that that is antitrust violation? I mean, you just --

11:32:24 12 It's a group decision that they made not to
11:32:27 13 bargain.

11:32:28 14 **MR. LITWIN:** You cannot make a group decision.
11:32:31 15 And it's --

11:32:32 16 You cannot take a group decision when the --
11:32:37 17 when the guilds have not consented to collective negotiation.
11:32:42 18 That's the whole point of a guild's -- a union's ability to
11:32:46 19 consent to collective negotiation.

11:32:48 20 They're not an employer. They don't have
11:32:51 21 rights under the labor laws.

11:32:54 22 **THE COURT:** All right.

11:32:54 23 **MR. LITWIN:** So, it's just like if Wal-Mart and
11:32:58 24 K-Mart and maybe a bunch of other companies that I think of
11:33:02 25 because I'm old, and they're all going out of business, if

11:33:06 1 they got together and went to, you know, Samsung and said:
11:33:10 2 This is how we're going to negotiate with you, and behind the
11:33:13 3 scenes they're agreeing on what their negotiation strategy
11:33:18 4 is, they're not allowed to do that.

11:33:20 5 They could have done any --

11:33:21 6 They could have said individually, we don't
11:33:23 7 want to talk to you. But that's not what they did. And we
11:33:27 8 have specific evidence of that, Your Honor. At paragraphs
11:33:31 9 392 to 94, we recount the e-mail trail that came in on June
11:33:37 10 25th in response to an offer to individually negotiate with
11:33:44 11 us. And there was an initial e-mail that came that said, you
11:33:48 12 know, we don't want to talk to you outside of the ATA. And
11:33:54 13 then Karen Stuart, the executive director of the ATA said:
11:34:00 14 This is great. Can I share this with the group?

11:34:03 15 And once she shared that e-mail with
11:34:05 16 everybody else, shockingly, we got the same responses back.
11:34:11 17 That is direct evidence of a coordinated negotiation
11:34:17 18 strategy.

11:34:17 19 But, secondly, we also know that their
11:34:23 20 negotiation strategy committee continued to meet after June
11:34:27 21 19th. Guild members were specifically told, and we allege
11:34:33 22 this in our Complaint, in our claims, rather, that this
11:34:38 23 committee whose purpose was to strategize on negotiations
11:34:46 24 with the Guild continue to meet well after June 19th, and
11:34:51 25 incidentally, well, after we had written a cease and desist

11:34:55 1 letter to the agencies telling them to knock it off.

11:35:01 2 **THE COURT:** Okay.

11:35:02 3 **MR. LITWIN:** Now, I do have a --

11:35:05 4 I'm sorry, Your Honor.

11:35:07 5 **THE COURT:** I have some questions I want to shift
11:35:09 6 in the RICO claims. Is that Ms. Leyton?

11:35:14 7 **MR. LITWIN:** Yes, Your Honor. Thank you.

11:35:21 8 **MS. LEYTON:** Thank you, Your Honor.

11:35:34 9 **THE COURT:** All right, Ms. Leyton, with respect to
11:35:36 10 the RICO, okay, again, I just want to make sure I understand.
11:35:38 11 Your argument is that these repackaging fees, they violate
11:35:41 12 the Section 302 of the Labor Management Relations Act.

11:35:47 13 But hasn't that statute been narrowly
11:35:51 14 construed to apply to payments made by employers in
11:35:55 15 collective bargaining? I mean, these agencies, they're not
11:35:59 16 Union representatives. And so I'm trying to see how this
11:36:03 17 fits into -- as a RICO case.

11:36:07 18 **MS. LEYTON:** No, Your Honor. That statute has not
11:36:09 19 been narrowly construed to apply only to the collective
11:36:09 20 bargaining context.

11:36:13 21 Initially, I'd like to point Your Honor,
11:36:15 22 direct Your Honor to the terms of the 302, and the terms of
11:36:18 23 302 talk about it being a crime and being the basis for a
11:36:22 24 racketeering conspiracy.

11:36:24 25 **THE COURT:** Right, for an employer --

11:36:26 1 **MS. LEYTON:** Exactly. To provide anything of
11:36:29 2 value to any representative of his or her employees. And so
11:36:32 3 that does not talk about only labor organizations. The labor
11:36:35 4 organization is -- is the term that is used to mean a Union.
11:36:38 5 So, it is to any representative of any of its employees.

11:36:41 6 **THE COURT:** So, then, just indulge me for a
11:36:44 7 second.

11:36:44 8 So, under that interpretation, could an
11:36:47 9 employer or would an employer violate Section 302 by making
11:36:51 10 payments to the employees' attorneys in litigation?

11:36:57 11 **MS. LEYTON:** Your Honor, if the attorney is
11:37:00 12 representing -- if the attorney were exercising delegated
11:37:05 13 authority from the Union to represent an individual writer in
11:37:08 14 some kind of negotiation, then in that case it would not be a
11:37:12 15 difficult question, that there would be a 302 violation.

11:37:16 16 **THE COURT:** But -- and help me understand. I
11:37:18 17 thought the whole purpose, is probably the wrong word, but
11:37:24 18 isn't the whole theory behind 302 is to prevent like
11:37:28 19 kickbacks and bribes?

11:37:30 20 **THE WITNESS:** Yes, Your Honor.

11:37:30 21 **THE COURT:** In essence you're saying these are
11:37:34 22 kickbacks or bribes?

11:37:34 23 **MS. LEYTON:** Your Honor -- yes, Your Honor, that
11:37:35 24 these are kickbacks or bribes.

11:37:39 25 The 302 is phrased so that it doesn't require

11:37:39 1 any showing --

11:37:42 2 This -- this particular provision of 302,
11:37:43 3 some of the other ones are different, does not require a
11:37:46 4 showing of any intent or effect of bribery. It doesn't
11:37:49 5 require them to show that this has the effect of changing
11:37:52 6 someone's allegiance. It can be an innocent purchase of a
11:37:55 7 dinner. It can be in Korholz case, which is cited in the
11:37:59 8 papers. It was somebody providing basically a loan to a
11:38:01 9 Union official who was trying to deal with some difficult
11:38:06 10 economic circumstances.

11:38:08 11 **THE COURT:** In those cases -- I mean, any payment,
11:38:10 12 whether it's known or unknown? I mean, it just strikes me as
11:38:10 13 odd to say this is a kickback or a bribe that everybody knew
11:38:21 14 about from 1990 something until the present day. But I mean
11:38:22 15 is that your position? It doesn't matter whether it was done
11:38:26 16 out in the open or in secret, just this payment -- this
11:38:30 17 packaging constitutes, in essence, a kickback or a bribe.

11:38:32 18 **MS. LEYTON:** Yes, Your Honor. It is very clear
11:38:35 19 that 302 does not depend on whether something is done in the
11:38:37 20 open, whether it's done in private, whether it's done with
11:38:39 21 the intent to bribe or with some innocent intent to help
11:38:39 22 somebody out.

11:38:43 23 And in fact, the purposes of 302 are very
11:38:46 24 much implicated here. The Union could be deducting these
11:38:49 25 above-scale individual negotiations on its own. The Union

11:38:54 1 doesn't have to delegate this authority. Under their
11:38:56 2 reasoning, if the Union were negotiating the above scale
11:38:57 3 bargains for individual writers and were getting something
11:39:00 4 from the employer, the Union would be guilty of a 302
11:39:03 5 violation.

11:39:04 6 Here the Union has delegated that authority
11:39:06 7 to agents that are -- were franchised by the Guild and the
11:39:10 8 agents were getting a thing of value from the employer. That
11:39:14 9 thing of value that they're getting, in fact, we've alleged,
11:39:17 10 presents an inherent conflict of interest in every case
11:39:20 11 whether the agents happened to act fairly or overcome that
11:39:24 12 conflict of interest or not. It presents an inherent
11:39:26 13 conflict of interest which is exactly what 302 targets.

11:39:28 14 And I'd actually like to point, Your Honor,
11:39:30 15 to a couple of cases that I think support this point.

11:39:30 16 **THE COURT:** All right.

11:39:33 17 **MS. LEYTON:** The United States versus Ryan case,
11:39:35 18 and that these are both cited in our opposition papers,
11:39:38 19 explains: That Congress did not mean the narrower NLRA
11:39:43 20 definitions to apply to the definitions of term under 302,
11:39:47 21 which is part of the Labor Management Relations Act, and in
11:39:50 22 fact Congress considered when it was adopting 302, an
11:39:53 23 amendment that would have made it applicable only to entities
11:39:56 24 that represented two or more employees, and Congress decided
11:39:59 25 not to amend the statute in that way.

11:40:01 1 And so Congress decided to -- specifically
11:40:03 2 decided to have the very broad language, any representative
11:40:06 3 of any of its employees. And that's different from
11:40:10 4 language -- the language in other subsections of Section 302,
11:40:14 5 which are specifically targeted at labor organizations.

11:40:17 6 I'd also like to call Your Honor's attention
11:40:19 7 to the Tenth Circuit case Korholz, K-O-R-H-O-L-Z. That was a
11:40:25 8 situation where a company did provide a loan to a Union
11:40:29 9 officer, and the defense was that the Union wasn't the
11:40:34 10 majority bargaining representative at that plant. And what
11:40:36 11 the Tenth Circuit held is that doesn't matter because the
11:40:38 12 Union and the Union official had been authorized by three
11:40:41 13 employees to negotiate and deal with the employer on terms of
11:40:44 14 employment. And so because some individual employees at that
11:40:48 15 plant had authorized the Union or the Union representative to
11:40:50 16 act on their behalf, that implicated 302 and was covered by
11:40:55 17 Section 302.

11:40:56 18 **THE COURT:** Okay. It just strikes me as a very
11:41:08 19 broad interpretation of 302. I -- I understand your point,
11:41:12 20 but I guess I'm sort of concerned that this is now viewed as
11:41:16 21 criminal conduct, in essence, but it's been going on for 40
11:41:22 22 years and no one said anything about it? And this whole time
11:41:27 23 I guess we're to believe, either, A, they didn't realize
11:41:31 24 those criminal conducts, or they did but it wasn't worth
11:41:35 25 raising? Is that --

11:41:36 1 Again, I guess, it's more -- less of a
11:41:38 2 question and more of a statement. I guess I'm just concerned
11:41:42 3 about what to me seems a newfound interpretation, one that I
11:41:46 4 am concerned --

11:41:53 5 I'm not sure that's the intent of 302, but
11:41:55 6 I'll let you argue any more on that. I think you've
11:41:55 7 addressed it, but I'm just being candid with you. I'm
11:41:58 8 just -- I'm concerned about this interpretation.

11:42:02 9 **MS. LEYTON:** Sure, Your Honor. There are often
11:42:03 10 disputes over whether 302 covers particular types of actions
11:42:07 11 by employers. In fact, there was an extension that the
11:42:11 12 Eleventh Circuit made to cover neutrality agreements.
11:42:13 13 Sometimes people had not thought of whether this is a
11:42:16 14 violation of 302 because there was not the attention focused
11:42:19 15 on this practice.

11:42:20 16 And I would like to point out, this is not a
11:42:21 17 common practice with the Sports Unions. The Sports Unions
11:42:23 18 have codes of conduct that prohibit this type of kickback
11:42:26 19 arrangement. This is a practice that has been ubiquitous and
11:42:30 20 has been increasingly common in Hollywood, but it is not the
11:42:34 21 only practice that may have been going on for many, many
11:42:36 22 years that people did not previously call it as unlawful.
11:42:40 23 And -- and so that is our position here.

11:42:42 24 **THE COURT:** All right. Are you dealing with
11:42:44 25 associational standing?

11:42:46 1 **MS. LEYTON:** Yes, Your Honor.

11:42:47 2 **THE COURT:** Okay. Walk me through this. I just

11:42:49 3 want to hear from the source how the Guild has associational

11:42:54 4 standing to bring these state law claims for breach of

11:42:58 5 fiduciary duty, breach of contract and constructive fraud.

11:43:02 6 It strikes me --

11:43:04 7 Aren't --

11:43:05 8 In essence, you're asking for damages on

11:43:09 9 behalf of these -- of -- of your members, aren't you?

11:43:13 10 **MS. LEYTON:** No, Your Honor. The Guild is not

11:43:15 11 seeking damages. The individual counter claimants are

11:43:18 12 seeking damages. The Guild in its associational capacity is

11:43:22 13 seeking --

11:43:22 14 **THE COURT:** Injunctive --

11:43:22 15 **MS. LEYTON:** -- injunctive and declaratory relief.

11:43:22 16 On the breach of fiduciary duty and

11:43:27 17 constructive fraud, we're only proceeding in our

11:43:28 18 representational capacity.

11:43:29 19 And actually, there is a California decision,

11:43:31 20 the market -- California Court of Appeal decision, Market

11:43:36 21 Lofts Community Association, which is a 2014 decision that

11:43:38 22 we've cited in our opposition papers which upheld a homeowner

11:43:43 23 association bringing a breach of fiduciary claims on behalf

11:43:48 24 its members, and in that case, the defendants made very

11:43:50 25 similar arguments to the arguments that are made here, that

11:43:52 1 they would be deprived of the opportunity to present their
11:43:54 2 individual defenses.

11:43:55 3 But the court held that there was a community
11:43:58 4 of interest regarding the relevant legal and factual
11:44:00 5 questions, that the factual defenses went to the merits and
11:44:03 6 could still be raised, and that the fact that there might be
11:44:05 7 individualized issues in some cases didn't deprive the
11:44:09 8 association of associational standing.

11:44:10 9 And I'd like to explain a little -- I'd like
11:44:12 10 to go into the merits of these claims a little bit to explain
11:44:14 11 why that makes sense. The elements of a breach of fiduciary
11:44:18 12 claim are the existence of a duty breach, and that it caused
11:44:21 13 some kind of injury, doesn't require quantification of the
11:44:24 14 injury.

11:44:25 15 The elements of constructive fraud are
11:44:27 16 similar, fiduciary relationship breach, reliance and harm.

11:44:30 17 Our allegations establish these elements on a
11:44:34 18 systemwide basis. We allege, and there's really no dispute,
11:44:36 19 the packaging fees are the standard mode of compensation in
11:44:40 20 Hollywood. That's the 3-3-10 model. That last 10 percent is
11:44:44 21 a profit percentage that the agencies make in some cases.

11:44:48 22 In every single case, the higher the costs of
11:44:51 23 the program, the lower that 10 percent percentage will be.
11:44:55 24 So it is as if a lawyer had a reverse-contingency interest in
11:45:00 25 his or her client's case, in every case where the agent has

11:45:03 1 the possibility of getting that 10 percent of profit
11:45:07 2 participation on the end. The agent has an interest in the
11:45:09 3 costs being lower. The costs include the costs of talent,
11:45:14 4 including the writers, and so the more the writers get paid,
11:45:16 5 the lower profit percentage would be at the end of the day.

11:45:19 6 Now, maybe on some cases the agents
11:45:22 7 nonetheless treat their clients fairly, maybe the lawyer
11:45:22 8 could overcome that conflict of interest, but the conflict of
11:45:26 9 interest is still present and it still needs to be subject to
11:45:30 10 a knowing waiver.

11:45:32 11 I'd also like to point out that in every
11:45:35 12 packaging fee arrangement, the agency is benefiting as an
11:45:38 13 independent party in that transaction which gives rise to an
11:45:42 14 inherent conflict of interest that doesn't depend on the
11:45:42 15 facts of individual deals.

11:45:44 16 The restatement third of agency, Section 8.02
11:45:50 17 explains, and I'm quoting here: "An agent has a duty not to
11:45:55 18 require a material benefit from a third party in connection
11:45:58 19 with transactions conducted or other actions taken on behalf
11:46:01 20 of the principal or otherwise through the agent's use of the
11:46:05 21 agent's position.

11:46:05 22 And the case law explains that this creates
11:46:08 23 an inherent conflict of interest when the agent is benefiting
11:46:11 24 from the transaction even if the ultimate deal that comes out
11:46:14 25 at the end is fair. And that's the Roberts decision that we

11:46:17 1 cited in our papers, the California Court of Appeal decision
11:46:20 2 that says: It's irrelevant whether the transaction is
11:46:22 3 ultimately fair to the principal. The agent still has to
11:46:25 4 fully disclose the nature and amount of the benefit that --
11:46:29 5 that he or she is getting, and a real estate agent who gets
11:46:32 6 any undisclosed profits violates his or her fiduciary duty."
11:46:39 7 And the example --

11:46:39 8 **THE COURT:** Go ahead.

11:46:40 9 **MS. LEYTON:** An example I think makes clear why
11:46:42 10 that is the case. If an attorney were negotiating a
11:46:44 11 severance arrangement, and the attorney were getting paid by
11:46:47 12 the employer but representing the employee, the
11:46:49 13 attorney would, even if that could be waivable, and we don't
11:46:52 14 assert that the conflict is non-waivable here, but even if
11:46:56 15 you assume that's a waivable conflict, the attorney would
11:46:57 16 certainly have to disclose the fact of payment and the
11:47:02 17 material elements of that payment to the client.

11:47:04 18 **THE COURT:** How does that fit in or not fit in
11:47:07 19 with -- I guess you call it -- is it AMBA or the Artist
11:47:09 20 Managers Base Agreement, which I thought releases agents from
11:47:13 21 the duty to disclose these agreements. If that in fact is
11:47:18 22 the case, I mean, if they don't have to disclose it, and
11:47:23 23 doesn't --

11:47:24 24 And didn't AMBA or the Artists -- AMBA give
11:47:29 25 the writers notice that these packaging agreements could or

11:47:32 1 would take place?

11:47:34 2 **MS. LEYTON:** Your Honor, I think the other side
11:47:37 3 acknowledged when they were up here that the AMBA did not
11:47:41 4 specify authorize the agents not to disclose packaging and
11:47:43 5 did not expressly waive any conflicts.

11:47:45 6 Through the AMBA, the Writers Guild --

11:47:49 7 Prior to the AMBA, as Your Honor is aware
11:47:51 8 from the last time that we appeared before Your Honor
11:47:53 9 actually did not want to allow packaging but ultimately
11:47:56 10 conceded after being sued by a predecessor William Morris to
11:47:59 11 allow some forms of packaging. It placed restrictions on
11:48:02 12 packaging and required agencies to comply with certain rules,
11:48:05 13 but in that agreement, the parties reserved their position on
11:48:09 14 the lawfulness of packaging.

11:48:11 15 That agreement --

11:48:11 16 Even if that agreement did purport to waive a
11:48:16 17 conflict, however, California law says that it's not just
11:48:19 18 disclosing the existence of a conflict, an agent or a
11:48:22 19 fiduciary has to disclose the material terms so that the
11:48:25 20 writer can decide Do I want to agree to this type of
11:48:28 21 representation, or do I want to insist on a commission
11:48:31 22 instead? And otherwise the waiver is not valid under
11:48:34 23 California law.

11:48:35 24 **THE COURT:** All right. So, I'm just putting in
11:48:38 25 some notes here.

11:48:47 1 Next question I have --

11:48:50 2 I'm moving around. It's talking about the
11:48:53 3 breach of contract claim by Barbara Hall. Couldn't there be
11:49:00 4 a pretty strong argument that -- that that breach of contract
11:49:04 5 claim is barred by the statute of frauds?

11:49:06 6 **MS. LEYTON:** Your Honor, it's not barred by the
11:49:08 7 statutory of frauds, and that's for two reasons. The first
11:49:12 8 reason is that we've shown partial performance, and they
11:49:15 9 claim that that's really only -- that Ms. Hall performed by
11:49:19 10 continuing to have her agent represent her, by continuing to
11:49:22 11 have her agent collect commissions.

11:49:24 12 They say that that's really the same as
11:49:27 13 Ms. Hall doing nothing, but they cite a case where basically
11:49:30 14 somebody did not contest a will, so the only part-performance
11:49:34 15 was purely inaction.

11:49:36 16 Here Ms. Hall still was represented by the
11:49:39 17 agent. She still was paying the agent through commissions
11:49:42 18 and through the packaging fees. So she was part performing.

11:49:44 19 The other reason is the reliance, detrimental
11:49:47 20 reliance excuses the statute of fraud. And so there are two
11:49:51 21 separate reasons.

11:49:52 22 And Ms. Hall detrimentally relied because she
11:49:58 23 allowed the agency to continue collecting double commissions
11:50:01 24 and continue to represent her.

11:50:03 25 **THE COURT:** Okay. I think that's all the

11:50:05 1 questions that I had.

11:50:06 2 **MS. LEYTON:** I have --

11:50:07 3 **THE COURT:** If there is some other points you wish
11:50:10 4 to raise. We've been going at this for almost an hour now.
11:50:12 5 So, I'll allow you a brief opportunity to address any other
11:50:15 6 points.

11:50:16 7 **MS. LEYTON:** Yes, Your Honor. I'd like to address
11:50:18 8 a couple of points about relief and about a supplemental
11:50:21 9 jurisdiction, and then a little bit more on the conflict of
11:50:23 10 interest issue.

11:50:24 11 On supplemental jurisdiction, these claims
11:50:26 12 whether they're compulsory or not, and they actually did not
11:50:29 13 in their Reply briefs contest that these claims were
11:50:32 14 compulsory counterclaims, but they're so -- they're
11:50:37 15 inextricably intertwined, these claims.

11:50:38 16 Our defense in the antitrust -- part of our
11:50:39 17 defense in the antitrust claim is coverage by the labor
11:50:43 18 exemption. The question -- part of the question there is
11:50:45 19 whether the Union is pursuing the legitimate interests of its
11:50:48 20 members, and the Union's legitimate interest.

11:50:49 21 That is, that is the core of what we are
11:50:52 22 doing here. The Union is seeking to stop this conflict of
11:50:54 23 interest because it is depressing the compensation of the
11:50:58 24 writers. That is the same issue that is -- that is central
11:51:01 25 in the breach of fiduciary and constructive fraud claims.

11:51:04 1 So, the discovery will be completely overlapping. The issues
11:51:09 2 that this Court will need to decide will be overlapping.

11:51:13 3 And I would like to point, actually, that it
11:51:16 4 was not that we dismissed this case from state court after it
11:51:17 5 was assigned to Judge Highberger. The case was assigned to
11:51:19 6 Judge Highberger, a status conference was held. Judge
11:51:24 7 Highberger asked the parties: Shouldn't this all be --

11:51:24 8 You've got your claims in federal court,
11:51:26 9 you've got your claims in state court, shouldn't these all be
11:51:30 10 in a single case? That was Judge Highberger's suggestion,
11:51:34 11 that they should all be adjudicated in a single case.

11:51:36 12 **THE COURT:** Note to self, I should send an angry
11:51:40 13 gram to Judge Highberger.

11:51:41 14 **MS. LEYTON:** Well, Judge Highberger may have
11:51:42 15 intended everything to move into his court. So, he might
11:51:43 16 have been trying to do you a favor, Your Honor.

11:51:45 17 But I would also point out that in that case
11:51:48 18 the agencies actually argued that the UCL claim could not be
11:51:52 19 adjudicated in state court because the 302 issue was properly
11:51:57 20 decided only in federal court. Our UCL claim or unfair
11:51:59 21 compensation law claim is based on 302, which essentially is
11:52:02 22 a federal issue.

11:52:02 23 I'd also like to turn to the question of
11:52:05 24 relief. This was a new argument that was raised in their
11:52:08 25 reply papers. So, first of all, I'd like to point out on

11:52:12 1 RICO, it is not that we are only left with our damages
11:52:16 2 claims. We also have a claim under the Declaratory Judgment
11:52:19 3 Act for declaratory relief.

11:52:21 4 The Ninth Circuit case that says that RICO
11:52:23 5 itself does not provide a cause of action for injunctive
11:52:27 6 relief, which we acknowledge forecloses our injunctive relief
11:52:31 7 claim at this stage. There's a circuit split. The supreme
11:52:31 8 court has taken the issue before, and we'd like to preserve
11:52:35 9 that issue, but that case says nothing to indicate that RICO
11:52:38 10 actually displaced or implicitly appealed the remedy that is
11:52:43 11 available under the Declaratory Judgment Act.

11:52:46 12 The Declaratory Judgment Act provides both
11:52:49 13 the Guilds and the individual counter claimants with the
11:52:50 14 ability to seek a declaration that these payments violate
11:52:53 15 302, whether we can get injunctive relief or not.

11:52:56 16 They also raise the new argument in their
11:52:58 17 Reply brief that we can't get injunctive relief for the Guild
11:53:02 18 or for individual counter claimants because the agents have
11:53:04 19 all been fired.

11:53:06 20 But the cases that they cite, they cite the
11:53:09 21 Hangarter case, and they cite other cases, where there was
11:53:10 22 really no possibility that the injury that was at issue could
11:53:13 23 recur. The disability policy had expired, and it was only an
11:53:16 24 individual. Or in one case people were trying to challenge
11:53:20 25 statutes that were not affected by.

11:53:22 1 But we allege in our Complaint at paragraphs
11:53:25 2 244 to 249 that the writers want to remain with these agents,
11:53:29 3 that the reason that the writers are not with the agents is
11:53:31 4 because the agents are engaging in conflicted practices.

11:53:35 5 Their antitrust claims in their affirmative
11:53:37 6 case against the Guilds make clear that the agents want to
11:53:39 7 continue representing writers. So, this is nothing like the
11:53:42 8 cases where there was no possibility of recurrence of injury.

11:53:44 9 I'd also just like to point out that the
11:53:47 10 agencies are still getting packaging fees, they're still
11:53:51 11 committing 302 violations from deals that were made before
11:53:54 12 the writers fired their agents. An example of that can be
11:53:58 13 found in paragraphs 308 and 309.

11:54:01 14 And in addition, there are some members of
11:54:03 15 the Guild that still are represented by agents. They allege
11:54:06 16 that in their Complaint, that most Guild members have fired
11:54:10 17 their agents but not all, and the Guild still has a duty of
11:54:14 18 fair representation to all of its members prevent the
11:54:15 19 conflict of interest.

11:54:16 20 I would just like to go back, if Your Honor
11:54:17 21 will indulge me for just one moment on the -- on the nature
11:54:21 22 of the conflict of interest and the breach of fiduciary duty.

11:54:21 23 **THE COURT:** Okay.

11:54:25 24 **MS. LEYTON:** We've explained, and I'd like to
11:54:27 25 point to the specific paragraphs in our Complaint where we've

11:54:29 1 alleged this, that there are inherent conflicts of interest
11:54:32 2 in every single packaging fee transaction that must be
11:54:36 3 disclosed and must be waived.

11:54:37 4 That establishes the fact of harm under
11:54:41 5 California case law, and the fact of harm in breach of
11:54:44 6 fiduciary duty and constructive fraud cases is intentionally
11:54:47 7 relaxed by the California courts.

11:54:48 8 All that we have to show is deprivation of
11:54:52 9 unconflictive representation, deprivation of information.
11:54:54 10 The extent of the harm, whether it's net harm, that's a
11:54:56 11 separate question that may be relevant to the extent that
11:54:58 12 individuals are seeking damages, but it's not an issue about
11:55:01 13 whether we've established the elements of the claim.

11:55:04 14 But the conflict that is present in every
11:55:05 15 deal, one is something that I -- that I already mentioned,
11:55:08 16 which is that the agency's interest in getting a 10 percent
11:55:11 17 profit participation in these shows, that their interest in
11:55:15 18 maximizing their profit is in conflict with the writer's
11:55:19 19 interests and maximizing their compensation because the
11:55:22 20 higher the show budget, the lower those profits will be.

11:55:24 21 A second way that that conflict is present in
11:55:27 22 every single case is because the agency's interest in
11:55:30 23 maximizing its packaging fee, because it's getting an
11:55:33 24 independent -- an independent profit from that transaction is
11:55:37 25 in conflict with the writer's interest in getting the maximum

11:55:40 1 possible compensation that's available given the studio's
11:55:46 2 budget.

11:55:47 3 A third way that we've alleged --

11:55:48 4 And that's alleged in paragraphs 11, 311, 316
11:55:53 5 and 503. A third way that this inherent conflict is present
11:55:57 6 in every packaging fee deal is that the agency interest in
11:55:58 7 having a favorable relationship of studios so that they can
11:56:02 8 continue to independently profit from these transactions
11:56:06 9 conflicts with their aggressive advocacy and negotiations on
11:56:09 10 behalf of their writer clients and their aggressive
11:56:12 11 enforcement of the terms of the writers's deals. That's
11:56:15 12 alleged in paragraphs 11, 310, 313 and 14 and 503.

11:56:21 13 Just a couple of more points, the fourth way
11:56:23 14 that this inherent conflict presents itself is that the
11:56:26 15 agency's profit share comes out before the writer's profit
11:56:31 16 participation in these deals, and so the higher the agency
11:56:34 17 profit share, the less money is left over for the writer to
11:56:37 18 get as profit participation. That's alleged in paragraphs
11:56:41 19 308, 309, 325 and 26 and 503.

11:56:47 20 And the final way is that the upfront three
11:56:49 21 percent and the deferred three percent both come from the
11:56:52 22 show's budget, and that conflicts with having money that is
11:56:55 23 available. And that's also -- all of these conflicts are why
11:56:59 24 this is also a 302 problem and absolutely implicates the
11:57:03 25 interests that are at the heart of 302 of ensuring

11:57:07 1 unconflicted representation.

11:57:08 2 There is no reason my Congress would have
11:57:11 3 intended for a Union not to be allowed to take a thing of
11:57:17 4 value from an employer but to allow a Union to delegate its
11:57:18 5 authority to another entity that then obtains things of
11:57:22 6 values to an employer that present an inherent conflict.

11:57:25 7 And I would like to -- unless Your Honor has
11:57:26 8 further questions, I would like to just close out this part
11:57:29 9 of my argument with a quote from the restatement which
11:57:32 10 explains why there is this rule, that an agent or a fiduciary
11:57:36 11 cannot benefit from something that the agent is participating
11:57:39 12 in on behalf of a principal, and that's Comment B of the
11:57:43 13 restatement 8.02: "An additional rationale for this real
11:57:49 14 rule stems from a" --

11:57:51 15 **THE COURT:** Slow down, slow down, slow down.

11:57:51 16 **MS. LEYTON:** Sorry. "An additional rationale for
11:57:53 17 this rule stems from risks to a principal's interests that
11:57:56 18 may arise when an agent pursues material benefits from third
11:58:00 19 parties in connections with actions taken on behalf of the
11:58:02 20 principal.

11:58:03 21 "For example, an agent's interest in
11:58:05 22 acquiring a benefit from a third party may supersede the
11:58:08 23 agent's commitment to obtain terms from the third party that
11:58:11 24 are best from the standpoint of the principal.

11:58:14 25 "Although the agent may believe that no harm

11:58:16 1 will befall the principal, the agent is not in a position
11:58:20 2 disinterestedly to assess whether harm may occur or whether
11:58:24 3 the principal's interests would be better served if the agent
11:58:27 4 did not pursue or acquire the benefit from the third party."

11:58:31 5 That is why the agents under 302 cannot be
11:58:34 6 taking this packaging fee at all, and under California law,
11:58:38 7 if they are going to be taking a packaging fee need to
11:58:41 8 disclose the fact that this creates a conflict of interest,
11:58:45 9 not just that they're not getting it, which writers may or
11:58:45 10 may not know, but knowledge, as we've explained, doesn't
11:58:47 11 excuse the duty to disclose. But the fact of the conflict of
11:58:50 12 interest and the material terms of the -- of the packaging
11:58:54 13 fee arrangement.

11:58:55 14 It's the principal's decision whether to
11:58:57 15 consent to this conflict of interest. It is not the agent's
11:59:01 16 decision whether the agent can still fairly represent the
11:59:04 17 writer, despite the inherent conflicts of interests that are
11:59:08 18 present.

11:59:09 19 **THE COURT:** Thank you, Mr. Leyton.

11:59:10 20 Mr. Kessler, I assume you have nothing to say
11:59:13 21 in response.

11:59:13 22 **MR. KESSLER:** So, we're going to divide this up.
11:59:17 23 I'm going to deal with the standing issues. Counsel for CAA
11:59:21 24 will address the RICO criminal 302 issues and the
11:59:25 25 associational standing issues, and Mr. Marenberg will be

11:59:31 1 cleaning up on what's left --

11:59:31 2 **THE COURT:** All right.

11:59:32 3 **MR. KESSLER:** In terms of that.

11:59:32 4 Very quickly, Your Honor, I'll start
11:59:35 5 backwards on the RICO issue.

11:59:37 6 So, it's conceded there is no injunctive
11:59:39 7 relief in this circuit, I mean, you know, maybe the Supreme
11:59:42 8 Court will rule differently some day. Your Honor lives in
11:59:45 9 the Ninth Circuit, there is no injunctive relief.

11:59:48 10 You can't avoid that through the Declaratory
11:59:52 11 Judgment Act. Why? Because there is a constitutional
11:59:55 12 requirement under Article III that there has to be a case, a
11:59:59 13 controversy before you could seek a declaratory judgment.

12:00:04 14 So, you can't go in for an advisory opinion
12:00:08 15 and say: Nobody has standing because no one -- and we'll get
12:00:12 16 to why there is no damages -- but I would like to get a
12:00:16 17 declaration whether or not this 302 is a criminal violation
12:00:19 18 for some transactions applying to who? Okay? It is
12:00:25 19 absolutely precluded that the declaratory judgment action is
12:00:28 20 not a way out of this in terms of that.

12:00:31 21 So, you come down to, if there is no
12:00:33 22 injunctive relief, who has suffered any damages?

12:00:37 23 Well, the Guilds don't claim even that
12:00:42 24 they've suffered damages from RICO. You know, we've heard
12:00:46 25 that. They claim that the members have suffered damages from

12:00:51 1 RICO in terms of that.

12:00:53 2 And the problem here again is once you get to
12:00:55 3 the members, it's got to be individualized. So, Your Honor
12:01:00 4 has to look and see: Has any specific, allegedly, criminal
12:01:07 5 act of packaging resulted in a harm to a specific writer?

12:01:13 6 And, again, I said -- challenge them: Where
12:01:17 7 is the allegation for Ms. Stiehm? There is no allegation for
12:01:21 8 Ms. Stiehm about how she's connected in harm to any packaging
12:01:26 9 fee. You can go one by one. The closest they make is one of
12:01:31 10 the counterclaims, someone says: Oh, my agent made more
12:01:36 11 money. Well, maybe that's some conflict of interest claim,
12:01:37 12 but it doesn't connect it to a criminal RICO violation for
12:01:40 13 damages within the proximate cause regarding that.

12:01:45 14 So, Your Honor, I would submit that there
12:01:48 15 just is no standing either for the Guilds or with respect to
12:01:53 16 their individual members on RICO.

12:01:55 17 Now, let me go to the antitrust.

12:02:00 18 So, counsel directed you to paragraph 424,
12:02:04 19 and said, I guess, that I didn't mention 424, somehow
12:02:08 20 misrepresented what they claim. I embrace paragraph 424.

12:02:13 21 So, 424 is where they allege, in conclusory
12:02:18 22 fashion, but they allege the following. "Counter claimants,
12:02:22 23 the Guilds and their members, including the individual
12:02:26 24 counter claimants have suffered antitrust injury due to the
12:02:33 25 illegal conspiracy because Guild members," this is the first

12:02:36 1 one, "purchased talent representational services at
12:02:41 2 artificially inflated prices. So, let me start first with
12:02:47 3 that part of it, and there's a second.

12:02:48 4 Whether or not there was an alleged price-fix
12:02:51 5 to the studios or package fees has nothing to do with the
12:02:57 6 Guild members paying their fee to the agency. In fact, it's
12:03:02 7 the opposite. In a packaging fee, the Guild members pay no
12:03:07 8 fee to the agency.

12:03:08 9 So, there can't be any connection between an
12:03:12 10 alleged price-fix of packaging fees and any inflation to a
12:03:16 11 fee that you don't even pay in packaging, and there is no
12:03:19 12 logical connection between that either.

12:03:22 13 So, you can't get any connection on that, and
12:03:26 14 certainly the Guilds suffer no harm if their members paid,
12:03:33 15 allegedly, higher fees to the agents, and they pay none in
12:03:36 16 packaging. And, in fact, the Guilds in the Complaint
12:03:40 17 specifically agree they are not in the talent representation
12:03:44 18 market. So, they're out of anything about the first part of
12:03:47 19 424.

12:03:48 20 The second part of 424 is that the quality of
12:03:54 21 the talent representation available to Guild members has been
12:03:57 22 substantially reduced. That's the one that Mr. Litwin
12:04:01 23 focused on. But let's look at that.

12:04:04 24 The price-fix claim could have nothing to do
12:04:07 25 with that. Whether or not the agencies allegedly fixed how

12:04:12 1 much they're charging the studios would have no connection to
12:04:16 2 whether their representation was higher quality or lower
12:04:20 3 quality to their writers. In other words, they make the same
12:04:24 4 claim that merely doing their packaging is -- affects their
12:04:31 5 quality, it's not the alleged price-fixing of packaging. So,
12:04:35 6 there is a complete, total failure to connect this to the
12:04:39 7 antitrust injury.

12:04:41 8 What about the group boycott. You heard
12:04:44 9 Mr. Litwin really didn't say much at all about the issue of
12:04:48 10 the June 19 versus the April problem, which is the
12:04:51 11 fundamental problem in the whole group boycott idea. You did
12:04:56 12 hear something from them: Well, it could occur in the
12:05:00 13 future. It was done in a different context, this was raised
12:05:04 14 not -- not in the antitrust context. But in the future they
12:05:10 15 may decide to rehire the agents, if --

12:05:13 16 And look what you have to do to get to that
12:05:15 17 chain. The group boycott has to end, and there would be, if
12:05:20 18 there was one, there would be individual bargaining, step
12:05:24 19 one. Step two: An agency would have to agree to the code of
12:05:30 20 conduct, which is no evidence that they would, because they
12:05:33 21 said they don't individually like it, but let's assume they
12:05:35 22 would, then after doing that, they would have to be rehired
12:05:40 23 by a specific agent's -- a specific talent, and that somehow
12:05:48 24 in this -- this is a claim for treble damages -- as a result,
12:05:53 25 there's been damages incurred.

12:05:56 1 What are the damages that would have been
12:05:59 2 incurred in the interim? How would you figure out --

12:06:01 3 As Your Honor said, if you allege that the
12:06:04 4 studios paid too much or there is a conflict or the claims
12:06:06 5 about participation and back-end profit, that money could go
12:06:10 6 to anyone. It could go to the directors, it could go to the
12:06:13 7 actors.

12:06:14 8 In fact, they agree, the packages of all
12:06:16 9 those different parties. So, this, again, just doesn't come
12:06:20 10 within any ambit of AGC.

12:06:24 11 Finally, Your Honor, I want to say that I
12:06:27 12 believe they had a confusion with respect to Eagle as to who
12:06:34 13 is who. I agree with them that the agencies here are not the
12:06:41 14 equivalent of the ship owners in this claim. In other words,
12:06:47 15 the -- the analogy to Eagle is that the ship owners were like
12:06:53 16 the studios, they were the ones who were the victim of the
12:06:58 17 alleged price-fixing conspiracy, they were the one who would
12:07:03 18 be hurt, who would have less resources, supposedly,
12:07:07 19 available.

12:07:07 20 And in that line of analogy, the writers were
12:07:11 21 exactly the seamen. They were the ones who worked for the
12:07:15 22 studios, like the seamen worked for the vessel owners who
12:07:21 23 were the victims. They were the ones who had some connection
12:07:24 24 to, say, you know, I'm going to get less money out of this.
12:07:27 25 The seaman had a direct percentage connection, they actually

12:07:31 1 were tied to it, and still the Ninth Circuit said: You are
12:07:34 2 not within an antitrust injury zone.

12:07:38 3 So, for all of these reasons, Your Honor, I
12:07:40 4 just don't believe that they could overcome the standing
12:07:45 5 issues with respect to either of the federal claims.

12:07:47 6 Unless Your Honor has any other questions,
12:07:50 7 I'm going to turn it over to my colleague.

12:07:52 8 **THE COURT:** No, I don't. Thank you.

12:07:54 9 Mr. Somers, welcome to the party.

12:07:59 10 **MR. SOMERS:** I'll started by saying that
12:08:01 11 Mr. Kendall sends his regret. He's recovering from knee
12:08:06 12 surgery. So I have the tall order of filling in for him.

12:08:07 13 And I want to start with the 302, because I
12:08:11 14 think your instincts are naturally right. Is, this is a
12:08:14 15 statute, doesn't remotely come to applying to this situation.

12:08:17 16 I think all we have to do is take a step back
12:08:20 17 and look at what the allegations are, because here you have
12:08:24 18 terribly serious accusations that the talent agencies are
12:08:29 19 racketeers who received criminal kickbacks from studios and
12:08:35 20 studio executives. And by any measure of common sense, we
12:08:38 21 know that those allegations are preposterous, and we can
12:08:42 22 start with AMBA for the past 43 years. There is an agreement
12:08:48 23 in place that said packaging is allowed. They put in
12:08:49 24 structures and rules for packaging to be done. It was an
12:08:50 25 agreement between the Union and the talent agencies. And so

12:08:52 1 packaging has been done out in the open. That's right in
12:08:55 2 their counter claimants.

12:08:56 3 Paragraph 280 says that: The knowledge of
12:09:00 4 packaging in the 33 end-structure has been out in the open
12:09:03 5 and widely reported, and everyone is -- is, you know, aware
12:09:08 6 of the practice.

12:09:08 7 **THE COURT:** But just because it's out in the open,
12:09:11 8 that doesn't -- I mean, that's not a waiver, or it doesn't
12:09:15 9 mean it's okay.

12:09:19 10 **MR. SOMERS:** Correct. It's not a waiver, but it
12:09:21 11 gives you, you know, gives credence to your instinct: Is
12:09:21 12 this criminal activity? Are people behaving like a crime is
12:09:25 13 occurring? And the reason they aren't is, this statute
12:09:28 14 doesn't apply.

12:09:29 15 So, we'll start with the first principles of,
12:09:32 16 you know, why was 302 passed? And you can look at the
12:09:35 17 Supreme Court's decision in Arroyo which comes after the Ryan
12:09:41 18 decision, and it says when 302 was passed, it was to deal
12:09:45 19 with problems peculiar to collective bargaining. The
12:09:49 20 provision was enacted as part of a comprehensive provision of
12:09:51 21 federal labor policy in light of the experience acquired
12:09:55 22 during the years following the Wagner Act and was aimed at
12:09:56 23 practices which Congress considered inimical to the
12:10:02 24 integrity of the collective bargaining process."

12:10:03 25 That -- that conclusion was based on a rich

12:10:10 1 body both of the legislative history and the statutory scheme
12:10:13 2 to which 302 was a part, and it matters because talent agents
12:10:17 3 have nothing to do with collective bargaining.

12:10:20 4 That's a term of art in labor law. To be a
12:10:23 5 representative in the collective bargaining sense means that
12:10:27 6 you are in charge of a bargaining unit. The decisions and
12:10:32 7 things that you make, the deals that you do bind the whole
12:10:34 8 Union. That isn't a talent agent.

12:10:37 9 A talent agent represents an individual
12:10:41 10 writer and negotiates various terms for that writer that
12:10:45 11 don't have any impact on the rest of the writers. It's a
12:10:48 12 transaction-specific deal.

12:10:50 13 And more importantly, they talk about the
12:10:52 14 delegation of authority to -- to the talent agencies. But
12:10:58 15 the talent agencies, and there are no allegations to this
12:11:01 16 effect, have no influence on the Union. That tells you that
12:11:06 17 302 doesn't come remotely in the vicinity because there is
12:11:11 18 not a concern that somehow a payment to a talent agency is
12:11:14 19 going to corrupt the labor organization and influence the
12:11:19 20 power that they have to bind all of their members.

12:11:22 21 **THE COURT:** Let me ask you this. Just looking at,
12:11:25 22 just a strict language of 302, it says: "It makes it a
12:11:31 23 criminal offense for any employer or association of employer.

12:11:35 24 Would you agree that the employer in this
12:11:38 25 scenario would be the studio?

12:11:41 1 **MR. SOMERS:** Yes.

12:11:43 2 **THE COURT:** Okay. "To pay, lend or deliver or
12:11:46 3 agree to pay, lend or deliver any money or thing of value to
12:11:51 4 any representative of his employees."

12:11:54 5 "Employees" is the talent, correct?

12:11:59 6 **MR. SOMERS:** Yes.

12:12:00 7 **THE COURT:** And the representatives of those
12:12:01 8 employees, that's not the talent agency?

12:12:05 9 **MR. SOMERS:** No, it's not.

12:12:07 10 **THE COURT:** Who's the representative of the
12:12:08 11 employee?

12:12:09 12 **MR. SOMERS:** You can look at the meaning of
12:12:11 13 "representative" because it's defined in the statute, and
12:12:14 14 that's in 152, Subsection 5. It defines it as -- not
12:12:20 15 Subsection 5, Subsection 4. And it defines a
12:12:27 16 "representative" as an "individual" or a "labor
12:12:29 17 organization."

12:12:29 18 Now, talent agencies are decidedly not labor
12:12:33 19 organizations.

12:12:34 20 **THE COURT:** Are they individuals?

12:12:36 21 **MR. SOMERS:** No, they're not, because an
12:12:38 22 individual is a natural person. And so the only person that
12:12:41 23 could arguably be an individual would be a talent agent, and
12:12:45 24 claims aren't brought against talent agents, but then there
12:12:48 25 would be no sound basis to bring a claim against talent

12:12:52 1 agents because you have to set the entire statute.

12:12:55 2 And what the Supreme Court has made clear,
12:12:57 3 going back to Arroyo, is that the context and purpose of the
12:13:00 4 statute is to address the collective bargaining process, and
12:13:04 5 a talent agent has nothing to do with that process.

12:13:08 6 Indeed, the fact that a talent agent is
12:13:11 7 competing with other talent agents to get the best deal for
12:13:14 8 their writers shows that their duties are fundamentally
12:13:17 9 different.

12:13:18 10 And in fact, if you look at the allegations
12:13:20 11 of the Complaint, in allegation 335, they say that the talent
12:13:27 12 agent's duties are consistent with California rules on agency
12:13:32 13 principals. It's not being bound by federal labor law, and
12:13:37 14 that tells you that what talent agents do is different.

12:13:43 15 **THE COURT:** All right. And are you arguing about
12:13:50 16 breach of fiduciary duty?

12:13:51 17 **MR. SOMERS:** I handling the associational standing
12:13:54 18 issue.

12:13:54 19 **THE COURT:** All right, go ahead.

12:13:55 20 **MR. SOMERS:** So, there I think there were some
12:13:58 21 very interesting things that reflect the fact that these are
12:14:02 22 highly individual issues.

12:14:03 23 Mr. Litwin said that in his discussion that
12:14:08 24 you have some members have come forward and given specific
12:14:12 25 examples in which people have done, you know, have harmed

12:14:17 1 them by not doing good deals. Well, that reflects that these
12:14:21 2 are individualized issues, that you need, you know, the
12:14:24 3 actual member who was allegedly harmed to come forward to get
12:14:30 4 evidence from that person and make an assessment: Is there a
12:14:33 5 breach of duty? Is there a constructive fraud?

12:14:35 6 And maybe the best way to illustrate this is
12:14:39 7 that if the Union came and said: We're going to bring a
12:14:42 8 claim on behalf of Meredith Stiehm and bring her fiduciary
12:14:46 9 duty claim and bring her constructive fraud claim, there is
12:14:47 10 no question that we would have to get evidence from Meredith
12:14:51 11 Stiehm and have her participation in the case.

12:14:54 12 If you did it with Meredith Stiehm and Patty
12:14:58 13 Carr, the same conclusion would be that we would need
12:14:59 14 evidence from these two writers, and anyone associated with
12:15:02 15 the writers, their lawyers, their managers and the like, and
12:15:05 16 here they're trying to do that but multiplied by 14,700.

12:15:10 17 And when you do that, that unfairly deprives
12:15:13 18 the, you know, counterclaim defendants of their right to test
12:15:19 19 the evidence, to obtain the evidence, to present
12:15:22 20 transaction-specific evidence to show whether things were
12:15:26 21 properly disclosed or not. Even taking Ms. Leyton's point of
12:15:30 22 saying that you have to fully disclose the terms in order for
12:15:33 23 there not to be a conflict.

12:15:34 24 Well, that's testable, and the only way to
12:15:37 25 test that is to find out what the individual knew, what was

12:15:42 1 disclosed to that person, what were the circumstances
12:15:43 2 surrounding them. For a fiduciary duty claim, you also look
12:15:45 3 at the sophistication of the principal you're representing to
12:15:48 4 understand what -- what they might have known; and according
12:15:52 5 to the Guild, they say that they regularly educate their
12:15:57 6 members about packaging.

12:15:58 7 Well, it's a plausible inference that some
12:16:01 8 members are fully aware of how patching works, and they could
12:16:06 9 still nonetheless decide to go forward with that, and the
12:16:09 10 only way to properly evaluate that is to have the individuals
12:16:13 11 participate, and you just can't do that on a, you know, wide
12:16:17 12 basis without -- without their involvement.

12:16:19 13 **THE COURT:** All right, thank you, Counsel.

12:16:21 14 Mr. Marenberg, was there anything else you
12:16:26 15 wish to raise at this time?

12:16:27 16 **MR. MARENBERG:** Let me just address a couple of
12:16:29 17 questions that you -- that you raised with the other side.
12:16:39 18 But let me make one point on the racketeering act that Mr.
12:16:44 19 Somers did not.

12:16:44 20 **THE COURT:** All right.

12:16:45 21 **MR. MARENBERG:** In paragraph 15 of their answer,
12:16:47 22 they have admitted that in the deals that they are signing
12:16:50 23 with agencies who are subscribing to the code of conduct,
12:16:54 24 that there is a sunset clause that permits these agencies to
12:16:58 25 continue to package for years.

12:16:59 1 They don't believe their own argument here.
12:17:02 2 If this were truly racketeering activity, they could not be
12:17:05 3 signing deals with agencies that would permit racketeering
12:17:11 4 activity to go on for years.

12:17:14 5 Now, let me deal with one other point on
12:17:17 6 that -- on the definitional issues. One case that's come up
12:17:22 7 recently in the Supreme Court that might bear on this and
12:17:25 8 that you might want to take a look at is the Nantkwest case
12:17:29 9 versus Lancu, I think is the name. And it deals with the
12:17:33 10 issue of, sometimes people get down in the weeds and look at
12:17:36 11 individual terms of a statute and say: This is what it
12:17:39 12 means.

12:17:39 13 In that case, it had to do with whether the
12:17:43 14 U.S. Patent and Trademark Office could collect fees in
12:17:45 15 certain instances. And if you read that statute literally
12:17:50 16 without tying it to the context and the historical practice
12:17:54 17 of the statute, you would have come out to the wrong
12:17:58 18 conclusion, the conclusion in that case advocated by the
12:18:01 19 patent office, that they were entitled to fees because after
12:18:04 20 all, that's what the statute said.

12:18:05 21 And the Supreme Court said: No, no, no.
12:18:07 22 You've got to look at the context of the statute and you've
12:18:11 23 got to look at the historical precedent. And fees can't be
12:18:14 24 just construed literally. You can't get down in the weeds
12:18:15 25 like they're inviting you to do here. Your inclinations

12:18:21 1 about this statutes are exactly right.

12:18:23 2 Now, let me just deal with a couple of points
12:18:30 3 that you asked about to my -- counsel for the other side.
12:18:34 4 One is Lenhoff. I was there, so I have something to say
12:18:38 5 about that. We don't say that Lenhoff is binding precedent
12:18:43 6 on this. What we say is that the Ninth Circuit dealt with a
12:18:46 7 situation where there were three complaints, and the Ninth
12:18:49 8 Circuit in the Lenhoff opinion addresses the allegations
12:18:52 9 of -- that there was a price-fixing of a 3-3-10, and they say
12:18:58 10 that doesn't cut it.

12:19:02 11 And they also addressed the evidence that
12:19:06 12 was -- I think in paragraph 349 that was cited here, which
12:19:11 13 was some evidence that there was an agreement to fix prices.
12:19:17 14 And the Ninth Circuit, if you'll look at the end of the
12:19:18 15 opinion, they basically say nothing in the record -- which
12:19:22 16 includes the allegations that are at 349 here, is sufficient
12:19:26 17 to change the conclusion that there is nothing that they
12:19:30 18 could say to amend their Complaint to state a price-fixing
12:19:34 19 claim.

12:19:34 20 And so Lenhoff does deal with this. It's a
12:19:39 21 persuasive opinion. It's not binding.

12:19:40 22 Now, in any event, the real reason on the
12:19:42 23 pleadings that they haven't alleged a sufficient agreement is
12:19:48 24 not Lenhoff, it's Twombly, it's Kendall versus Visa, and it's
12:19:53 25 Musical Instruments. And they just don't do it under those

12:19:57 1 cases.

12:19:57 2 I want to talk about the boycott allegations
12:20:00 3 and whether they're sufficient because you asked about those.
12:20:02 4 And, basically, I think we now have some clarity that the
12:20:09 5 boycott concerns a conspiracy that had to have occurred, if
12:20:13 6 it occurred at all, after June 19, 2019, when the Guild
12:20:18 7 withdrew their permission to collectively bargain.

12:20:21 8 The only allegations that there was a refusal
12:20:25 9 to individually bargain are the following: One, there are
12:20:30 10 allegations that Karen Stuart of the ATA circulated an
12:20:34 11 e-mail. Now, that proves nothing, and it doesn't get them
12:20:38 12 over the hump of Twombly. That's Klein versus Caldwell
12:20:43 13 Banker, 50 years ago when I was in college. The Ninth
12:20:47 14 Circuit established that you don't visit on the members of a
12:20:49 15 trade association the sins of the trade association itself.
12:20:53 16 And I was reaffirmed in Kendall versus Visa. So that
12:20:58 17 allegation means nothing.

12:20:58 18 Then, there are a couple of specific
12:21:01 19 allegations of refusing to bargain individually in this
12:21:05 20 Complaint. And one of the things I have -- I learned in law
12:21:09 21 school, in civil procedure, is not only can you not plead
12:21:13 22 enough and not satisfy -- lose under Rule 12 but you can
12:21:18 23 plead too much and lose under Rule 12.

12:21:21 24 And if you look at the allegations that they
12:21:23 25 pleaded here, there are two statements in there of agencies

12:21:28 1 refusing to bargain individually. One is from an agency
12:21:32 2 called Gersh, the other is from an agency called ICM. There
12:21:39 3 are --

12:21:39 4 When it comes to the three --

12:21:40 5 And neither of those agencies are sued here,
12:21:43 6 nor is the ATA.

12:21:44 7 When it comes to the agencies that have been
12:21:47 8 sued here under the antitrust laws, two of them, WME and UTA
12:21:54 9 say: We would prefer that you negotiate through the ATA.

12:21:58 10 And that is -- there is nothing irrational or wrong about
12:22:01 11 that, because as they've admitted, it's in the agency's
12:22:05 12 individual interest. You can't infer agreement from that,
12:22:09 13 because it's in the agency's rational interest to prefer to
12:22:13 14 bargain collectively. It's probably also in the writer's
12:22:15 15 interest, but it's certainly in the agency's interest. And
12:22:18 16 neither of those agencies refuse, like Gersh or ICM, to
12:22:22 17 bargain individually.

12:22:23 18 And then the third agency here, CAA, there is
12:22:27 19 nothing about them at all on the conspiracy claim, no
12:22:31 20 allegation whatsoever. So, they haven't pleaded enough on
12:22:34 21 that boycott, and your instinct was correct on that.

12:22:38 22 Finally, on the remand issue. I don't want
12:22:41 23 to spend a lot of time on this because I think we've gone
12:22:44 24 over it sufficiently. But I --

12:22:47 25 We have never said, again, that would be an

12:22:49 1 overstatement that there was no overlap at all. Rather, when
12:22:54 2 you get into it and start examining really what the overlap
12:22:56 3 is and how extensive it is, it's not that extensive.

12:23:00 4 And if you're thinking about discovery in
12:23:02 5 this case, the discovery is blown up if we include discovery
12:23:08 6 about the individuals' claims of antitrust violations or RICO
12:23:13 7 violations, or if you just get -- let's assume that they're
12:23:16 8 gone as they should be, even if we include discovery about
12:23:19 9 the breach of fiduciary duty and constructive fraud claims,
12:23:24 10 because we're getting into questions of who said what to
12:23:27 11 whom, what was the affect of packaging on these individual
12:23:30 12 members, what would they have gotten absent packaging.

12:23:33 13 Some of these individuals don't have
12:23:35 14 back-ends, and so nothing said about back-ends apply to them
12:23:39 15 at all. Others are show runners, and of course they know
12:23:42 16 that their shows have been packaged. They see the budget to
12:23:45 17 the show every day.

12:23:46 18 So, we're getting into vastly broader
12:23:50 19 discovery if we keep the individuals' claims once the RICO
12:23:56 20 and the antitrust claims and the Guild's associational claim
12:24:00 21 are dismissed, and they really should go back to Judge
12:24:04 22 Highberger, who's perfectly capable of addressing claims of
12:24:08 23 state law in state court.

12:24:08 24 **THE COURT:** All right, thank you.

12:24:09 25 Ms. Leyton --

12:24:09 1 **MR. KESSLER:** Your Honor, if I may --

12:24:12 2 **THE COURT:** Mr. Kessler, we've been at this since

12:24:14 3 11 --

12:24:14 4 **MR. KESSLER:** It was a question that you asked
12:24:16 5 that I don't think we actually answered, but if Your Honor --

12:24:18 6 **THE COURT:** I think we're okay.

12:24:18 7 **MR. KESSLER:** Okay, fine. All right.

12:24:18 8 **THE COURT:** And, Ms. Leyton, just in the interest
12:24:25 9 of time, I've got another criminal calendar in less than an
12:24:28 10 hour. I'd like the focus to be on this 302 claim.

12:24:34 11 **MR. MARENBERG:** Your Honor, can I just say -- I
12:24:35 12 misspoke. It's paragraph 125 for the record, not 15. I
12:24:38 13 misspoke.

12:24:39 14 **THE COURT:** Okay. All right, thank you.

12:24:40 15 **MS. LEYTON:** Okay, Your Honor, the other side on
12:24:42 16 the 302 issue says that collective bargaining means
12:24:45 17 inherently that that means bargaining by the exclusive
12:24:49 18 representative that combined others. That is an invention of
12:24:53 19 the plaintiffs here.

12:24:53 20 302 nowhere says that that is what collective
12:24:57 21 bargaining means or that is what 302 targets. "Bargaining"
12:24:59 22 is dealing with an employer regarding the terms and
12:25:03 23 conditions of the employee's employment. The central term
12:25:06 24 and condition of the employment in almost every employment
12:25:09 25 relationship is wages, and that is exactly what the agents

12:25:12 1 do.

12:25:12 2 And to the extent there is any question about
12:25:14 3 that, the Korholz case says it does not matter if the entity
12:25:19 4 that is the representative that is getting something of value
12:25:21 5 is the exclusive representative of the employees in the
12:25:24 6 workplace as long as their representative is authorized to
12:25:27 7 deal with the employer on their behalf.

12:25:29 8 **THE COURT:** And just run this by me one more time,
12:25:34 9 because I thought Mr. Somers said that 152 paragraph 4
12:25:38 10 defines representatives as an individual or labor
12:25:40 11 organization. And your response is, that the agents are
12:25:44 12 individuals, or are they labor organizations --

12:25:47 13 **MS. LEYTON:** Your Honor, I have a few responses to
12:25:49 14 that. The first response is that the definition that the
12:25:51 15 other side has pointed to is in National Labor Resignations
12:25:55 16 Act, the NLRA, which was actually passed ten years before the
12:25:58 17 LMRA. The LMRA is what adopted Section 302.

12:25:58 18 So, the definition that is in the NLRA is not
12:26:05 19 even necessarily applicable to the LMRA.

12:26:07 20 The LMRA does say that the terms that we are
12:26:11 21 using should have the same meaning as they are used in NLRA.

12:26:14 22 But in United States versus Ryan, the
12:26:18 23 court -- the Supreme Court considered an argument that that
12:26:19 24 meant that the terms of 302, the term representative, should
12:26:23 25 have the same narrow definition that it has under the NLRA,

12:26:28 1 that it should really mean a labor organization.

12:26:30 2 And in that case, the Supreme Court rejected
12:26:33 3 it and talked about 302 having a broader reach and nothing
12:26:33 4 tied to the terms as they're used in the NLRA.

12:26:37 5 I'd also like to point out that the terms are
12:26:40 6 not the same. The term that is defined in the NLRA is
12:26:43 7 representatives, plural.

12:26:44 8 As Your Honor has quoted from 302, 302 is
12:26:48 9 using representative in singular and is also saying: Any
12:26:54 10 representative of his employees.

12:26:56 11 It is a term that is used in context. We
12:26:58 12 know from Ryan that Congress rejected a narrowing
12:27:01 13 construction of that term, and that it is a different term.

12:27:04 14 In addition, I would like to say that if
12:27:06 15 their argument is really that the individual agents can be
12:27:09 16 liable here but not the agencies, themselves, first of all,
12:27:13 17 I'd like to say that makes no sense, that Congress would have
12:27:16 18 allowed a payment to go to a middle man, to go to a middle
12:27:19 19 entity, and there are numerous cases, including some that
12:27:24 20 we've cited where the payment actually went to a business
12:27:27 21 entity, not to a Union or an individual. So it makes no
12:27:30 22 sense that Congress would have allowed that. And we've cited
12:27:31 23 cases explaining that that's not the case.

12:27:31 24 But to the extent that the agencies are
12:27:35 25 serious about that, it appears that they are inviting us to

12:27:38 1 amend our Complaint to assert a defendant class action
12:27:41 2 against all of the individual agents in these agencies.

12:27:43 3 If that is what the agencies would insist 302
12:27:47 4 intends, I highly doubt that that's what Congress meant when
12:27:50 5 they attempted to prevent conflicts of interest. But at the
12:27:53 6 very least, the agents themselves are committing the
12:27:56 7 violations.

12:27:57 8 And to the extent that they're arguing that
12:27:59 9 the fact that this is out in the open, that the Guild has not
12:28:02 10 stopped it somehow means that this is not criminal, that is
12:28:04 11 simply not the case. 302 targets any receipt or any offer of
12:28:08 12 anything of value. It can be an innocent thing in the
12:28:13 13 Malhall (phonetically spelled), Eleventh Circuit decision, it
12:28:13 14 was a --

12:28:13 15 **THE COURT:** You mentioned that earlier. I get
12:28:15 16 that. I guess --

12:28:16 17 Can we just take a step back on 302, just
12:28:20 18 looking at sort of the intent or the purpose behind it.
12:28:26 19 What's your response --

12:28:26 20 Again, you heard the plaintiffs say, like,
12:28:30 21 these talent agencies, they have nothing to do with the
12:28:34 22 collective bargaining agreements. And isn't 302 -- wasn't
12:28:37 23 the purpose of 302 to deal with issues with respect to
12:28:41 24 collective bargaining agreements?

12:28:43 25 **MS. LEYTON:** My first point would be that the

12:28:45 1 agents are absolutely exercising the delegated authority of
12:28:49 2 the Guild here. If the Guild chose to do these above-scale
12:28:52 3 individual deals, the Guild would have the exclusive right to
12:28:55 4 bargain all of these individual deals.

12:28:57 5 There are collective bargaining agreements
12:28:59 6 that provide for different wages for different groups of
12:29:01 7 workers, and there are collective bargaining agreements that
12:29:03 8 authorize a Union to make above-scale deals. The Guild could
12:29:07 9 do that if it elected. It's delegated that authority, and
12:29:11 10 they are exercising the same authority that the Guild would
12:29:11 11 have.

12:29:14 12 But in addition, 302 does not talk about only
12:29:17 13 collective bargaining. 302 has provisions that specifically
12:29:21 14 apply only to labor organizations. But this provision of 302
12:29:23 15 applies to any representative of any employees.

12:29:25 16 The agencies, actually, in many cases
12:29:28 17 represent multiple writers. In the packaging fee context
12:29:33 18 they are always representing multiple employees, multiple
12:29:36 19 writers and other talent if they're getting a packaging fee.
12:29:39 20 So, this is absolutely --

12:29:40 21 The concern that Congress had was that when
12:29:43 22 there is a collective bargaining relationship, when there is
12:29:46 23 a relationship between an entity that is representing
12:29:51 24 employees and negotiating terms with an employer, and it
12:29:54 25 doesn't have to be a Union, it can be a worker center in some

12:29:57 1 cases, if they're bargaining on behalf of individuals. But
12:30:01 2 when an entity is negotiating with an employer on behalf of a
12:30:04 3 worker or workers, and we know that it doesn't have to be
12:30:08 4 more than one because Congress rejected that reading, if it
12:30:12 5 is bargaining with an employee, employer on behalf of
12:30:12 6 workers, that entity cannot take a thing of value from the
12:30:16 7 employer because that presents the danger of an inherent
12:30:20 8 conflict of interest, and the 302 conflict, unlike the
12:30:22 9 conflict of interest under California law is not waivable,
12:30:25 10 the Union would not be able to waive that on behalf of the
12:30:28 11 employees.

12:30:29 12 **THE COURT:** All right. Thank you, Ms. Leyton.

12:30:32 13 **MS. LEYTON:** I'd like to just make a couple of
12:30:32 14 other points, and I know Your Honor is short on time, just to
12:30:34 15 respond to specific point --

12:30:34 16 **THE COURT:** You got three minutes.

12:30:36 17 **MS. LEYTON:** Okay, thank you, Your Honor.

12:30:40 18 **THE COURT:** Three minutes.

12:30:40 19 **MS. LEYTON:** First I would like to say that the
12:30:42 20 Ninth Circuit decision that held that injunctive relief is
12:30:44 21 not available under RICO, it was a specific statutory
12:30:47 22 interpretation decision, it was not about Article III
12:30:49 23 standing, we have explained why here the unions and the
12:30:52 24 individuals have Article III standing to seek declaratory
12:30:55 25 relief.

12:30:55 1 To say that there is a very attenuated chain
12:31:00 2 that would be required before these agencies would ever start
12:31:01 3 representing these writers again, but presumably, if this
12:31:03 4 Court holds that the payment of a packaging fee violates
12:31:07 5 RICO, they will not continue to be -- to take packaging fees.
12:31:11 6 And in that case we have specifically alleged that the
12:31:14 7 individual counterclaimants who are members of the Guilds
12:31:16 8 would want to go back to their agents, they also don't
12:31:19 9 respond to our points that the agencies are still getting
12:31:23 10 packaging fees, that a declaratory judgment would have the
12:31:26 11 effect of stopping those, and that they still represent some
12:31:29 12 writers that are members of the Guild. All of those would
12:31:31 13 give article standing in this case. There is no requirement
12:31:33 14 that there be a cause of action other than under the
12:31:36 15 Declaratory Judgment Act here.

12:31:37 16 One point before my colleague will ask Your
12:31:40 17 Honor's indulgence, just on the proximate cause issue, we've
12:31:44 18 outlined the harms that are befalling the writers, the
12:31:47 19 specific harms on a systemwide basis, they are in many ways
12:31:52 20 far more specific and far less speculative than the harms
12:31:55 21 that the Ninth Circuit held were sufficient to establish
12:31:58 22 proximate cause under RICO in the Diaz case that we've cited
12:32:01 23 in our opposition brief.

12:32:02 24 We've alleged wage suppression, denial of
12:32:09 25 employment opportunities, deprivation of unconflicted

12:32:09 1 representation, failure to disclose information that the
12:32:12 2 writers are entitled to know, and writers having to pay other
12:32:16 3 professionals to do things that the agents should be doing.
12:32:19 4 We've also alleged the Guilds' organizational harms in
12:32:23 5 expanding resources to stop the conflicts and in the form of
12:32:25 6 lost dues revenue. And those are more than sufficient under
12:32:28 7 Diaz to establish proximate cause under RICO.

12:32:34 8 **MR. LITWIN:** Your Honor, I apologize. There were
12:32:36 9 just some new things that came up.

12:32:39 10 **THE COURT:** Mr. Litwin, look, I think I've given
12:32:41 11 you all a lot of time here. I mean, you've been here most of
12:32:46 12 the morning. You've seen the other cases. You've got two
12:32:47 13 minutes. I've got other cases I have to deal with.

12:32:50 14 **MR. LITWIN:** I appreciate it, thank you very much.
12:32:52 15 Your Honor, first on the Lenhoff case,
12:32:54 16 responding for Mr. Marenberg, despite what he says, he did
12:32:58 17 not contradict his cocounsel when she argued to the Ninth
12:33:01 18 Circuit regarding the alleged -- the -- the declaration
12:33:03 19 regarding 3-3-10, quote: "And that's not what they alleged
12:33:07 20 here. What they alleged at the last minute, they didn't
12:33:10 21 actually file an amended notice of appeal related to a
12:33:14 22 conversation that one of the talent agencies who's not a
12:33:18 23 named defendant had."

12:33:18 24 I mean, it's pretty clear. It's not a
12:33:21 25 price-fixing case. It doesn't control here. It's an

1 unpublished decision with a different game and different
2 facts. It is just simply irrelevant.

3 Turning to Mr. Kessler's argument about
4 paragraph 424, about artificially inflated prices, again, I
5 refer to our allegations that the budgets of projects were
6 fixed, that when a packaging fee is taken directly out of and
7 dollar for dollar, money that should have gone to you and
8 went to the agency instead, you paid that representational
9 fee. It's not like they're giving away these
10 representational services for free. The agencies aren't
11 charities, and the same thing, even if a commission is paid,
12 because when a commission is paid, very often the full salary
13 for the writer goes to the agency. The agency withholds
14 their 10 percent and then it goes to the writer. So, it's
15 the same type of dynamic.

16 Finally, regarding quality and the link
17 between quality, we allege specifically at paragraph 350,
18 that in response to the studio's efforts and for the purpose
19 of preserving their ability to earn packaging fees, the
20 conspiracy went to the heart of packaging. If there wasn't a
21 conspiracy in the but-for world, we're not here today because
22 packaging doesn't exist anymore.

23 Turning to the group boycott claim. The
24 agency's claim that they have the exclusive right to procure
25 employment for talent, the agencies here, sitting here at

12:34:53 1 this table, have a 70 percent market share, and they have a
12:34:56 2 right to negotiate individually with us but not collectively.

12:35:00 3 In the St. Paul case, Your Honor, the Supreme
12:35:04 4 Court case cited in our brief, the Supreme Court wrote: "The
12:35:07 5 four insurance companies that control the market in medical
12:35:10 6 malpractice insurance are alleged to have agreed that three
12:35:15 7 of the four would not deal on any terms of the policyholders
12:35:21 8 of the fourth."

12:35:22 9 And what the Supreme Court said about that is
12:35:23 10 that, in a sense, the agreement imposed even a greater
12:35:26 11 restraint on competitive forces than an horizontal pact not
12:35:30 12 to compete with respect to price, coverage, claims, policy
12:35:34 13 and service. Since the refusal to deal in any fashion
12:35:39 14 reduced the likelihood that a competitor might have broken
12:35:41 15 ranks as to one or more of the fixed terms. And that is
12:35:44 16 exactly what we're alleging here.

12:35:46 17 It isn't the substance of the June 25th
12:35:49 18 e-mails that matters here. It is the undeniable fact that
12:35:54 19 they were coordinated. And Mr. Marenberg tries to say this
12:35:59 20 was just the ATA, and they're not a defendant here. No, it
12:36:03 21 was the ATA and each of the agencies coordinating their
12:36:06 22 conduct together, and that is verboten under the antitrust
12:36:11 23 laws.

12:36:11 24 **THE COURT:** All right, thank you very much. I
12:36:13 25 appreciate the arguments from both sides. There is much more

12:36:16 1 I'm going to have to look into as a result of the arguments.
12:36:19 2 So, this matter will remain under submission until the Court
12:36:24 3 issues its final rulings.

12:36:25 4 Have a wonderful weekend and safe travel for
12:36:28 5 those who are traveling.

12:36:30 6 Thank you.

12:36:35 7 COURT CLERK: This Court is in recess.

12:36:37 8 (Recess taken.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

Fees charged for this transcript, less any circuit fee reduction and/or deposit, are in conformance with the regulations of the judicial conference of the United States.

/S/Anne Kielwasser

1/30/2020

Anne Kielwasser, CRR, RPR, CSR
Official Court Reporter

Date

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