No. 16-55739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lenhoff Enterprises, Inc.,
Plaintiff-Appellant,

v.

United Talent Agency, Inc., International Creative Management Partners, LLC,
Defendants-Appellees.

Appeal from a Final Judgment of the United States District Court for the Central District of California
The Honorable Beverly Reid O'Connell
Case No. 2:15-cv-01086-BRO-FFM

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, plaintiff and appellant Lenhoff Enterprises, Inc. makes the following disclosure: It has no parent corporation and no publicly-held company owns ten percent or more of its stock.

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JURISDICTIONAL STATEMENT

A. Jurisdiction in the District Court

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 because this action arises under the antitrust laws of the United States, namely, Section 4 of the Clayton Act, 15 U.S.C. § 15(a) and Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Sherman 1"). (2 ER 49, ¶¶5, 73-81.)[1]

The District Court had pendent jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

B. Appellate Jurisdiction

This Court has jurisdiction under 12 U.S.C. § 1291 because this is an appeal from a final order dismissing the federal and certain state law claims in the Third Amended Complaint (the "Complaint" or "TAC") of Plaintiff/Appellant Lenhoff Enterprises, Inc. ("Lenhoff" or "Plaintiff") with prejudice under Fed. R. Civ. P. 12(b)(6). (1 ER 65, pp. 21-22.) The district court declined to exercise supplemental jurisdiction over the state law claims that were dismissed with leave to amend. (*Id*., p. 21.)

[1] Record references are to the two-volume Excerpts of Record ("ER"). Citations are in the format "([Volume #] ER [Tab #])" followed by page and/or paragraph numbers. Tab references correspond to docket numbers and page numbers are the numbers in the lower right corner. References to documents not in the Excerpts are to the district court's docket number and docket page number (Dkt. #, p. __).

The District Court entered its order dismissing Plaintiff's claims on April 20, 2016. (1 ER 65, pp. 21-22.)

Plaintiff filed a timely motion for reconsideration under Fed.R.Civ.P. 60(b), on May 2, 2016, in which it sought reconsideration of the Court's Order dismissing the TAC and denying leave to amend. (2 ER 66.) Plaintiff provided a declaration identifying evidence that further supported Plaintiff's price fixing allegation and asked the court to reconsider the denial of leave to amend and also sought limited discovery to aid in filing a further amended complaint. (2 ER 66, pp. 8-9.)

On May 19, 2016, prior to a ruling on the motion for reconsideration, Plaintiff filed its Notice of Appeal, within the thirty days permitted under Fed. R. App. P. 4(a)(1). (2 ER 68.) In the Notice of Appeal, Plaintiff informed this Court it had filed a motion for reconsideration and asked that the appeal be held in abeyance until the motion was resolved. (2 ER 68, p. 2 [citing F.R.A.P. 4(a)(4)(B)(i); *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994)].)

On June 13, 2016, Plaintiff's motion for reconsideration was denied. (1 ER 72.)

ISSUES PRESENTED FOR REVIEW

This lawsuit is brought by a small talent agency against two of the most powerful players in the billion-dollar scripted television market—United Talent Agency ("UTA") and International Creative Management ("ICM") (collectively "Defendants").[2] The suit alleges that Defendants (who are competitors) have conspired to fix prices, eliminate barriers to outside financial investment and largely co-package television projects exclusively among themselves in order to exclude small talent agencies from competition in the scripted television series packaging market, thereby allowing defendants to reap supra-competitive prices from their customers, in violation of Sherman 1 and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*.

Plaintiff further alleges claims for intentional interference with contractual and prospective relationships based on allegations that Defendants interfered with Plaintiff's contracts with two clients and "poached" those clients from Plaintiff's talent agency.

Despite detailed allegations regarding Defendants' anticompetitive conduct, and the harm flowing to consumers from that conduct, the district court dismissed Plaintiff's Sherman 1 and UCL claims under Fed. R. Civ. P. 12(b)(6). The court also dismissed Plaintiff's interference claims as to one client with prejudice and the claims as to another client with leave to amend.

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[2] Although not named as defendants, Plaintiff identified two other talent agencies, William Morris/Endeavor ("WME") and Creative Artists Agency ("CAA") (or their predecessors) as participants in the conspiracy. (2 ER 49, ¶¶3, 6.) In this brief and in the TAC, these four agencies are referred to as the "Uber Agencies."

The court then declined to exercise supplemental jurisdiction.

This appeal presents the following issues for review:

1. Whether the Complaint adequately pleads an agreement, in violation of Sherman 1 and the UCL, to control the market for scripted packaged television series and to fix prices where Plaintiff's allegations are as supportive (if not more supportive) of the existence of an unlawful agreement as they are of independent lawful action.

2. Whether the lower court abused its discretion in denying leave to amend where Plaintiff presented additional facts (either in opposing the motions to dismiss or in its motion for reconsideration) showing the following: that Defendants conspired to restrain trade in the market for scripted television package series by fixing prices; an extraordinary increase in market concentration as a result of the conspiracy; and the rate at which the Uber Agencies co-package shows with each other (as opposed to non-cartel agencies) is out of proportion to the statistical likelihood of such an arrangement assuming equal probabilities of market participants – in other words absent collusion.

3. Whether the court erred in dismissing Plaintiff's claim for intentional interference with contract where Plaintiff alleged facts and presented evidence that showed the Plaintiff's clients were not entitled to terminate their contract when Defendants solicited them away from Plaintiff. And as to Plaintiff's interference with prospective advantage claim, the court's dismissal was predicated on the finding that Plaintiff failed to adequately allege a Sherman 1 or UCL claim. Reversal by this Court of

either ruling dismissing the Sherman 1 or UCL claim will require the reversal of dismissal of the intentional interference claim.

STANDARD OF REVIEW

This appeal arises from the granting of Defendants' Fed. R. Civ. P. 12(b)(6) motions to dismiss. Defendants sought dismissal on grounds that Plaintiff failed to allege facts demonstrating the existence of a conspiracy or agreement to conspire. (Dkt. 50, 52.) The district court dismissed Plaintiff's Sherman 1 and UCL claims with prejudice, and denied leave to amend on the ground that Plaintiff had been afforded leave to amend on prior occasions. (1 ER 65.)

The court later denied Plaintiff's motion for reconsideration where Plaintiff presented further evidence to support leave to amend. (1 ER 72.)

The lower court's ruling granting the motions to dismiss is reviewed *de novo*. *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009).

The court's decision to deny leave to amend and denying reconsideration as to leave to amend and for discovery is reviewed for abuse of discretion. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). This Court reviews the complaint *de novo* in deciding whether a court erred in denying leave to amend. *Hildes v. Arthur Andersen LLP,* 734 F.3d 854, 859 (9th Cir. 2013). Leave to amend is to be "freely given when justice so requires," and denial of a motion to amend is proper only if it is clear "the complaint would not be saved by any amendment." *Carvalho v. Equifax Info. Servs., LLC,* 629 F.3d 876, 892–93 (9th Cir. 2010).

STATEMENT OF THE CASE

A. Overview of Plaintiff's Claims

This lawsuit arises out of a conspiracy in the scripted television packaging market and specifically at the talent end of the industry where four major agencies, the Uber Agencies, entered into an agreement to ultimately control and restrain trade in the scripted television market.[3]

Plaintiff alleges that Defendants, along with WME and CAA, agreed to (i) charge the exact same fee for "package" deals sold to studios and networks – a fee based on a percentage of the show's budget and back-end profit that differs dramatically from the 10% maximum commission other competing talent agencies are largely relegated to charging their client artists; (ii) work to exclusively co-package scripted television series with each other and not split co-packaging fees with agencies outside their cartel; (iii) coerce studios and networks to maintain their fixed price for package deals and not deal with other talent agencies; and (iv) poach artists from non-cartel agencies by knowingly inducing them to break their contracts with offers of eliminating the commission the artists pay non-cartel agencies in favor of the cartel's fixed packaged fee thus increasing the Uber Agencies' stockpiles of talent with the goal of controlling the market for scripted television series packages.

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[3] Scripted series are television series produced by members of the Alliance of Motion Picture and Television Producers (Sony, NBC-Universal, CBS, ABC, Warner Brothers and Fox) and the talent are actors, writers, directors or producers who are members of the recognized unions such as the Screen Actors Guild ("SAG"), Writers Guild of America ("WGA"), and Directors Guild of America ("DGA"). (2 ER 49, ¶41.) Scripted series do not include sports, news, reality shows and game shows. (*Ibid*.)

Since implementing their agreement, the Uber Agencies have dramatically increased control over the market. In the 2001-2002 television season, they controlled approximately 68% of the market for scripted television series packages. (2 ER 56-1, p. 2, ¶9.)[4] By the 2014-2015 season, their market share had increased to nearly 94%.[5] (2 ER 49, ¶45.) The effect on small talent agencies has been equally dramatic. The number of talent agencies outside of Defendants' cartel servicing the relevant market has dropped by approximately 39 agencies. (*Id.,* ¶17.)[6]

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[4] Plaintiff identified data on scripted packaged television series sold in various years up to 2014-2015 and the Uber Agencies' market share. (2 ER 49, ¶¶ 44-45.) Defendants challenged the numbers claiming they differed from allegations in the SAC. (Dkt. 52-1, pp. 2-3; Dkt. 50, p. 3.) Plaintiff explained in the TAC why the numbers differed. (2 ER 49, pp. 6, 14, n. 1 & 2.) In opposing Defendants' motions, Plaintiff presented two declarations, one by an economist who updated the statistics to the 2015-2016 series and explained the calculations and one by one of Plaintiff's principals explaining the sources of the data. (2 ER 56-1, pp. 1-8, 17.) The court declined to consider the expert's declaration other than as to the request to amend. (1 ER 65, p. 6, n. 2.) The court acknowledged the data dispute but determined the data (wrong or right) did not alter the court's conclusion the TAC failed to allege a conspiracy to exclude non-cartel agencies from co-packaging. (1 ER 65, p. 12.) We state facts from the TAC as well as the expert's declaration since they are relevant to the issue of leave to amend.

[5] By 2015-2016, their market share had increased to nearly 96%, and the market control was approximately 2,700, measured by the Herfindahl-Hirschman Index ("HHI") a metric used by the Department of Justice in assessing market concentration resulting from mergers. (2 ER 56-1, pp. 3-5, ¶¶11, 15.) "[W]here the post-merger HHI exceeds 1,800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." (*Id.,* pp. 3-4, ¶14.)

[6] Plaintiff's expert declaration clarified the number of non-Uber Agencies in 2001-2002. (2 ER 56-1, p. 3-4, n. 5.)

B. Procedural History

Lenhoff filed its original complaint on February 13, 2015 against UTA and ICM alleging a conspiracy to monopolize the market for scripted television series. (Dkt. 3.) Lenhoff stated a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2 ("Sherman 2"), and a claim under California's Unfair Competition Act ("UCL"), (Cal. Bus. & Prof. Code, § 17200), which relied solely on the Sherman 2 violations as the predicate acts. (*Id.,* ¶¶92-93.) Plaintiff also stated claims for intentional interference with contract and prospective economic advantage based on allegations that Defendants had "poached" two clients from Plaintiff's agency as part of their scheme to control the market. (*Id.,* ¶¶96-110.)

Lenhoff voluntarily filed a First Amended Complaint ("FAC"), on June 15, 2015 prior to service. (Dkt. 8.)

Defendants moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) challenging the sufficiency of Plaintiff's allegations. (Dkt. 16, 18, 21.) Defendants attacked the Sherman 2 claim arguing that Plaintiff's allegations of a "shared monopoly" or "joint monopolization" were deficient under *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995). (Dkt. 28, pp.5-7.) Defendants also attacked the interference claims arguing Plaintiff failed to allege whether Plaintiff's contracts with the clients were terminable at will or for a specified term. (*Id.,* pp. 8-9.)

On September 18, 2015, the district court dismissed Lenhoff's Sherman 2 claim finding the monopolization claim failed under *Rebel Oil*. (Dkt. 28, p. 7.) The court granted leave to amend the antitrust and

intentional interference claims and denied the motion as to the UCL claim. (*Id.,* p.12.)

On October 2, 2015, Lenhoff filed its Second Amended Complaint stating a Sherman 1 claim in place of Sherman 2. (Dkt. 31, pp. 38-40, ¶ 118.) Plaintiff again asserted claims for violations of the UCL and intentional interference claims. (*Id.,* pp. 40-44.)

Defendants moved to dismiss challenging the allegations as to the existence of an unlawful agreement under *Bell Atlantic Corp. v. Twombly* ["*Twombly*"], 550 U.S. 544 (2007) and *Ashcroft v. Iqbal* ["*Iqbal*"], 556 U.S. 662 (2009). The district court granted the motions dismissing all claims, including the UCL claim, with leave to amend. (Dkt. 43.)

On January 22, 2016, Plaintiff filed its Third Amended Complaint (the "Complaint" or "TAC"), and included additional factual allegations supporting the existence of an unlawful agreement between Defendants, including tables that identified that the vast majority of packaged scripted television series in the 2014-15 television season were packaged by an Uber Agency or co-packaged between two or more Uber Agencies. (2 ER 49-1.) The tables also reflected the pathetically small number of occasions an Uber Agency co-packaged with a non-cartel member. (*Ibid*.)

Plaintiff restated the UCL claim relying on its Sherman 1 allegations but also alleged Defendants' actions violated California's Cartwright Act, (Cal. Bus. & Prof. Code, § 16720, et seq.). (2 ER 49, ¶¶83-88.) And, Plaintiff reasserted its interference claims. (2 ER 49, ¶¶89-106.)

On February 12, 2016, Defendants filed motions seeking dismissal of all claims without leave to amend. (Dkt. 50, 52.)

Plaintiff opposed the motions, arguing the TAC's factual allegations were sufficient to state claims for Sherman 1 and UCL violations as well as intentional interference claims. (Dkt. 56.) Plaintiff sought leave to amend showing that further allegations were available to support the claims. (Dkt. 56, pp. 23-25.) Plaintiff included the declaration of an expert economist who testified that the dramatic increase in market share garnered by the Uber Agencies in the scripted television package market was *statistically improbable*. (2 ER 56-1, ¶¶17-23.) And, the expert testified that the rate of co-packaging between the Uber Agencies was far out of proportion with the expected rate absent collusion. (*Id.*) Plaintiff argued that this expert opinion testimony confirmed the allegations as to Plaintiff's Sherman 1 and UCL claims but it also presented the evidence to show additional evidence that could be alleged if amendment was necessary. (Dkt. 56, pp. 23-24.)

Despite the factual allegations advanced in the Complaint regarding the existence of an unlawful agreement between Defendants, on April 20, 2016, the court granted the motions finding the Complaint did not "sufficiently plead a per se Sherman Act violation." (1 ER 65, p. 9.) The court found Plaintiff did not state a Sherman 1 claim under the rule of reason because Plaintiff "failed to plead facts with the requisite specificity" that Defendants engaged in a conspiracy. (1 ER 65, pp. 9-13.) And, the court held the TAC failed to allege injury to competition because there was insufficient evidence of a horizontal or vertical agreement to state a claim for injury to competition – stated otherwise there was no injury because there was no collusive agreement. (*Id.,* pp. 13-15.) The court denied leave to

amend finding Plaintiff had been afforded ample opportunity to correct the deficiencies. (*Id*. p. 15.) Even thought the court stated it could consider Plaintiff's expert declaration in deciding whether to grant leave to amend, (1 ER 65, p. 6-7, n. 2), the court seemingly gave no consideration to that declaration in denying leave to amend. (1 ER 65, pp. 15-16, 17, 19-20.)

In dismissing the UCL claim, the court did not consider whether Defendants' wrongful acts violated the Cartwright Act. The court simply found that its analysis under Sherman 1 claim was dispositive of the Cartwright Act violations, citing this Court's decision in *County of Tuolumne v. Sonora Cty. Hospital*, 236 F.3d 1148, 1160 (9th Cir. 2001). (1 ER 65, p. 16, n. 6.)

As to the intentional interference claims, the court dismissed those claims as to one client without leave to amend but with leave to amend as to the other, finding Plaintiff failed to specifically identify facts that would demonstrate the contracts were not at will. (1 ER 65, pp. 19-21.)

The court declined to exercise supplemental jurisdiction over the state law claim it dismissed with leave to amend. (*Id*., p. 21.)

STATEMENT OF FACTS

I. Overview

We confront in this case an unholy war that has developed among talent agencies that represent artists who write, act, direct, produce and/or otherwise develop content for scripted television programs. Although it is not surprising that the war pits the small agencies against the large – that story is as old as David and Goliath – now, not only do the small agencies

allege the large ones have conspired to drive them out of the market, they are joined by the talent who complain bitterly about a system implemented and enforced by the Uber Agencies that adversely impacts artists, the networks and consumers to the sole benefit of the Uber Agencies.

Efforts to break the cartel have regularly failed with networks kowtowing to the Uber Agencies' resistance in a manner that confounds basic economic principals since there is no plausible economic rationale for the networks' willingness to forego millions of dollars in revenue simply to stay in the Uber Agencies' good graces. And, although artists rail against the collusive machine the Uber Agencies have created, they too are confounded in their efforts to force change. All the while, the small talent agencies servicing the relevant market continue to disappear — either being bought out or simply shuttering their doors due to dwindling talent rosters and income.

And, the Uber Agencies continue to grow — adding agent upon agent, artist on top of artist. By the 2015-2016 television season, the Uber Agencies controlled nearly 96% of the market for scripted packaged television series – nearly doubling their market share in a 15-year period.

II. The Rise of the Uber Agencies

a. It's All About Money

The war arose from an agreement among a very few of the largest talent agencies who recognized if they agreed among themselves to set the price for packaged scripted television series they could achieve greater wealth than they otherwise could earn by simply marketing their artists

individually for television projects and collecting the mandated 10% commission on the fees paid the artist.

A scripted packaged television series is essentially a package of talent put together by the agent and pitched to the network or studio. (2 ER 49, ¶¶14, 42.) The more talent available to an agency, the greater the ability to put together a package. (*Id*., ¶14.)

The talent agent's "primary role is to procure employment for artists by marketing the artists' talents throughout the entertainment industry." (William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 Loy. L.A. Ent. L. Rev. 493, 501 (2000).) (2 ER 49, ¶¶8, 14.)

Talent agents are regulated in California by the Talent Agencies Act ("TAA"), (Cal. Labor Code, §§ 1700, *et seq*.); Birdthistle, *A Contested Ascendancy, supra,* at 511.) Although the TAA imposes various requirements and obligations on talent agents, (Cal. Labor Code, §§ 1700-1700.47), it does not set or limit the fee a talent agent can charge. (*Id.*)

Rather, it is an agreement with the artists' unions (SAG, DGA and WGA), that caps the commission a talent agent may charge at 10% of the fee earned by the artist.[7] (2 ER 49, ¶¶54, 56.) However, an agent that sells a "packaged series" to the network can skirt this 10% commission limitation.

[7] Any talent agency certified or franchised by any of these unions must charge no more than a 10% commission. And, members of the unions agree not to use an agent who is not certified or franchised by the union. (David Zelenski, *Talent Agents, Personal Managers, and their Conflicts in the New Hollywood*, 76 S.Cal. L.Rev. 979, 989-990.)

(*Id.,* ¶¶14-15, 52-56.)

Plaintiff alleges the Uber Agencies entered into an agreement to fix the price the agents charge networks and studios for "packaged series." (2 ER 49, ¶53-56, 78.)

Following the dismissal of the TAC, Plaintiff submitted a declaration in support of its motion for reconsideration reporting that in or around 1995-1996, William Morris (now WME) was charging 5% of the gross for packaged series while the next largest agencies (ICM, CAA, Endeavor [which later merged with William Morris] and Paradigm) were charging either 2.5% of the gross or 3% of the adjusted gross. (2 ER 66, p. 8.)[8] At the time, none of the agencies would agree to a split-package, i.e., a sharing of the package fee between agencies. (*Id*.)

The declaration further disclosed that studios and networks in the mid-1990s were pushing to eliminate packaging fees altogether. (*Id*.) And, in an effort to preserve the packaging fee, the agencies collectively agreed to fix the fee each charged and to split packages when necessary.[9] The price they

[8] The Complaint did not plead this 1990s' agreement to fix the packaged series price. Rather, in seeking reconsideration, one of Plaintiff's principals submitted a declaration explaining a witness had informed him after the TAC was filed of the agreement to set the packaging fee. (2 ER 66, p. 8.) Plaintiff sought reconsideration of the court's decision denying leave to amend and further sought leave to permit discovery to confirm the facts told by the witness who was a former agent of William Morris. (2 ER 66, pp.3-5.) The court denied Plaintiff's motion finding disclosure of the facts on reconsideration untimely. (1 ER 72, pp. 5-6.) Although this appeal tests the sufficiency of the TAC, we also challenge the lower court's denial of leave to amend based on the facts raised in Plaintiff's request for reconsideration and for these reasons refer to the evidence.

[9] In the declaration, it was reported that the agencies who agreed in the 1990s to set the packaging fee were William Morris, ICM, CAA,

fixed was a guaranteed 3% of the license fee (i.e. budget), plus an additional deferred 3% of the license fee and 10% of the gross profit *before* the artists' net profit participation (the "3-3-10 Packaging Fee"). (2 ER 66, p. 8; 2 ER 49, ¶53.)

Since then, the 3-3-10 Packaging Fee has gone unchanged and continues to be the agreed amount the Uber Agencies each charge for scripted packaged television projects. (2 ER 49, ¶53.)

The TAC also states facts demonstrating the cozy relationship between the Uber Agencies. The comments of key representatives of each of the Uber Agencies, when jointly interviewed by the Hollywood Reporter, revealed they work closely with each other in a manner more representative of The Four Musketeers than vigorous competitors. (*Id.,* ¶47.) They further discuss how, on numerous occasions, the Uber Agencies co-package series together with one another. (*Id.*)

The financial impact of the 3-3-10 Packaging Fee is enormous – an agent relegated to the maximum 10% commission will make a fraction of what an agent will receive from a packaging fee and the packaging fee will often dwarf the amount the artist is paid. As Meredith Stiehm, who is the celebrated writer/creator of *Cold Case*, and a vocal critic of the 3-3-10 Packaging Fee, publicly remarked:

Endeavor and Paradigm. UTA was not identified. That it may not have been a part of the price fixing agreement at its inception is no bar to UTA's subsequent entry into the conspiracy. *In re Polyurethane Foam Antitrust Litigation*, 799 F. Supp. 2d 777, 800 (N.D. Ohio 2011) (company who joined a 12-year old conspiracy to fix prices for polyurethane foam at year 9 can still be liable under Sherman 1). The Complaint certainly alleges that UTA is now a member of the cartel. (2 ER 49, ¶¶3, 6, 11-13.)

> It wasn't until year seven of my show when I was tasked with slashing the budget that I finally noticed that my agency was making $75,000 per episode - more than I was … When I suggested to the studio that we slash that episodic expense [the agency packaging fee] they wouldn't hear of it. Again I was stunned, and confused. I have since come to understand how the studios and agencies collude to keep packaging as a norm, securing money for them that belongs in our pockets.

(*Id.,* ¶53.)

And, a packaged product can also be factored because, among other things, it continues in perpetuity whereas the 10% commission is temporally tied to the period the artist works on the project obtained by the agency or limited by a seven-year rule. (*Id.,* ¶¶ 27, 56.)

b. Rule 16(g) which Limited Financial Investment in Talent Agencies was a Major Impediment to the Conspiracy and The Ubers' Ability to Make Even More Money — It Had to Go!

Unions or "guilds" have played a significant role in the entertainment industry. Through various agreements these unions account for a "large corpus of private law regulating the activities of many of the industry's players." (Birdthistle, *A Contested Ascendancy, supra*, 20 Loy.L.A. Ent. L.Rev. at 520.) "By representing the interests of Hollywood's most valuable asset, the talent, these guilds have exacted a great deal of concessions from other industry players through their collective bargaining agreements." (*Id.*)

One of the strongest impediments to unfettered growth by talent agencies was a provision implemented by the Screen Actors Guild ("SAG"), the Agency Financial Interests Regulation, also known as "Rule 16(g)." (2 ER 49, ¶¶19-20). That rule was a part of the franchise agreement between

SAG and the Association of Talent Agencies ("ATA") for over 60 years (from 1939 until 2002).[10] (*Id.,* ¶¶6, 20.) Rule 16(g) effectively mandated that talent agencies remain independent of production entities and barred any investment in talent agencies by entities engaged in the production or distribution of motion pictures or television motion pictures and vice versa. (2 ER 49, ¶24.)[11]

The ATA's governing board is controlled by the Uber Agencies. (*Id.,* ¶21.) In or around 1999, the ATA formed a Strategic Planning Committee (the "SPC") comprised of representatives of UTA, ICM, CAA, and William Morris. (*Id.,* ¶¶ 22.)[12] The SPC was formed with the objective of eliminating the prohibitions in Rule 16(g) on outside financial investment in talent agencies from sources such as movie or television production companies or other potentially conflict riddled entities. (*Ibid*.) The elimination of these provisions would generate the money necessary for the Uber Agencies to vertically integrate their businesses with studios, concentrate their economic power, gain control over the production side and ultimately control both the production and distribution of product. (*Id.,* ¶25.)[13]

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[10] Since 1937, the ATA has been responsible for negotiating agency franchise agreements and regulations with the major entertainment guilds, including SAG-AFTRA, WGA and DGA. The Uber Agencies are members of the ATA. (2 ER 49 ¶21.) There were 77 agencies servicing talent in the relevant market in 2001-2002 and now there are approximately 43. (2 ER 56-1, pp. 3-4, n. 5.)

[11] http://www.sagaftra.org/files/sag/documents/sag_rule_16_g.pdf.

[12] Other SPC members were from Endeavor and Broder/Kurland/ Webb/Uffner ("BKWU"). Endeavor ultimately merged with William Morris creating WME and BKWU was purchased by ICM. (2 ER 49, ¶13.)

[13] The ability to control multiple lines of a product by a vertically integrated oligopoly such as talent, production and distribution in the entertainment industry, has previously drawn antitrust scrutiny. (Birdthistle,

During the period from 1999 to 2004, representatives of the Uber Agencies met in person, participated in numerous conference calls and/or communicated electronically on at least 59 occasions. (*Id.,* ¶23.)[14]

In meetings with ATA's general membership and otherwise, the SPC explicitly raised the issue of eliminating Rule 16(g). (2 ER 49, ¶26.)

SAG was strongly opposed to any modification to Rule 16(g) and viewed efforts to loosen the financial interest restrictions as a conflict of interest and contrary to the agent's fiduciary obligations to clients. (*Id.,* ¶29.) In the face of the SAG's objections, on April 20, 2000, the ATA, at SPC's urging, served a six-month termination notice on SAG which required that the parties negotiate in good faith. (*Id.,* ¶30.)[15] Absent the negotiation of a revised agreement, Rule 16(g) would simply expire.

The ensuing negotiations between the ATA and SAG were fraught with contention. On May 3, 2001, the ATA issued a veiled threat at the

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20 Loy. L.A. Ent. L.Rev at 504-50 [discussing federal government's breakup of the the film studio system where corporations owned interests in talent, production and movie theatres]; see also *United States v. Paramount Pictures,* 66 F.Supp. 323 (S.D.N.Y.), *findings entered,* 70 F.Supp. 53 (S.D.N.Y.1946), *aff'd in part, rev'd in part and remanded,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948.

[14] Although the court found Plaintiff failed to identify the individuals involved in the alleged conspiracy, (1 ER 65, pp. 8, 12), Plaintiff specifically identified each individual it alleged was involved in the efforts to implement and maintain the conspiracy to control the market for scripted package television series. (2 ER 49, ¶¶22-23.) On reconsideration, Plaintiff identified those involved in the price fix. (2 ER 66, pp. 8-9, ¶7.)

[15] Kelli Shope, *The Final Cut: How SAG's Failed Negotiations With Talent Agents Left the Contractual Rights of Rank-and-File Actors on the Cutting Room Floor,* 26 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1, pp. 133-136 (2006).

behest of the larger talent agencies that "unless meaningful amendments are made in the financial interest and commission prohibitions, the actor/agent ratio will further decline as agents abandon the agency business to better compete for their clients outside the guilds' [i.e. SAG's] jurisdiction." (*Id.,* ¶31.)

In February 2002, a provisional agreement was reached to loosen, but not remove, the restrictions to allow (i) agents to take up to a 20% stake in production and distribution companies, and (ii) advertising firms and independent (non-studio) producers to take up to a 10% and a 20% stake (respectively) in talent agencies. (2 ER 49, ¶32.) The SAG/ATA franchise agreement required that the parties negotiate in good faith and the proposed provisional agreement was a step in the direction of elimination since it allowed investment and merely set a cap. As the proverb goes: "If the camel once gets his nose in the tent, his body will soon follow."

The provisional agreement was submitted to SAG members for approval and was voted down. (2 ER 49, ¶33.) That SAG's membership voted against the proposal is not surprising. SAG members had long been opposed to allowing production companies to invest in talent agencies and vice versa because doing so creates a conflict when an agent represents the client and also acts as the client's employer. (2 ER 49, ¶29.)

And, of course, once the proposal was voted down, the negotiation period that came into play when ATA gave the six-month termination notice, had expired, and all bets were off. Rule 16(g) was history. (*Id.,* ¶34.)

The ATA led by the SPC knew that SAG would not vote to allow agencies to have an ownership interest in production companies. And the

SPC knew that SAG would not be able to entice the ATA back to the drawing board once the provisional agreement was nixed – which is precisely what occurred. The ATA refused SAG's repeated overtures to renegotiate and the SPC with the Uber Agencies at the helm achieved their goal – the demise of Rule 16(g). (*Id.,* ¶37)

It did not take long before the money faucet was turned on and an enormous influx of outside funding flooded into the Uber Agencies – estimates are that $6.5 billion has been invested in the Uber Agencies since 2002 as a result of the demise of Rule 16(g).[16] (2 ER 49, ¶38.)

Not long after Rule 16(g) hit the cutting room floor, the SPC disbanded, the mergers described above in footnote 12 occurred, and at least three members of the SPC cashed out of the business. (*Id*., ¶40.)

The massive amount of investment in the Uber Agencies has led to an unparalleled tripling in their size. (*Id*., ¶13.) Defendants now have more than 400 agents and more than 7,500 clients. (*Id*., ¶¶11-12.) And, by 2014-2015, the Uber Agencies controlled over 94% of the scripted series packaging market. (*Id*., ¶45.) The billions of dollars in financial investments have allowed the Uber Agencies to poach in-demand writing, acting, producing and directing talent (which they effectively stockpile) by

[16] The TAC identifies the funding sources as private equity hedge funds, outside investors and wealthy individuals. (2 ER 49, ¶6.) Earlier complaints were more specific as to the investing sources and confirm it included entities involved in motion picture production. (Dkt. 8, ¶¶61-69.) This appeal tests whether the TAC states a claim based solely on its allegations, but Plaintiff also challenges the court's denial of leave to amend. If the failure to expressly state that outside funding came from entities that otherwise would have been barred under Rule 16(g), then prior iterations of the complaint confirm Plaintiff can establish that fact given leave to amend.

convincing the talent they will effectively charge them nothing since the Uber Agencies are solely intent on packaging series that allow them to reap enormous amounts of money that dwarf the normal 10% commission. (*Id*., ¶¶51, 52, 53, 54.)

c. Having Fixed the Price, Eliminated Rule 16(g) and with Money Flowing In, the Uber Agencies Deployed the Remaining Elements of the Conspiracy.

i. First, Let's Steal Away All the Talent

There is only one thing integral to the success of any talent agency – talent. And a conspiracy to control the market for scripted television packaged series would fundamentally fail if the conspiring agencies have no artists to package.

The TAC alleges that the Uber Agencies have advanced their conspiratorial goal by engaging in a campaign to steal talent away from other agencies. They do so by duping artists into believing that leaving a small agency will be in the artist's financial advantage because the Uber Agencies forego a commission based system in favor of the 3-3-10 Packaging Fee. (2 ER 49, ¶¶51-53.) But, the harsh reality is that the packaging fee does not advance the interest (financial or otherwise) of the artists, the networks, the studios, or the consumers. (*Id.,* ¶¶16-17, 49, 53, 58-59, 61, 65, 70.) Rather it is nothing more than an artifice that appears to benefit the artist, when in fact it sucks out vast sums of money that otherwise would be invested in the program to either pay the artist more, or advance the quality of programming. It forces the viewing audience to consume only that which is packaged by an Uber Agency and it denies talent the freedom

to choose who will represent them out of fear of becoming unpackagable and thus obsolete. (*Ibid.*)[17]

They also advance their opportunity to meet with artists by making the networks and studios agree that only Uber Agencies may host private VIP screenings of packaged shows. (2 ER 49, ¶48.) This is precisely what happened to Plaintiff who lost a key client who UTA "poached" at a VIP screening. (*Ibid.*)

ii. And if the Studios and Networks Won't Go Along with the 3-3-10 Packaging Fee, We'll Make Them — Because We Control the Talent

The Uber Agencies have successfully advanced their control of the relevant market by eliminating any ability of the networks or studios to push back against their tactics. We have shown above that the 3-3-10 Packaging Fee forces the networks and studios to pay exorbitant sums of moneys to the Uber Agencies. (*Supra* pp. 15-16.) Despite the billions of dollars that are extracted for scripted television packages, the networks and studios are powerless to do anything to break the cartel.

The scope of the stranglehold the Uber Agencies have over the networks and studios is best exemplified by the experience of Gavin Polone, a seven-time Emmy Nominee and executive producer of *Curb Your*

[17] A further downstream effect of the conspiracy is that as the Uber Agencies gobble up the "bankable" talent and drive the small agencies out of business, the "yet-to-be-discovered artist," the diverse artist and diverse programming are shut out. (2 ER 49, ¶¶16-17, 49 and 64-65.) Despite increases in the number of scripted packaged television series over the last 15 years, minorities in leading roles are underrepresented by 7 to 1, diverse creators are underrepresented 9 to 1 and minority writing staff on scripted series are 10% or less. (*Id.,* ¶16.)

Enthusiasm. In 2015, Mr. Polone wrote an article published in the Hollywood Reporter entitled *Gavin Polone on TV's Dirty Secret: Your Agent Gets Money For Nothing*.[18] (2 ER 49, ¶77.) There, he challenged the scripted television packaging fee arguing it adversely impacts the quality of programming and the amount of programming. (*Id.*)

Mr. Polone recounted his experience pitching a project idea to several network executives and telling them he wanted to work with a specific writer. The idea was liked by the executives and the writer and the show was eventually purchased. (*Id*.) It was only then that the writer's agency reared its hoary head and demanded the 3-3-10 Packaging Fee, despite having done absolutely nothing to put the package together. (*Id*.) Mr. Polone refused to go along with the agency's demands and told the network to tell the agency to "take it or leave it" because the client wanted the project done without the packaging fee. (*Id*.) The network demurred telling Mr. Polone it would rather pay the fee, which could amount to millions of dollars, rather than jeopardize its relationship with the agency. (*Ibid*.) In the end, the agency got its fee and as Mr. Polone describes it:

> 100 percent of the broadcast network scripted TV shows generate package fees for the talent agencies. And, I promise you, *the only reason those fees are paid is out of fear that the agency will kill a deal if its agents don't get to wet their beaks, rather than because they did any extra work or "packaging*."

(*Ibid*., emphasis added.)

[18] http://www.hollywoodreporter.com/news/gavin-polone-tvs-dirty-secret-783941

Ms. Stiehm encountered the same type of resistance from a studio when she suggested the 3-3-10 Packaging Fee be cut as she was being forced to slash the budget for *Cold Case*. (2 ER 49, ¶53.)

The Uber Agencies further strong arm the networks and studios through tying agreements on scripted television packaged series. For example, UTA forced AMC Network to renew a low-rated series "Halt and Catch Fire" in order to get a higher rated series "Better Call Saul." (2 ER 49, ¶42.) ICM did the same with ABC forcing it to renew "Private Practice" (a ratings-challenged series) so as to keep the highly successful "Gray's Anatomy." (*Id.*) CAA "convinced" Fox to renew the hit "American Horror Story" on condition it reorder the fatally infirm "Scream Queens." (*Id.*)

iii. If Poaching their Talent Won't Drive Our Tiny Competitors out of the Business, We'll Refuse to Co-Package with Them and Drive a Wedge Between Them and the Networks

Defendants further their conspiracy by agreeing to largely co-package among themselves as evidenced by the very compelling facts detailed in the TAC. There, Plaintiff presented evidence from the 2014-2015 television season demonstrating Uber Agencies co-packaged among themselves on 85 out of 97 co-packaged series or 88% of the time.[19] (2 ER 49, ¶45; 2 ER 49-1.) Uber Agencies accounted for well more than 90% of the total scripted packaged television series in the 2014-2015 season. (2 ER 49, ¶45.)

[19] Of the remaining twelve series, one non-cartel agency, Paradigm, was the co-packager with an Uber Agency on eleven of them. (2 ER 49-1, pp. 2-14.)

In contrast, in the 2001-2002 television season, there were approximately 119 scripted packaged television series sold by approximately fifteen talent agencies. (2 ER 49, ¶44; clarified by 2 ER 56-1, p. 2, n.1.) The Uber Agencies were responsible for 68%. (2 ER 56-1, p. 2, ¶9.)

From 2001-2002 to 2014-2015, the market share of the Uber Agencies increased from 68% to 94%. (*Id.,* p. 2-3, ¶¶9-10.) And, in 2015-2016, they controlled 96%. (*Id.,* p. 3, ¶11.) During this period the market consolidated with William Morris merging with Endeavor and ICM acquiring BKWU. (Supra fn. 12.) The Herfindahl-Hirschman Index ("HHI") in the market in 2001-2002 was 1,470.[20] (*Id.,* p. 3, ¶14.) But, the acquisitions described above drove the HHI to 1,911, well over the 1,800 threshold. (*Id.,* p. 3-5, ¶¶14-15.) By 2014-2015, the HHI had increased to 2,741 and by 2015-2016, it reached 2,796. (*Ibid*.) The DOJ considers markets with an HHI above 1800 as highly concentrated.

In fifteen years, the Uber Agencies have virtually taken control of the market for scripted packaged television series even though there are far more non-cartel agencies than Uber Agencies. (2 ER 56-1, pp. 5-8, ¶¶17-23.) Despite this, the number of occasions the Uber Agencies co-package with non-cartel agencies has plummeted and the rate is statistically out of proportion with the likelihood of the Uber Agencies being involved in such an arrangement assuming equal probabilities by market participants. (*Ibid*.)

[20] The HHI is the metric used to measure concentration by the DOJ in investigating potential anticompetitive effects of a proposed merger. See, supra, p. 7, n. 5.

Defendants' conspiracy to drive the small talent agencies from the market has been a success. There has been a dramatic reduction in the number of agencies representing talent on scripted television shows and packaged series in the relevant market since 2001. (2 ER 49, ¶17.)

SUMMARY OF THE ARGUMENT

This lawsuit is based on an agreement between four competitors, Defendants and two other Uber agencies, who conspired to restrain competition by excluding the smaller, non-cartel talent agencies from the scripted television package market and to fix the price at which such packages are sold to studios.

In dismissing Plaintiff's Sherman 1 claim, the lower court erred in finding the well-pled facts in the Complaint failed to plausibly allege the existence of an unlawful agreement to conspire. The court failed to place Plaintiff's factual allegations in context and ignored facts which demonstrated that Plaintiff's unlawful conspiracy allegations were, at least, in equipoise with arguments of plausible alternative lawful reasons for Defendants' conduct. Where there are two alternative explanations, one advanced by the plaintiff and the other by the defendant, both of which are plausible, a complaint must survive a motion to dismiss. *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011).

And, in dismissing Plaintiff's UCL claim, the court erred in finding Plaintiff failed to state a violation of the Cartwright Act and instead simply cabined its decision on Sherman 1 into a decision under the UCL. Since the Cartwright Act is broader in reach than the federal antitrust laws, the court erred in failing to consider whether the allegations in Plaintiff's Complaint,

even if deficient under federal law (which they are not), are sufficient to state a claim under state law.

The lower court's decision to deny leave to amend was made in the face of evidence presented in opposition to Defendants' motions and evidence submitted in support of Plaintiff's motion for reconsideration, that if added to the complaint would have filled in gaps the court deemed deficient in the TAC. Where, as here, evidence was submitted showing that further allegations could be made that would have corrected any deficiencies, denying leave to amend was an abuse of discretion.

ARGUMENT

I. The Plausibility Pleading Standard.

On a motion to dismiss an antitrust case, the court must determine whether the claim is "plausible" in light of basic economic principles. *Twombly*, 550 U.S. at 556. That begs the question -- what is "plausible" and when does a complaint "nudge" into the plausibility realm? In *Twombly*, the court explained:

> a complaint . . . does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.

Id., at 555 (citations and internal quotations omitted). Applying the foregoing standards to a Sherman 1 claim, the *Twombly* court held:

> Stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

Id., at 556.

Following *Twombly,* the Court in *Iqbal,* 556 U.S. 662 (2008), sought to resolve the plausibility conundrum through a two-step analysis. The court "begin[s] by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*., at 679. And, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*.

Neither *Twombly* or *Iqbal* eliminated the mandate that material factual allegations are accepted as true and are construed most favorably to the plaintiff. *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2010).

This Court in *Starr v. Baca,* 652 F.3d 1202 (9th Cir. 2011) took up the plausibility standard in the context of competing explanations and concluded that where there are equally plausible scenarios advanced by the opposing sides, a motion to dismiss should not be granted:

> If there are two alternate explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im* plausible. The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual

> allegations of the complaint need only "plausibly suggest an entitlement to relief."

Id., at 1216-17 (emphasis in original, citations omitted).

And, recently this Court confirmed that "the plausibility standard is not akin to a 'probability requirement,' but it asks for more than sheer possibility that a defendant has acted unlawfully." *Mashiri v. Epstein Grinnell & Howell,* __ F.3d __ Case No. 14-56927, 2017 WL 127565 at *3 (9th Cir. Jan. 13, 2017), quoting *Iqbal,* 556 U.S. at 678.

The absence of direct evidence of a conspiracy is not fatal to an antitrust complaint. In *Text Messaging Antitrust Litig.,* 630 F.3d 622 (7th Cir. 2010), the court sustained a conspiracy claim by consumers alleging the defendant cellular phone companies engaged in price fixing of text messaging services, where there was no "direct" evidence of a conspiracy. Rather the complaint alleged that four defendants collectively controlled 90% of the market, belonged to a trade association and "exchanged price information directly" at the meetings and further created an "elite leadership council" within the trade association with a mission to urge members to substitute "co-opetition" for "competition." 630 F.3d at 628. Further, the complaint alleged that in the face of steeply falling costs, defendants increased prices and further the pricing structure changed almost overnight from a heterogeneous and complex system to a uniform pricing structure that simultaneously increased prices by a third. In short, the complaint in *Text Messaging* (like the complaint here) was "a mixture of parallel behaviors, details of industry structure and industry practices, that facilitate collusion." *Id.*, at 627. In finding that the complaint withstood dismissal, the court held the "second amended complaint provides a sufficiently plausible case of

price fixing to warrant allowing the plaintiffs to proceed to discovery." *Id.,* at 629.

Similarly, the court in *Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2nd Cir. 2010), *cert denied*, 562 U.S. 1168 (2011), held purchasers of digital music stated a claim for price fixing against defendants who sold digitized music over the Internet and on CDs where defendants controlled about 80 percent of the digital music sold to end purchasers, imposed terms on the purchase of the music that were so unreasonable they could not be maintained without a conspiracy, prices charged were nearly 3 times as high as another similarly structured service, and defendants maintained high prices even as the distribution costs dropped. *Id*., at 323-324. There, as here, a collection of specific allegations of conduct coupled with a structure at odds economically and logically with independent action was sufficient to state a Sherman 1 claim.[21]

Here, the district court subjectively weighed competing explanations, opting to dismiss where the opposing parties' alternative explanations were, at a minimum, in equipoise on the plausibility battleground. In doing so, the court gave short shrift to factual allegations of defendants' overwhelming control of more than 90% of the relevant market; a high 3-3-10 Packaging Fee which is more than the talent is paid and can be nearly 30 times the alternative 10% commission; a fee that has remained in existence for many years without any Uber Agency breaking ranks which one would expect in a

[21] In *Starr* the court rejected the argument the complaint failed because it did not "identify the specific time, place, or person related to each conspiracy allegation" finding that language to that effect in *Twombly* was specific to that case where there were very little allegations other than parallel conduct. 592 F.3d at 325.

truly competitive market; extremely limited instances of Uber Agencies co-packaging with a non-cartel member despite high numbers of series co-packaged among the Uber Agencies; criticism of the Uber Agencies' structure by the talent; an utter inability of the buyers to break the fee structure even though it reduces their profits by millions of dollars and is imposed even when the agency does nothing to warrant a fee; and a trade organization with an elite committee comprised of representatives of the Uber Agencies that met continually for many years to eliminate a provision between the artists and talent agencies that advantaged the agencies to the detriment of their artists.

II. The Complaint States a Conspiracy Claim Under Sherman 1.

Sherman 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. A claimant under Sherman 1 must show the existence of (1) a contract, combination, or conspiracy; (2) that unreasonably restrained trade under either a *per se* rule or a rule of reason analysis; and (3) affected interstate commerce. *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996).

A. Plaintiff Has Alleged Facts Showing the Existence of an Anticompetitive Agreement Between the Defendants.

Plaintiff pled that Defendants conspired and agreed to set the price at which scripted television packages are sold and eliminate the major impediment to much needed financial investment. Thereafter, Plaintiff alleges, the Uber Agencies engaged in actions to further the conspiracy, including co-packaging almost exclusively with and among each other,

inducing a boycott of non-Uber agencies by studios and networks, and threatening studios and networks that declined to pay their exorbitant package fees with future reprisals. These facts make Plaintiff's allegations of an unlawful agreement more plausible than independent action.[22]

And, in seeking reconsideration of the lower court's denial of leave to amend, Plaintiff presented a declaration in which it reported that a witness had provided further evidence to support its allegation that Defendants agreed to fix the price for scripted packaged television series. (2 ER 66, pp. 8-9.)

1. The Uber Agencies Have Long Worked Collectively to Eliminate Competition in the Scripted Packaged Television Market

We start with the fact that Defendants have long sought to eliminate competition in the scripted television package market. Plaintiff alleges that Defendants (who purport to be vigorous competitors) have long worked collectively to advance their collective interests – not their individual self-interest. This includes:

- Admissions by key representatives of the Uber Agencies that they work closely together, including the following statement by a key representative of one Uber Agency: "We'll create a new monetary system . . . We'll hunker down and come up with a system of

[22] An "explicit agreement is not a necessary part of a Sherman Act conspiracy." *U.S. v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966). And, "concerted action may be inferred from circumstantial evidence." *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1479 (9th Cir. 1986).

mathematics, in which the four of us will judge what everything's worth" (2 ER 49, ¶47);[23]

- Representatives of the Uber Agencies controlled the SPC and were integral to the process implemented to eliminate Rule 16(g) (*Id.,* ¶¶22, 27-37);[24]
- In the 1990's, representatives agreed to set the 3-3-10 Packaging Fee (2 ER 66, pp. 8-9);
- The Uber Agencies continue to this day to charge the fixed 3-3-10 Packaging Fee without any one ever breaking the price (2 ER 49, ¶53), even though price competition would be in their independent self-interest;

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[23] Although not referenced in the order dismissing the TAC, the court considered this allegation in dismissing the SAC, and concluded it was irrelevant because it purportedly was stated in the context of issues relating to Netflix or "appears to have been made in jest and not as a true statement of UTA's intent to engage in a conspiracy." (Dkt. 43, p. 9, n. 3.) The court's assumption the comment was made in jest demonstrates an unfortunate decision to weigh evidence on a motion to dismiss. More significantly, the court's unwillingness to consider the comment as evidence of collective action (no matter the context) was wrong since it was an express statement of the Uber Agencies acting collectively against a buyer (Netflix) on an issue of pricing.

[24] The court found Plaintiff's allegations of collective action to eliminate Rule 16(g) unpersuasive finding participation in a trade organization was "as much evidence of a conspiracy as it is evidence that each individual agency acted for its own independent benefit" particularly because SAG rejected the proposed rule amendment. (1 ER 65, p. 11.) Although participation in a trade association alone may be insufficient to suggest collective action, *In re Citric Acid Litig.,* 191 F.3d 1090, 1097 (9th Cir. 1999), it is well accepted that such organizations "can be rife with opportunities for anti-competitive activity." *Am. Soc. Of Mech. Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 571 (1982); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 511 (1988)

- The buyers (the networks and studios) are unable to break the 3-3-10 Packaging Fee and are forced to pay it even when the agency does nothing to warrant any fee (2 ER 49, ¶¶75-77);
- Despite charging far less than the Uber Agencies, non-cartel agencies are being driven out of the market (*Id.,* ¶¶6, 17, 51-55, 61); and
- The Uber Agencies co-package scripted television series among themselves to the near exclusion of non-cartel agencies (*Id.,* ¶¶43-46, 49; 2 ER 49-1, pp. 2-14, 16-27; 2 ER 56-1, pp. 1-8).

These allegations show that it is as plausible, if not more plausible, that the Uber Agencies acted collectively to set barriers to competition through the elimination of Rule 16(g) and set the price for scripted packaged television series at supra-competitive levels.

2. Since Rule 16(g)'s termination, the Uber Agencies Control of the Market has Grown Exponentially To Nearly 96% Allowing them to Reap Extraordinary Profits

The Uber Agencies now control nearly 96% of the market for scripted packaged television shows. As of the 2015-2016 television season, the HHI, equaled approximately 2,796, (2 ER 56-1, p. 5, ¶15), well above the 1,800 threshold deemed high concentration. (*Id.*)

By 2015-2016, the Ubers packaged 434 of 454 shows, for a total of nearly 96% packages. (2 ER 56-1, p. 3, ¶11.) Of these, 121 were co-packaged and every co-package included at least one Uber. (*Id*., p. 5, ¶17.) In other words, non-Uber agencies cannot participate in packaging independent of the Uber Agencies because of the latter's market power.

3. In a Truly Competitive Market, the 3-3-10 Packaging Fee Would Have Fallen By the Wayside

The Uber Agencies not only charge a different price than non-cartel agencies, but they use a different pricing system all to themselves. While most talent agencies operate on an individual commissions-based payment system, the Uber Agencies have agreed to charge the 3-3-10 Packaging Fee, a fee that increases the price the studios pay and reduces output by restricting the budget available to produce a show. Both outcomes are anti-competitive.

The impact of the differences in the two pricing systems can be seen by the following hypothetical (using the Meredith Stiehm show, *Cold Case*). We know Ms. Stiehm's agency received $75,000 per episode which correlates to 3% of the budget. (2 ER 49, ¶53.) We also know that Ms. Stiehm reported her agency was paid more than she received per episode. If we assume Ms. Stiehm was paid $50,000 per episode and there were 154 episodes of *Cold Case* produced, then Ms. Stiehm was paid $7,700,000. Her agency received $11,550,000 ($75,000 x 154 episodes) plus an additional $11,550,00 when the show was syndicated. And, the agency also participated in the back end profit receiving 10% off the top and before the talent thus reducing the talent's profit

Under the fixed 3-3-10 Packaging Fee charged by Uber Agencies, the studio paid Ms. Stiehm's agency $23,100,000 as a package fee, even before the "back-end" 10% is considered. Ms. Stiehm received $7,700,000. In other words, the agency makes three times what the actual talent earns. In contrast, under a commissions-based system, which the smaller agencies

use, the studio pays nothing, while Ms. Stiehm's salary remains the same $50,000 per episode, but she pays $770,000 (10% commission to her agent.

The 3-3-10 Packaging Fee has raised the price to the studio by well more than $23 million over the commission-based system. Because this fee impacts the studio's total show budget, simple economics dictate that it reduces output. Stated otherwise, the $23 million paid to the agency could have been used for additional episodes. The funds could also be used to pay the artists more, hire additional actors, or improve the quality of the show.

In a truly competitive market, no agency would be paid a package fee of $23 million. Rather in a competitive market, where talent agencies are "price-takers,"[25] each would accept a competitive price and any attempt by one or more to raise the price ("price-setting" at a higher level) would fail because customers would switch to lower-priced competitors. Firms that try to raise prices are faced with either bringing their price back to a competitive level or losing revenues or going out of business.

In the present case, the Uber Agencies have successfully managed to become "price-setters" rather than "price-takers." Rather than accepting a 10% individual commission, they successfully raised the price nearly 30 times more than the 10% commission, as evidenced by our *Cold Case* example. The compensation comes directly from the studio and indirectly from the artists, who are worse off because their show has a smaller budget. This arrangement only benefits the Uber Agencies to the detriment of the artists, studios and non-cartel agencies. But despite vigorous criticism from

[25] https://en.oxforddictionaries.com/definition/us/price-taker

the talent and studios, neither the buyers (the networks and studios) nor the critical product (the talent) have been able to alter the 3-3-10 Packaging Fee.

This structure could only exist through collusion among the Uber Agencies to fix prices at supra-competitive prices that are well above that charged by the non-cartel agencies serving the relevant market. And yet the non-cartel agencies outnumber the Uber Agencies roughly ten-to-one, but they have less than 5% of the market as compared to the whopping near 96% market share held now by the Uber Agencies.

At a minimum, it cannot be denied that it is, at least, equally if not more, plausible that Defendants entered into an unlawful agreement to fix prices, to control the market and to exclude competition. And, where the explanations (unlawful and lawful) stand on equal footing, dismissal is in error. *Starr v. Baca, supra*, 652 F.3d at 1216.[26]

B. Defendants' Agreement Unreasonably Restrains Trade Under Either a *Per Se* or Rule-of-Reason Analysis.

In finding there was no unlawful agreement, the lower court concluded that Plaintiff's conspiracy claims were deficient whether analyzed as a *per se* violation or under the rule of reason. The rule of reason, under which the "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an

[26] See also *Evergreen Partnering Group, Inc. v. Pactiv Corp.,* 720 F.3d 33, 47 (1st Cir. 2013) ("allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage. Requiring such heightened pleading requirements at the earliest stages of litigation would frustrate the purpose of antitrust legislation and the policies informing it").

unreasonable restraint on competition," is generally accepted as the standard for testing whether a particular practice violates Sherman 1. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). But, it does not govern all restraints. Some "are deemed unlawful *per se.*" *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997). When so characterized, the need to study the reasonableness of a restraint in light of market forces is eliminated. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988).

Restraints deemed *per se* unlawful "include horizontal agreements among competitors to fix prices, . . . , or to divide markets." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). This Court has identified three factors indicative of an illegal *per se* boycott: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." *Adaptive Power Solutions, LLC v. Hughes Missile Systems Co.*, 141 F.3d 947, 950 (9th Cir. 1998).

Here, there are strong arguments that Plaintiff's Sherman 1 claim is reviewed under the *per se* analysis. First, we start with the allegation that Defendants have set the price for scripted packaged television projects – the 3-3-10 Packaging Fee and each maintain that price. (1 ER 49, ¶¶53-55; 78.) Although, Plaintiff presented facts in support of its request for reconsideration that the Uber Agencies agreed to set that price in the mid-1990s, (2 ER 66, pp. 8-9), even without this evidence, Plaintiff's allegations confirm the existence of a horizontal price fix.

We start with the simple proposition that the 3-3-10 Packaging Fee is inconsistent with basic economics. Absent a collusive agreement, each Defendant would be better served by competing with the other on the fee. For example, if one agency lowered the fee to 2.5%, 2.5%, and 7.5%, it would incentivize the buyers to prefer that agency over the others since lower fees save the network millions of dollars.

Further, artists would prefer the agency with the lower fee because the networks, their ultimate clients, prefer them. Artists would be drawn to the agency charging a lower fee because it would mean more money to either compensate the talent or for the show's budget, thus increasing the likelihood of a more successful and longer running series.

The other agencies would be forced to respond by cutting their fees or risk losing business to the price-cutting agency. This price competition could continue as long as the price set by any single agency is greater than the competitive price. No agency could set a higher price without losing market share. And, no group of agencies, absent an unlawful agreement, could set a higher price because any single firm's best interests would be served by undercutting the group's prices and capturing market share. Thus, the fact that each of the Uber Agencies charge the same 3-3-10 Packaging Fee is inconsistent with their independent economic interests.

The 3-3-10 Packaging Fee cannot represent a competitive price arrived at independently by the Uber Agencies for at least the following reasons.

First, the 3-3-10 Packaging Fee has long been the standard in the industry and despite the fact that supra-competitive profits exist, not one of the Uber Agencies has ever under-cut another in order to seize market share.

Second, the 3-3-10 Packaging Fee is vastly higher than the 10% individual commission charged by the small talent agencies. In the example given above with respect to *Cold Case*, a small agency would have been paid $770,000. However, the Uber Agency reaped $23 million — 30 times the fee the smaller agency would have charged, even before any profit participation. Although Defendants may argue the artist is better off because he/she does not pay a commission, the benefit is a mirage, as Ms. Stiehm pointed out. The 3-3-10 Packaging Fee limits the show's budget, the amount available to pay talent, and can limit the number of episodes and impair the show's quality. In the end, the artist suffers, the studio suffers and the non-cartel agencies are driven out of the market. The only beneficiaries are the Uber Agencies.

Third, the package fee is charged regardless of whether the agent performed any services. As Mr. Polone stated: "…the only reason those [package] fees are paid is out of fear that the agency will kill a deal if its agents don't get to wet their beaks, rather than because they did any extra work or 'packaging.'"[27] The current scenario in the scripted packaged television market is akin to a sports agent demanding a percentage of an entire team's revenues as payment, rather than a percentage of their client's salary – a proposition that is facially preposterous and merely serves to

[27] See fn. 18, supra.

confirm how untethered the 3-3-10 Packaging Fee is to a competitive market.

Plaintiff further alleges and presented statistical evidence that Defendants agreed to co-package almost exclusively among themselves thus largely declining to co-package with any non-cartel member. (2 ER 49, ¶¶ 43-46; 2 ER 49-1.)

In the end, Defendants' unlawful agreement largely prevents Plaintiff and others from competing in the scripted television packaging market. Defendants possess a dominant position in the market controlling the vast majority of scripted television projects. Defendants possess a dominant hold on the key product which is talent. And, Defendants' unlawful agreement has not enhanced efficiency or competition but has done the opposite. For these reasons, the Defendants' agreement should be viewed as *per se* unlawful eliminating any need to analyze it under a rule of reason. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

But even under the rule of reason, Defendants' agreement fails. To succeed, plaintiff must show not only that an anticompetitive agreement exists, but that the restraint could significantly restrain competition. *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). The power of a restraint to harm competition may be shown circumstantially through proof of the defendant's high market share coupled with barriers to entry and expansion in the relevant markets. *Rebel Oil*, 51 F.3d at 1434.

Defendants' market share is clearly sufficient to support a finding of market power. By the 2015-2016 television season, Defendants (and their

co-conspirators) successfully co-opted nearly 96% of the market share of scripted packaged television projects, which is more than sufficient to support the market power requirements under Sherman 1. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc*. 627 F.2d 919, 926 (9th Cir. 1980); *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992). There are also high barriers to entry in the relevant market. (2 ER 49, ¶¶46, 60.)

The Complaint thus pleads not only the existence of an anticompetitive agreement, but that the agreement is capable of harming competition. This satisfies Plaintiff's initial burden of pleading a rule-of-reason violation under Sherman 1. *Bahn*, *supra*, 929 F.2d at 1413.

III. The Complaint States a UCL Claim and Violations of the Cartwright Act.

The UCL affords relief from unlawful, unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200. Under the "unlawful prong," the UCL "borrows" violations of other laws and treats them as unlawful practices that the UCL makes independently actionable. *Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999).

Depending on which prong is invoked a UCL claim can arise from a wide variety of wrongful conduct. For example, an action for misrepresentation may be actionable under the UCL (*Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011)); or for misappropriation (*Glue–Fold, Inc. v. Slautterback Corp.,* 82 Cal.App.4th 1018 (2000)); or price fixing

(*Clayworth v. Pfizer, Inc.,* 49 Cal.4th 758 (2010)); or interference with prospective economic advantage (*Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal.4th 1134 (2003)), or any of countless other common law and statutory claims.

Here, Plaintiff alleged violations of the UCL arising from its interference claims as well as the antitrust claims. And, Plaintiff further alleged that Defendants violated the Cartwright Act. The Cartwright Act codifies "the general common law prohibition against restraints of trade." *Corwin v. Los Angeles Newspaper Service Bureau*, 4 Cal.3d 842, 852 (1971). The Cartwright Act's purpose is to "protect and foster competition by preventing combinations and conspiracies which unreasonably restrain trade." *Morrison v. Viacom, Inc.*, 52 Cal.App.4th 1514, 1524 (1997); *Marin County Bd. Of Realtors, Inc. v. Palsson*, 16 Cal.3d 920, 935 (1976).

The Cartwright Act explicitly prohibits agreements among two or more persons by which the price of any article or commodity "might in any manner be affected." Cal. Bus. & Prof. Code § 16720(e)(4).

But the Cartwright Act also prohibits an array of conduct that the federal antitrust laws do not address. Cal. Bus. & Prof. Code, § 16720. And, the language of the Act differs in significant ways from the Sherman Act. Compare 15 U.S.C. § 1 with Bus. & Prof. Code, § 16720.

The lower court dismissed the UCL claim by accepting that the "analysis under California's antitrust law mirror[s] the analysis under federal law" relying on this Court's decision in *County of Tuolumne v. Sonora Cnty Hosp., supra.* (1 ER 65, p. 16, n. 6.) But, this Court's view that the analysis of Cartwright Act claims mirrors federal law is not correct. The California

Supreme Court has made clear that, "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." *Aryeh v. Canon Bus. Solutions, Inc.,* 55 Cal.4th 1185, 1195 (2013), citing *State of California ex rel. Van de Kamp v. Texaco, Inc.,* 46 Cal.3d 1147, 1164, (1988) ["[J]udicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent...."]; *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 772–773 (2010). The California Supreme Court also holds that the Cartwright Act is "broader in range and deeper in reach than the Sherman Act." *Cianci v. Sup. Ct.,* 40 Cal.3d 903, 920 (1985).

As with claims under the federal antitrust laws, not all restraints of trade under the Cartwright Act are evaluated the same way: some are deemed *per se* unlawful, while others are subject to the "rule of reason." The issue of which standard applies is a "threshold question" in suits brought under the Cartwright Act. *Palsson*, *supra*, 16 Cal.3d at 930.

Where evaluated under the rule of reason, the critical question is whether the anticompetitive effects of the restraint outweigh its procompetitive effects. *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.,* 198 Cal.App.4th 1366, 1374 (2011). The fact finder considers various factors, including the nature of the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, the history of the restraint, the reason for adopting the restraint, the percentage of the business controlled by the restraint, and the strength of the remaining competition. *Corwin*, 4 Cal.3d at

854. Rule of reason cases under the Cartwright Act proceed under a burden-shifting framework. The plaintiff's initial burden is to "delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." *Roth v. Rhodes*, 25 Cal.App.4th 530, 542 (1994). If the plaintiff satisfies that burden, the burden shifts to the defendant to "offer evidence of pro-competitive effects" of the challenged restraint. *Bhan v. NME Hospitals, Inc.*, *supra*, 929 F.2d at 1413.

In contrast, where a *per se* rule applies, the court's inquiry is markedly abbreviated. In such cases, "there is no need to define a relevant market or to show that the defendants had power within that market." *Knevelbaard Dairies v. Kraft Foods, Inc.* 232 F.3d 979, 986 (9th Cir. 2000) (applying California law). It is "not necessary to inquire" whether the challenged restraint "had an actual anticompetitive effect." *Mailand v. Burckle*, 20 Cal.3d 367, 380 (1978) (vertical price fixing is per se violation of the Cartwright Act).[28] Where restraints are *per se* unlawful, those restraints are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Palsson, supra*, 16 Cal.3d at 930-31, *quoting No. Pacific R. Co. v. U. S.* (1956) 356 U.S. 1, 5.

"Agreements fixing or tampering with prices are illegal per se." *Oakland-Alameda Cty. Builders' Exch. v. F. P. Lathrop Constr. Co.,* 4 Cal.3d 354, 363 (1971); *Kolling v. Dow Jones & Co., Inc.*, 137 Cal.App.3d

[28] This is not true under the Sherman Act where vertical price restraints are tested under the rule of reason. *Leegin Creative Leather Prods. v. PSKS, Inc.,* 551 U.S. 877 (2007).

709, 721 (1982) ("price fixing is illegal per se, so that *any* combination which tampers with price structures constitutes an unlawful activity").

Here, the TAC alleges the Uber Agencies all charge the same 3-3-10 Packaging Fee (a price that is dramatically different from the price charged by non-cartel agencies). Plaintiff alleges the Uber Agencies agreed to fix that price for scripted packaged television series.[29] These allegations support a claim that Defendants engaged in horizontal price fixing – a per se violation of the Cartwright Act.

Plaintiff further alleges that Defendants' steal away talent from the non-cartel agencies by agreeing not to charge the artist any commission and instead tell the talent they will seek compensation from the studio or network under the 3-3-10 Packaging Fee structure. By doing so, Defendants effectively sell their services to the artist for nothing.

The Unfair Practices Act ("UPA"), Cal. Bus. & Prof. Code § 17043, declares it unlawful "to give away any article or product, for the purpose of injuring competitors or destroying competition." The prohibitions in the UPA on below-cost sales "'are designed to protect ... [a competitor] whose more powerful neighbor is attempting to drive him out of business.' [Citations.]" *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.,* 14 Cal.4th 1247, 1261 (1997). A violation of the UPA can support the unlawful prong of a UCL claim and allegations of selling below cost (or in this case giving something away for free), can be an "unfair" practice that supports a

[29] In seeking reconsideration Plaintiff presented evidence that the large agencies including Defendant ICM, agreed in the mid 1990s to fix the price charged for scripted packaged television series. (2 ER 66, pp. 8-9.) The TAC alleges that UTA agreed to the price fix. (*Id.,* ¶¶6, 18, 53, 78.)

UCL claim. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal.4th 163, 180-189 (1999). Plaintiff's allegation that Defendants steal talent by giving away their services for free are thus supportive of a violation of the UCL.

Plaintiff also alleged facts to show antitrust injury under the Cartwright Act. (2 ER 49, ¶¶83-84.) See, e.g., *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.,* 198 Cal.App.4th 1366, 1378-80 (2011). California courts find antitrust injury where the injury is to a single merchant. *Kolling v. Dow Jones & Co.,* 137 Cal.App.3d 709, 724 (1982). Plaintiff alleged it suffered from Defendants' anticompetitive conduct through the loss of talent and loss of revenue resulting from talent loss and the Uber Agencies limited and near complete refusal to co-package with non-cartel agencies, and their coercion of networks and studios to not purchase from the non-cartel agencies. (2 ER 49, ¶78.) And, even if there is a deficiency in Plaintiff's antitrust injury allegations, which there is not, Plaintiff has alleged a right to restitution or injunctive relief under the UCL. (*Id.*, ¶88.)

In short, the TAC stated allegations sufficient to support a UCL claim, whether arising from violations of the Cartwright Act or allegations that Defendants' conduct is unfair.

IV. Leave To Amend Should Have Been Granted

The decision to grant leave to amend is vested in the district court's discretion. *Leadsinger, Inc. v. BMG Music Pub.,* 512 F.3d 522, 532 (9th Cir. 2008). Leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a)(2); *Foman v. Davis,* 371 U.S. 178, 182 (1962); *United*

States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981); *DCD Programs, Ltd. V. Leighton,* 833 F.2d 183, 186 (9th Cir. 1987) (reversing denial of leave to amend to file fourth amended complaint).

And, "[d]ismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.,* 942 F.2d 1467, 1472 (9th Cir.1991).

Here, the court afforded two occasions to amend and denied leave to amend the TAC because "Plaintiff has failed to cure deficiencies as to its Sherman Act § 1 claim in each of its previous pleadings." (1 ER 65, p. 15, citing *Zucco Partners, LLC v. Digimarc Corp*., 552 F.3d 981, 1007 (9th Cir. 2009).)

Among the deficiencies was the alleged failure to adequately plead a conspiratorial agreement by failing to identify the specific time, place, or person involved in the conspiracy. (1 ER 65, pp. 9-10.) Although Plaintiff believed that identification of the members of the SPC and the specific dates of meetings in the TAC was sufficient to correct this, the court determined otherwise.

In opposing the motions to dismiss, Plaintiff presented statistical evidence that further supported the existence of a conspiracy. The evidence related to the market concentration of the Uber Agencies, the limited number of occasions these agencies co-packaged with a non-cartel agency, the dwindling numbers of non-cartel agencies in the years following the alleged conspiracy, the statistical improbability that the rates of co-packaging occurred absent collusion and evidence that the Uber Agencies divided

control of the market. (Dkt. 56, pp. 28-30; 2 ER 56-1, pp. 1-17.) Plaintiff expressly sought leave to amend to include this information. The court refused without any indication it considered the newly identified facts.

Plaintiff then sought reconsideration of leave to amend based on a declaration by one of its principals recounting information disclosed by a former William Morris agent after the TAC was filed that the Uber Agencies (other than UTA) collectively agreed to set the 3-3-10 Packaging Fee in the mid 1990s. The declaration identified the individuals involved and the nature of the discussions. (2 ER 66, pp. 8-9.) The court denied the motion essentially because Plaintiff had delayed in presenting this evidence to the court. (1 ER 72, pp. 5-6.)

We respectfully submit where, as here, there is evidence that Plaintiff could amend and correct the TAC's alleged deficiencies, and no evidence of prejudice to the Defendants, leave to amend should have been granted.[30]

V. Plaintiff's Intentional Interference Claims Should Be Reinstated

Plaintiff's intentional interference claims are based on Defendant's successful efforts at "poaching" two of Plaintiff's clients in 2014, at a time when the provisions of an ATA/DGA agreement prohibited them from terminating their contracts with Plaintiff. (2 ER 49, ¶¶91-93; 95.) Both of

[30] Charles A. Wright, Arthur R. Miller, 6 *Fed. Prac. & Proc. Civ.* § 1487 (3d ed 2016) ("Perhaps the most important factor . . . for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter a pleading. . . if the court is persuaded that no prejudice will accrue, the amendment should be allowed").

the clients were members of the DGA and accordingly bound by that agreement. (*Id.,* ¶¶91, 96.)

Specifically, Plaintiff alleged that Rider D to the ATA/DGA barred its clients from terminating their contract because within the 90 days immediately preceding their notice of termination, the clients were under contract and each had received "an amount equal to their last compensation at a pro rata rate equivalent to three weeks of service." (*Id.,* ¶¶92-93, 95.) As a result of Rider D, Plaintiff alleged that the contracts between Plaintiff and the two clients were not at will. (*Id.,* ¶¶93, 95.)

Plaintiff further alleged Defendants had actual notice that both clients were under contract with Plaintiff. (*Id.,* ¶¶94, 96-97.) And, Plaintiff alleged that Defendants' predatory acts were accomplished through, among other things, the unlawful violations of federal and state antitrust laws and the UCL. (*Id.,* ¶98.)

Although the court found that Plaintiff's allegations were sufficient to show that the clients had employment within 90 days of the termination notice and thus satisfied the first prong of Rider D, the court inexplicably found that Plaintiff's allegations regarding receipt of compensation were purportedly too conclusory to satisfy *Twombly* and thus failed to meet the second prong of Rider D. (1 ER 65, p. 19.)

However, there is no requirement in *Twombly* that plaintiff stating a claim for intentional interference with a contract must allege the specific identification of the amount the client was paid before and after. Rather, Fed.R.Civ.P. Rule 8 merely requires a short and plain statement of the claim showing that the plaintiff is entitled to relief. Fed.R.Civ.P. 8(a).

Twombly's directive that each defendant be given "fair notice of what the ... claim[s][are] and the grounds upon which [they] rest" *(Twombly,* 550 U.S. at 555), merely requires some factual basis for each claim and the specific legal theory supporting the claim.

Plaintiff's allegations that Client #1 and Client #2 "received an amount equal to her [or his] last compensation at a pro rata rate equivalent to three (3) weeks of services" and (2 ER 49, ¶¶93, 95), are allegations of fact. They are *not* mere conclusory statements as the lower court found. Rather, these allegations comport entirely with this Court's requirements that the complaint set forth "who is being sued, for what relief, under what theory, with enough detail to guide discovery." *McHenry v. Renne,* 84 F.3d 1172, 1177 (9th Cir.1996).

And finally, the lower court's dismissal of Plaintiff's claim for intentional interference with prospective advantage should also be reversed since it was based on the court's erroneous finding that Plaintiff failed to state an independently wrongful act, either under Sherman 1 or the UCL. Since as we have shown above, Plaintiff has adequately pled those claims, the dismissal of the claim for interference with prospective advantage should be reversed.

CONCLUSION

This Court should reverse the dismissal of the Complaint and remand for further proceedings.

Dated: January 17, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of this Court, Appellant and their counsel of record state that they are unaware of any related case pending in this Court.

Dated: January 17, 2017

/s Gretchen M. Nelson
Gretchen M. Nelson

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,953 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing word count was calculated using the Microsoft Word program used to prepare this brief and the word count includes headings and footnotes.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief was prepared in proportionally spaced, 14-point, Times New Roman font.

Dated: January 17, 2017

/s Gretchen M. Nelson
Gretchen M. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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