WEDNESDAY, AUGUST 5, 2020
5:00p - 5:45p PDT

LABOR OF LOVE: A DISCUSSION OF THE RELATIONSHIPS BETWEEN UNIONS, TALENT AND PRODUCERS

moderator:
Michael Maizner
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RICHARD W. KOPENHEFER *PARTNER,* SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

RICHARD W. KOPENHEFER IS A PARTNER IN THE LABOR & EMPLOYMENT PRACTICE GROUP IN THE FIRM'S LOS ANGELES OFFICE.

AREAS OF PRACTICE

RICHARD REPRESENTS PRODUCERS AND DISTRIBUTORS OF FEATURE FILMS, TELEVISION SHOWS, ELECTRONIC GAMES, COMMERCIALS AND NEW MEDIA, PRINCIPALLY IN THEIR DEALINGS WITH THE UNIONS AND GUILDS IN THE ENTERTAINMENT INDUSTRY. HE REGULARLY NEGOTIATES, ARBITRATES AND LITIGATES WITH SAG/AFTRA, DGA, WGA, AFM, IATSE AND THE TEAMSTERS, ALONG WITH THEIR RESPECTIVE BENEFIT PLANS AND TRUSTS. HE ADVISES CLIENTS CONCERNING DEVELOPMENT DISPUTES, INCLUDING WRITER DEFAULTS, SCREEN CREDITS, SEPARATED RIGHTS AND THE WGA'S TERRITORIAL JURISDICTION. IN PREPRODUCTION, HE IS INSTRUMENTAL IN NEGOTIATING ALL PRODUCTION LABOR AGREEMENTS. IN THIS CONNECTION, HE IS CONVERSANT WITH IATSE'S TERM COLLECTIVE BARGAINING AGREEMENTS AND FREQUENTLY DEALS WITH SO-CALLED "RUNAWAY" PRODUCTION IN TAX-SHELTERED PRODUCTION VENUES IN THE UNITED STATES, CANADA AND AROUND THE WORLD. HE FREQUENTLY DEALS WITH DIRECTOR'S CREATIVE RIGHTS DISPUTES. HE HAS A SPECIAL EXPERTISE IN THE NEGOTIATION OF GUILD "FINANCIAL ASSURANCES" CONCERNING THE PAYMENT OF RESIDUALS.

RICHARD HAS NEGOTIATED GUILD FINANCIAL ASSURANCES FOR SINGLE PICTURES, AND FOR ENTIRE LIBRARIES. HE FREQUENTLY ASSISTS NON-UNION PRODUCERS WITH UNION ORGANIZING EFFORTS AND IS THOROUGHLY FAMILIAR WITH PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD. RICHARD REPRESENTS CLIENTS IN CONNECTION WITH BOTH RESIDUALS AND FRINGE BENEFITS AUDITS, AND DEFENDS THEM IN BOTH FEDERAL COURT AND TRI-GUILD ARBITRATIONS. HE IS A WELL-KNOWN EXPERT ON RESIDUALS ACCOUNTING ISSUES. HE REPRESENTS AD AGENCIES, ADVERTISERS AND COMMERCIAL PRODUCTION COMPANIES. HE ASSISTS OFF SHORE PRODUCERS IN CONNECTION WITH "GLOBAL RULE ONE" AGREEMENTS WITH SAG. HE IS PRESENTLY PREPARING TO RE- NEGOTIATE THE IATSE LOW BUDGET THEATRICAL AGREEMENT ON BEHALF OF A COALITION OF INDEPENDENT FILM PRODUCERS. RICHARD REPRESENTS LIONSGATE IN CONNECTION WITH ITS ENTIRE MOTION PICTURE AND TELEVISION OUTPUT. HE HAS REPRESENTED LEGENDARY ENTERTAINMENT ON "42", "PACIFIC RIM", "SEVENTH SON" AND "HOT WHEELS." HE REPRESENTED DREAMWORKS STUDIOS ON "LINCOLN." TELEVISION CLIENTS INCLUDE FX AND THE HALLMARK HALL OF FAME.

RICHARD REPRESENTS MANAGEMENT IN ALL ASPECTS OF LABOR AND EMPLOYMENT LAW, INCLUDING EMPLOYMENT DISCRIMINATION, SEXUAL HARASSMENT, WRONGFUL TERMINATION, WAGE AND HOUR, UNFAIR COMPETITION, COLLECTIVE BARGAINING, GRIEVANCE AND ARBITRATION, WORKER'S COMPENSATION, WORKPLACE SAFETY AND OSHA.

RICHARD PRACTICES IN STATE AND FEDERAL COURT, BEFORE LABOR ARBITRATORS AND MEDIATORS AND IN THE MYRIAD ADMINISTRATIVE AGENCIES INVOLVED IN LABOR LAW. HE FREQUENTLY LECTURES ON DISABILITY RIGHTS LAW AND SEXUAL HARASSMENT. FROM 1978 TO 1984, RICHARD WAS EMPLOYED AS A FIELD ATTORNEY FOR THE NLRB IN BOTH ITS CINCINNATI AND LOS ANGELES REGIONAL OFFICES.

• BEST LAWYER IN AMERICA, BEST LAWYERS, 2013-2020

ARTICLES

LABOR AND EMPLOYMENT LAW BLOG POSTS

• "'FINANCIAL CORE' – A DISSIDENT WRITER'S RECOURSE," MAY 9, 2019

• "DEPUTY LAWYER; WGA TRIES PREEMPTION ROUTE IN ATA DISPUTE," APRIL 4, 2019

MEDIA MENTIONS

• LOGGING A STRING OF BIG WINS IN LABOR & EMPLOYMENT, DAILY JOURNAL, FEBRUARY 9, 2011

SPEAKING ENGAGEMENTS

• "WHAT IS SAG/AFTRA AND WHAT DOES IT AND THE NEW COLLECTIVE BARGAINING MEAN FOR FASHION ADVERTISING?" NEW YORK, FEBRUARY 13, 2013

EVENTS

• 2012 INTERNATIONAL FILM & TV FINANCE SUMMIT

THE LUXE HOTEL, LOS ANGELES, CA, MARCH 22, 2012

• LABOR & EMPLOYMENT LAW UPDATE & HAPPY HOUR - CENTURY CITY OUR NEW, IMPROVED, AND FREE BREAKFAST WITH YOUR LABOR LAWYER (IN THE EVENING!) HYATT REGENCY CENTURY PLAZA – LOS ANGELES, SEPTEMBER 29, 2010

• CALIFORNIA BAR ASSOCIATION

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MICHAEL MAIZNER *FOUNDER AND MANAGING PARTNER,* MAIZNER & ASSOCIATES PLLC

MICHAEL MAIZNER IS AN ENTERTAINMENT LABOR ATTORNEY WITH OVER 17 YEARS OF EXPERIENCE ADVISING AND REPRESENTING CLIENTS IN THEIR DEALINGS WITH ENTERTAINMENT GUILDS AND UNIONS. MICHAEL HAS REPRESENTED TELEVISION AND THEATRICAL MOTION PICTURE COMPANIES, BASIC CABLE NETWORKS, NEW MEDIA COMPANIES AND PLATFORMS, PODCAST PRODUCERS, AND ADVERTISERS AND ADVERTISING AGENCIES IN THE NEGOTIATION AND INTERPRETATION OF COLLECTIVE BARGAINING AGREEMENTS WITH THE AFM, SAG-AFTRA, DGA, WGA, IATSE, TEAMSTERS, AND OTHER ENTERTAINMENT INDUSTRY GUILDS AND UNIONS. HE HAS COUNSELED CLIENTS IN CONNECTION WITH GUILD AND UNION ORGANIZING ACTIVITIES, CORPORATE STRUCTURE AND SIGNATORY RELATIONSHIPS, FINANCIAL ASSURANCES, AND WAIVERS. HE HAS ALSO DEFENDED COMPANIES IN CONNECTION WITH CLAIMS FOR RESIDUALS, SUPPLEMENTAL MARKETS FEES, BENEFIT PLAN CONTRIBUTIONS, SCREEN CREDITS, AND OTHER GUILD AND UNION CLAIMS.

MICHAEL'S LABOR RELATIONS EXPERIENCE IS HONED FROM OVER 10 YEARS OF EXPERIENCE AT A BOUTIQUE ENTERTAINMENT LABOR LAW PRACTICE AND 4 MORE YEARS AT A LARGE, MULTI-NATIONAL FULL-SERVICE ENTERTAINMENT LAW FIRM. MOST RECENTLY, MICHAEL SERVED AS DIRECTOR OF LABOR RELATIONS AT NETFLIX IN NEW YORK WHERE HE PROVIDED STUDIO LABOR RELATIONS COUNSEL AND SPECIALIZED ENTERTAINMENT-RELATED LABOR ADVICE TO CREATIVE EXECUTIVES, BUSINESS AFFAIRS, LEGAL AFFAIRS, PRODUCTION FINANCE, AND PHYSICAL PRODUCTION TEAMS FOR NETFLIX'S ORIGINAL SERIES SHOOTING AROUND THE GLOBE, AND HELPED TO LEAD THE GROWTH OF NETFLIX'S NEW YORK OFFICE.

MICHAEL IS ALSO CONSIDERED BY MANY AS A GO-TO RESOURCE FOR ADVICE RELATING TO THE APPLICATION AND INTERPRETATION OF CHILD PERFORMER LAWS THROUGHOUT THE UNITED STATES. HE ALSO FREQUENTLY REPRESENTS CLIENTS IN GETTING CHILD PERFORMER CONTRACTS APPROVED IN NEW YORK, CALIFORNIA, TENNESSEE AND ELSEWHERE.

OLGA RODRIGUEZ-AGUIRRE *EXECUTIVE DIRECTOR, ENTERTAINMENT CONTRACTS*, SAG-AFTRA

OLGA RODRIGUEZ-AGUIRRE HAS BEEN PRACTICING LABOR LAW IN THE ENTERTAINMENT INDUSTRY FOR OVER 23 YEARS. AS A LAW GRADUATE OF UC HASTINGS COLLEGE OF THE LAW, SHE JOINED BUSH GOTTLIEB (FORMERLY GEFFNER & BUSH), A UNION-SIDE LABOR BOUTIQUE IN BURBANK, CA WHERE SHE REPRESENTED MANY OF THE ENTERTAINMENT GUILDS AND PLANS-SAG, DGA AND WGA AMONG OTHERS FOR 8 YEARS IN THE AREA OF FINANCIAL ASSURANCES AND ERISA. OLGA HAS BEEN WITH SAG-AFTRA (FORMERLY KNOWN AS SCREEN ACTORS GUILD, INC.) FOR 15 YEARS WORKING IN THE AREAS OF LABOR, SECURED TRANSACTIONS, COPYRIGHT AND BANKRUPTCY, SPECIALIZING IN NEGOTIATING WITH PRODUCERS AND ATTORNEYS FOR THE PAYMENT OF ADDITIONAL COMPENSATION TO SAG-AFTRA PERFORMERS WORKING IN STUDIO AND INDEPENDENT PICTURES EXHIBITING IN THEATERS, TELEVISION AND STREAMING PLATFORMS. CURRENTLY, SHE IS AN EXECUTIVE DIRECTOR OF ENTERTAINMENT CONTRACTS WHERE SHE OVERSEES THE ENFORCEMENT, NEGOTIATION AND POLICIES OF SAG-AFTRA COLLECTIVELY BARGAINING AGREEMENTS.

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R. "IATSE Petition Telling President Matt Loeb To Hang Tough In Netflix Contract Talks Grows To 11,0000 Signatures," *Deadline* (February 27, 2020)

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LOCATION: Los Angeles, California

LENGTH OF ACTIVITY: 1.75 hours

ELIGIBLE CALIFORNIA MCLE CREDIT: up to 0.75 hour of general credit and 1 hour of recognition and elimination of bias in the legal profession and society credit

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5:00 pm - 5:45 pm 45 minutes 0.75 hour of general credit	**LABOR OF LOVE: A DISCUSSION OF THE RELATIONSHIPS BETWEEN UNIONS, TALENT AND PRODUCERS** Michael Maizner (Moderator), Richard W. Kopenhefer and Olga Rodriguez-Aguirre	_____	_____
5:50 pm - 6:50 pm 1 hour 1 hour of recognition and elimination of bias in the legal profession and society credit	**SPORTS, ENTERTAINMENT AND RACIAL EQUITY: HEEDING THE CALL FOR JUSTICE** Lisa Gilford (Moderator), Nichelle Carr, Nicole Duckett and Karen Grant-Selma	_____	_____

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LABOR OF LOVE: A DISCUSSION OF THE RELATIONSHIPS BETWEEN UNIONS, TALENT AND PRODUCERS	Knowledge of Subject Matter	

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Lisa Gilford (Moderator), Nichelle Carr, Nicole Duckett and Karen Grant-Selma	Overall Teaching Effectiveness	
SPORTS, ENTERTAINMENT AND RACIAL EQUITY: HEEDING THE CALL FOR JUSTICE	Knowledge of Subject Matter	

Labor of Love: A Discussion Of The Relationships Between Unions, Talent and Producers

Outline of Topics/Issues

In the ever changing media and content landscape, labor unions are dynamically evolving and responding to protect its members. Conversely, studios, networks and tech companies are working to adhere and comply with unions while balancing the economics of exploiting and producing content. With strikes and union rifts in the background, studios, companies and union members need to find a way to focus on the 'relation' aspect of 'labor relations' to ensure that despite both parties protecting their interests, the show must go on. This panel of 'labor relations' experts will cover the day to day challenges along with the current status of larger union issues that impact all interested parties from potentially just getting along.

SAG-AFTRA President Gabrielle Carteris Says New Film & TV Contract "Is The Most Lucrative Deal We Have Ever Negotiated"

By David Robb
July 2, 2020 10:22am PDT

CREDIT: SAG-AFTRA

SAG-AFTRA president Gabrielle Carteris is urging the members to vote yes to ratify the union's new film and TV contract, saying in a video message to her members today that the pact "is the most lucrative deal we have ever negotiated. It's valued at $318 million over the three year term of the contract. That's an extra $318 million in members' pockets."

"People who study this deal they say it's an amazing accomplishment during a global pandemic and economic upheaval," she said. "But you know what I say? I say it's an amazing accomplishment no matter the time or circumstances. Because with all of these successes and more, this contract will keep our union strong for years to come."

See the video below.

On Monday, the new contract was approved along the guild's fractious party lines by a two-thirds vote of the national board of directors. Opponents will be sending a minority report to accompany ratification ballots.

The contract with managements AMPTP includes a 26% increase in residuals from original shows made for high-budget streaming platforms; wage increases of 2.5% in the first year and 3% in each of the second and third years; job gains for West Coast background performers, and increases in funding for the union's health plan that are projected to generate more than $50 million in additional funding over the course of the contract.

Saying that “it’s my pleasure to finally be able to talk about good news for a change – actually really good news” – Carteris said that the new deal “sets up for our long-term future by securing a substantial 26% increase in fixed streaming residuals – improving the formula across the board to better reflect the current reality of entertainment.”

“And it wasn’t just about money,” she said. “It was about demanding more safety for women and men. We made incredibly important advancements like securing a 48 hour notice provision for nudity and simulated sex.”

“So please, join me in voting yes,” she said, urging members to go to the union’s website to view “the terrific gains we got.”

SAG-AFTRA Factions Weigh In On Pros & Cons Of Proposed New Film & TV Contract

By David Robb
July 2, 2020 3:46pm

CREDIT: Shutterstock

SAG-AFTRA-building-HQ-LA

Ratification ballots are in the mail for the new SAG-AFTRA contract, with pro and con statements from opponents and proponents. Opponents have issued a minority report urging members to vote no, saying that the deal "enshrines historic losses and missed opportunities." Proponents, saying that this is the best deal in the union's history, are urging a "yes" vote. The union will be holding a series of virtual information meetings later this month.

On Monday, voting along the guild's fractious party lines, nearly one-third of the national board of directors voted to reject the contract. And although they fell short of achieving the threshold required to trigger the board's consideration of a minority report, the guild included their dissenting opinion in the ratification package that's now been sent to members.

Their dissent stands in sharp contrast to statements made by supporters of ratification. Earlier today, SAG-AFTRA president Gabrielle Carteris released a video in which she said the new contract "is the most lucrative deal we have ever negotiated."

In their rebuttal to minority report, supporters of the new pact say "this is the richest deal in TV/Theatrical history, negotiated while our employers watched their businesses grind to a halt. The opposition believes

that you should celebrate this victory with a self-inflicted wound. They urge you to reject these gains and jeopardize the return of our work precisely when that mistake will do the most damage to members who are already in financial crisis. The only alternative they offer is to not have a deal. If this non-strategy sounds familiar, it should. This is how the authors of the opposition statement lost hundreds of millions in member wages in 2008."

Read the full ratification package, with pro and con statement, here.

Most notably, opponents of the contract argue that it includes rollbacks in the fixed formula for residuals from the floundering syndication market, saying that will cost actors $70 million over the next three years and $170 million over the next eight years. They say the new contract "destroys our decades-old fixed residual formula" and will result in up to a 90% reduction in these residuals.

Read their opposition statement here.

In their rebuttal, however, supporters say that the 17 shows currently in syndication will continue in syndication under their current formulas, and that the new formula "provides an opportunity for new residuals, for shows that would never have syndicated." They say "the continuing decline of a business model based on local stations broadcasting linear, appointment television is inevitable. Streaming is the future. That's what this deal secures."

The guild has also produced a video (watch it below) saying that a new residuals formula was needed to account for the fact that "The broadcast syndication market is in a natural and almost certainly irreversible decline," with research showing a projected 50% decline in broadcast syndication over the next five years, which the guild says translates into a potential decline in broadcast residuals from $95.8 million this year to only $43 million by 2025.

The union says that gains in the new pact are valued at $318 million over the next three years, including a 26% increase in residuals from original shows made for high-budget streaming platforms; $54 million in additional funding for the union's health plan, and some 2,100 additional jobs a year for West Coast background performers beginning in the third year of the contract. SAG-AFTRA national executive director David White, the union's chief negotiator, has said that the new agreement "represents significant and much needed monies to our pension, health and retirement plans, and compensation gains designed to protect the current and next generation of our membership, particularly in the area of high-budget subscription streaming residuals."

Dissenters from the union's loyal opposition, who opposed Carteris' re-election last year, say that the new deal doesn't go nearly far enough. "This deal was negotiated during an unprecedented global health and economic crisis," they said. "Our country has turned to performers for warmth, humor, and inspiration. The value of our services is growing, not shrinking. Even through the shared pain of this moment, it's our duty to negotiate with strength to fiercely protect your wages, residuals, health, safety, and the survival of our Pension and Health Plans."

Dissenters include former SAG president Ed Asner, current Los Angeles Local president Patricia Richardson, and national board member Matthew Modine, who lost in his bid last year to unseat SAG-AFTRA president Gabrielle Carters. Other signers of the minority report include national board members Elliott Gould, Neve Campbell, Dianne Ladd, Esai Morales (who lost to Carteris in 2017), Jennifer Beals, Joanna Cassidy, and Rob Schneider, as well as Los Angeles local vice presidents Frances Fisher and David Jolliffe. Other board members who signed include Joe d'Angerio, Debbie Evans, Greg Evigan, Marie Fink, Lamonte Goode, Jodi Long, Jonathan Taylor Thomas and Olga Wilhelmine. LA Local board signers

include Peter Antico (who also lost to Carteris in 2017), Pamela Guest, Linda Harcharic, Matt Kavanaugh, Ron Ostrow, and Shaan Sharma.

Dissenters will hold a virtual town hall meeting on July 9 to discuss their objections to the proposed new contract. These are the key concerns as detailed in their minority report:

Syndication
• Destroys our decades-old fixed residual formula.
• Up to 90% reduction.
• Total 3-year loss of $70 million.
• 8-year loss of $170 million.
• 2019 earnings of $95 million will plummet to $16 million.
• Affects 35,000 individual performers.
• Pre 1998 episodes will have your P&H contribution deducted from your residual.

Pension & Health
• 1.5% of the proposed 2% P&H increase will be deducted from your wage increase.
• Members working under an AFTRA contract receive zero individual pension increases, bypassing them, going straight to the AFTRA Retirement Plan.

Advanced Payment of Residuals
• The Netflix deal achieved a 15% cap, while studios can continue to apply a significantly higher percentage.

Background Performers:
• Of the promoted $318 million increase, the 1 new Background spot in the 2nd year is worth only .2% ($600,000).
• In the last 28 years, BG has lost a total of 36 spots. 1 new spot isn't enough.
• Scanning: No protection for background actors from the use of digital doubles.
• Unequal nudity protections.

Foreign Travel
• Giving away First-Class Travel under 1,000 miles, especially in the COVID era, puts our members at risk.

Grandfathering in SVOD
• New episodes of old shows are prevented from receiving newly increased negotiated residuals.
• The supposed elimination of "grandfathering" in this agreement is extremely vague.

Stunts
• Money/Schedule Breaks ignored for features, robbing cumulative overtime.
• No safety improvements.

New Media under 20 minutes
• New Media shows under 20 minutes will continue to be freely negotiated and will not have most of our standard protections.
• No minimums
• No 12-hour turnaround
• Half-hour shows are typically 22 minutes. Cutting just 2 minutes will side-step the basic agreement.

Options & Exclusivity
• The freedom of performers to pursue future work remains terribly restricting.
• Guest spots are unfairly limited.
• Actors are put on unreasonable holds.

Supporters of the deal took issue with each of the opponents' concerns. In their rebuttal, they said:

High-Budget SVOD:
• The opposition makes literally no mention of the most impactful issue facing our members.
• The high-budget SVOD gains (26% – 45% increase) will exceed syndication losses within 2-3 years and dramatically surpass them ever after. That's called a good deal.
• The supposedly "vague" Grandfathering provisions are crystal clear, and a huge improvement over how this worked in 2014 and 2017.

Syndication:
• The 17 shows currently in syndication continue in syndication under their current formulas. The new formula provides an opportunity for new residuals, for shows that would never have syndicated.
• The continuing decline of a business model based on local stations broadcasting linear, appointment television is inevitable. Streaming is the future. That's what this deal secures.
• Above-pattern improvement prohibiting advance pay for new contracts means you get actual money for your residuals, not a credit against a prepayment bargained into your contract.

Air Travel:
• Coach for under 1,000-mile domestic flights is already allowed. • Given the choice between rejecting this pattern proposal and putting record-setting sums of money in members' pockets at a time of unprecedented need, we think we made the right call.
• We improved the pattern here too by securing you free access to first-class lounges and priority boarding for coach flights outside of North America.

Stunts:
• Achieved our proposal to make an overtime improvement in episodic — that's a gain.
• Feature gain is better pursued in a negotiation that isn't happening while movie theaters are closed.
• Stunt community's #1 priority in Wages & Working conditions was funding our (benefit) Plans. We did that.

Background Actors:
• Background actors get 2,100 new jobs from a new covered position.
• Union has addressed scanning/digital doubles successfully with studios outside of negotiations, and this deal sets industry-wide discussion.
• New and crucial nudity/simulated sex protection for background. Same as principals in all but two areas — auditions and notice — one of which is addressed in a different way.

Advance Pay, Options & Exclusivity, and New Media Below 20 Minutes:
• The union has creative ways to address these areas outside of bargaining.
• These issues remain on our agenda for future negotiations — don't let the perfect be the enemy of the great.

Supporters urged members to "Vote yes for our future!" Opponents urged members to "Arm yourself with facts" and "Make an educated decision."

WGA & Producers Reach Tentative Deal On New Film & TV Contract, Averting Strike During Pandemic

By David Robb, Dominic Patten
July 1, 2020 9:24am

After long and hard negotiations conducted remotely, the WGA and the AMPTP have secured a tentative overall deal that brings much-desired labor stability to an industry already hobbled by the consequences of the coronavirus pandemic.

After a last-ditch marathon bargaining session that stretched into the early hours Wednesday, the sides — which by all accounts had a fairly no-drama negotiation for the past several weeks — secured an agreement to take to the guild's membership for ratification.

As usual, details of the deal were not released in the immediate hours after the agreement, which closely mirrors the deal reached between the DGA and producers in March.

Most significantly, sources tell Deadline that the new tentative agreement contains "significant movement" and "flexibility" on the exclusive options that tether writers to series regardless of their length. This in particular has been a major thorn in the guild's paw for the past several years with the rise of streaming platforms and varying episode orders for series.

As has been customary during the past several contract cycles, the WGA is expected to take the deal to its members for ratification quickly. An individual familiar with the talks and the tentative agreement tells Deadline that the process "will clearly be different" from past ratification votes due to the COVID-19 crisis.

Representatives for the WGA and the AMPTP have not responded to requests for comment.

We will update with more details as they become available.

Erik Pedersen contributed to this report.

WGA Details $200M Gains & Losses in New Film & TV Contract

By David Robb
July 1, 2020 6:25pm

CREDIT: WGA

The WGA said tonight that it had to "fight off significant writer-centric rollbacks," in its now-completed negotiations for a new film and TV contract, which the guild said "would have been very damaging." The new pact, which was reached in the early morning hours today, contains many of the guild's terms, but also rollbacks in residuals from the long-floundering syndication market, which the WGA said had been baked into the deal by earlier deals that management's AMPTP struck with the DGA and SAG-AFTRA.

"Although the ongoing global pandemic and economic uncertainty limited our ability to exercise real collective power to achieve many other important and necessary contract goals, we remain committed to pursuing those goals in future negotiations," the WGA negotiating committee said in a message to their members.

"Many of the new terms track those recently negotiated by other guilds, including increases in SVOD residuals, the lowering of SVOD budget breaks, and elimination of almost all SVOD grandfathering, as well as rollbacks, including syndication residuals," the guild leaders said.

The guild said that "In addition, as part of an overall package valued at more than $200 million over three years, we were able to achieve several writer-specific gains. The writer training and new writer discounts that undercut screen and television minimums and disproportionately impacted underrepresented groups have been eliminated.

"A new paid parental leave fund available to all writers who qualify for health insurance was established, with benefits beginning in May 2021. The benefit will be entirely funded by an employer contribution of .5% on writers' earnings.

“Our pension fund will receive an immediate 1.5% contribution increase to 10%, with the ability to divert an additional 1.25% from minimums, if needed, over the final two years of the contract. This increased funding of our pension plan, totaling 2.75% over the term of the contract, was a vital goal of this negotiation and sets our plan on a much firmer foundation.

“We also improved protections for television writers in the area of options and exclusivity, including specific limitations on options after short periods of employment, and expanded the number of writers covered by the span protections first negotiated in 2017.”

The WGA’s negotiating committee, which earlier today unanimously approved the terms of the new film and TV contract, said tonight that it is recommending membership ratification. Upon their approval, increases in guild minimums will be retroactive to May 2, 2020, and expire on May 1, 2023.

Editors Guild Chief Cathy Repola Addresses Systemic Racism In Hollywood And Back To Work Protocols That "Are Still In The Works"

By David Robb
June 30, 2020 1:25pm

Just when you thought that guidelines for the film and TV industry's safe return to work were in place and ready to implement, Cathy Repola, executive director of the Editors Guild, IATSE Local 700, says that those protocols "are still in the works." In a video message to her members today, she said: "We are still in discussions with the AMPTP and with IATSE and the above-the-line guilds to try to put together standardized protocols that will apply across the board." Those discussions, she told her members, "are ongoing, and at such time when they're completed, you will certainly be among the first to know."

Watch her video message above.

On June 12, Hollywood's unions released their detailed protocols for the safe resumption of film and TV production – a joint effort by the DGA, SAG-AFTRA, IATSE and the Teamsters. The 36-page report (see it below) is designed to implement the more general guidelines set forth in a White Paper on reopening that was issued on June 1 by the Industry-Wide Labor-Management Safety Committee Task Force. Like the White Paper, the unions' protocols stress that testing and social distancing are the keys to a safe reopening.

But Repola told her members today that "if any of you are asked to report to work, and you've not heard anything further from us that there are protocols in place, you should reach out to the guild staff right away and make sure that we can help you navigate through whatever the company is telling you, and whatever they are saying they will provide to you, to assure the utmost concern for your health and safety."

Repola also addressed the "current escalation of awareness in this country of the systemic racism that has been going on here for decades that many of us have either chosen to ignore or buried our heads in the sand about. I assure you, I am not burying my head in the sand at all. In fact, while I haven't been speaking publicly about it a great deal, I have been in a lot of dialogue and doing a lot of research and a lot of reading. I think as a union, we can do better – we must do better. I think it's time for me to do a lot of listening, as opposed to maybe a lot of talking. I want to understand what our black members are going through in their work environments; how it feels to have a lack of diversity within their working areas. I want to know what they think we can do as a union to improve on all of that."

Her comments come a day after IATSE international president Matthew Loeb and the union's entire executive board acknowledged the union's role in failing to upend "systemic racism in the arts and entertainment industry," calling for industrywide action and vowing to do the "hard work" needed to "create real, lasting change."

Repola, noting that her local already does outreach to film schools and other organizations that bring newcomers with diverse backgrounds into the industry, promised that "we are going to increase that." She

also said that the local will be holding seminars and training on racism, discrimination and unconscious bias, and “to do absolutely anything within our power as a union to help all of our members.“

“I think we need a collaborative solution,” she said. “I think we need a lot of dialogue. I think we need to show a lot of respect for different viewpoints. I think we need to provide a lot of education; we need to listen to one another; we need to come together to collectively make change. This will never get better for our black members, or other members who feel underrepresented, if we don’t come together, uplift one another, and do this as an organization that wholeheartedly embraces all of our differences and sees the value that we all have to add – not just to this union, but to the post-production community … as an industry; as a country. We can make a difference. I know we can. And I am committed to working with you to do so.”

SAG-AFTRA Calls On Broadcast Industry To Diversify Newsrooms

By David Robb
June 30, 2020 12:07pm

CREDIT: Shutterstock
SAG-AFTRA-building-HQ-LA

SAG-AFTRA, which represents thousands of radio and TV newscasters, today called on the broadcast industry to create more inclusive and diverse newsrooms.

“We believe diversity in newsrooms can cause necessary challenges to established majority viewpoints, can help guide what and how stories are covered, can bring better balance and focus, and can ensure that authentic voices of under-covered communities are heard,” the union said.

SAG-AFTRA, in collaboration with its Broadcast Steering Committee, urged employers “to actively search, to reach out to schools, organizations, and associations that connect to the wider communities in order to recruit potential applicants. We ask employers to devote resources to provide meaningful professional development and mentorship opportunities for their employees. We believe that diverse voices provide the opportunity to rethink how newsrooms cover many crucial issues, especially the issue of race.”

Here is SAG-AFTRA’s full statement, which was approved unanimously by its Broadcast Steering Committee at its quarterly meeting last week:

The Coronavirus Pandemic, the resultant devastating economic impact, and the Black Lives Matter demonstrations have exposed inequities in health care, jobs, criminal justice, and schools.

These crises have also exposed a significant lack of diversity in many of the newsrooms called upon to report on these issues.

We, the members of the SAG–AFTRA National Broadcast Steering Committee, strongly reaffirm our commitment to fairness, equity, and diversity in hiring, assignment, compensation, training opportunities and advancement in broadcast news organizations.

We believe that radio, television, and online news organizations should truly represent and reflect the multicultural communities they serve.

We remember the Civil Rights era – more than 50 years ago – when companies explained their lack of black, brown, and other non-white minority staff members by claiming they could not find any who were qualified.

We hear the same response today and ask where are they looking?

We urge employers, now, to actively search, to reach out to schools, organizations, and associations that connect to the wider communities in order to recruit potential applicants.

We ask employers to devote resources to provide meaningful professional development and mentorship opportunities for their employees.

We believe that diverse voices provide the opportunity to rethink how newsrooms cover many crucial issues, especially the issue of race.

We believe diversity in newsrooms can cause necessary challenges to established majority viewpoints, can help guide what and how stories are covered, can bring better balance and focus, and can ensure that authentic voices of under-covered communities are heard.

We believe that the Pandemic, the economic crisis, and the outcry over police brutality have underscored the effects of racial inequities that permeate our society.

And, finally, we believe that only a truly diverse newsroom can adequately report on these issues and bring our listeners and viewers the information they need to live their lives and to govern themselves.

Hollywood Unions & MPA Lobby Nancy Pelosi & Mitch McConnell For More COVID-19 Relief To Restart Industry

By Dominic Patten
June 29, 2020 2:57pm

CREDIT: Shutterstock

It's not that often that Senate Majority Leader Mitch McConnell and the GOP high command get a direct request from Hollywood, but the chaos, losses and wounds of the coronavirus pandemic have created a new normal.

Looking for some significant measures to help the hobbled multi-billion-dollar entertainment industry get back on its feet, the Motion Picture Association, the DGA, SAG-AFTRA, IATSE and the Independent Film

& Television Alliance today wrote to top Republicans in Congress, along with House Speaker Nancy Pelosi and leading Democrats.

They are asking for help in the form of insurance required to help the industry recover.

"This letter contains certain recommendations to help our industry resume productions and create jobs," they wrote in a four-page missive Deadline obtained. The letter was sent Monday, signed by MPAA CEO Charles Rivkin, SAG-AFTRA National Executive Director David White, IASTE chief Matt Loeb, IFTA Prez & CEO Jean Prewitt and DGA National Executive Director Russell Hollander (read it here).

"Thus, as Congress considers additional legislation to address the serious challenges to our nation's public health and to help restore our economy, our organizations respectfully request that you adopt the following tax-related and other priorities," the letter proclaims, asking for relief as a surge in COVID-19 cases imperils plans to restart the industry.

"These policies would help jump start domestic film and television production, encourage hiring, and ameliorate the higher costs that must be undertaken to protect our industry's workforce," the studio and Netflix-back lobby group and guilds wrote. Hollywood saw all production halt in mid-March as state, regional and local governments imposed stay-at-home measures to gain some control over the spread of the potentially fatal virus.

The MPAA and guilds are asking for help in the form of tax credit hiring incentives, more write offs for production costs and more tax relief for performers' work related expenses. "We ask Congress to pass the Performing Artist Tax Parity Act, which will raise the maximum income cap to $100,000 for individual filers and $200,000 for joint filers," the letter asserts in an update from the current decades old exception scheme.

"The ability of our industry to return to active production, whether on set or on location, is severely compromised by the inability to purchase insurance to cover losses stemming from communicable diseases amongst cast, crew, and others involved in the production," the letter continues, imploring Speaker Pelosi, Senator McConnell and the respective leadership to push through new relief packages moving their way through Congress now.

"Without it, production – especially independent production – cannot resume on a significant level…We urge Congress to develop a program of federal insurance (or guarantee to fill this gap) to cover pandemic-related business losses in the future."

Having already given Congress a standing ovation upon the passage of the CARES Act back in late March, it is worth noting that today's correspondence comes as overall contact talks between the WGA and AMPTP come down to the wire.

Certainly, as a Jeffrey Katzenberg hosted virtual fundraiser for Joe Biden that raised more than $6 million this weekend displays, the GOP can not help but consider the political realities of what is in it for them to give Tinseltown a leg-up. Even as tax incentive rich Georgia opens up and sees production move closer to restarting, the top hubs for the entertainment industry remain California and New York – neither of which are going to be providing too many Republican votes comes November.

On the other hand, as previous COVID-19 relief packages have shown the past few months, there is a bipartisan appetite in DC on some level – and that's a true Hollywood ending waiting to happen.

Acting While Black: SAG-AFTRA Panel Explores Micro & Macro Racism In Hollywood

By David Robb
June 26, 2020 11:20am

Speaking out and standing up to racism was the theme of a recent SAG-AFTRA panel on "Race & Storytelling." Moderator Jason George recalled a paint-down incident while filming the 2002 movie *The Climb*, in which he portrayed a mountain climber on a rescue mission.

"I walked into the trailer and saw there a Caucasian man, wearing my wardrobe, my costume, and they were putting makeup on him to darken his skin so that he could be my stunt double," he said. "In the stunt world, they call that a paint-down." A once-common practice, it's rare but not unheard of these days.

But George wasn't having any of it. "This isn't going to stand," he told the producers, insisting that they hire a hire a black stuntman to double for him. They agreed and hired one of the world's top black mountain climbers. "When you go looking for the talent, you can find jewels," George said.

George, who stars on ABC's *Station 19*, said that the incident motivated him to become an activist in the union's efforts to secure contract language to prohibit paint-downs and other discriminatory practices, rising to chair the SAG-AFTRA Diversity Advisory Committee.

CREDIT: SAG-AFTRA

"Race & Storytelling," the first panel in a series on racial biases and inequities in the entertainment industry, is full of such moments. The panelists – SAG-AFTRA president Gabrielle Carteris; national executive director David White; former DGA president Paris Barclay; famed casting director Robi Reed, and actors Sterling K. Brown, Yvette Nicole Brown and Michelle Hurd – each spoke of their own encounters with, and standing up to, racism in Hollywood – both micro and macro. And in some cases, almost every day.

You can watch the 90-minute panel presented by the SAG-AFTRA President's Task Force on Education, Outreach & Engagement above.

In 1991, Carteris appeared on CBS' *Circus of the Stars*, performing a high-wire act with actor Alfonso Ribeiro, who at one point in the show had to carry her on his shoulders. "It was a very, very challenging

act – a lot of tricks," she recalled. Carteris, who now is the union's president, said that when they finished their run-through for network executives, she gave Ribeiro, who is black, a big hug.

"And they came up to me later and they said, 'Gabrielle, that was an amazing show. That was wonderful. But when we go live tomorrow, just make sure you don't hug Alfonso.'"

"And I said, 'Why?'"

"And they said, 'Well, Middle America, they just won't like that.'"

She went straight to Ribeiro and told him what had happened. "You won't believe what they just said to me. They don't want me to hug you. So I just want you to know, when we go out there live tomorrow, I'm gonna hug you."

The next day, they did the show. "I hugged him and gave him a kiss. And for me, it was an important moment. There are so many times in this industry when we're told what to do and we just know it's not the right thing to do. It was not organically correct. It wasn't just, and it wasn't fair. And I couldn't say it to them because they would have just found another way to block it or cut it out. So I agreed and then just did what I wanted to do. And I will never regret that moment."

George, a longtime friend of Carteris' who had asked her to tell the *Circus of the Stars* story, said. "It's important to hear that there's a role for allies to play" and for people of good will to step up and do the right thing or "be a bystander and say nothing – and therefore be complicit in maintaining that implicit bias."

Former DGA president Barclay, an executive producer and director of *Station 19*, recalled an incident some years ago when he drove onto the Warner Bros. lot to direct an episode of *ER*. The security guard at the booth looked at his ID and said, "What are you dropping off?"

"I said, 'What?' And he said, 'What are you delivering?' And I said, 'I'm delivering my services to *ER* as a director.'" The guy eventually let him through, but Barclay complained to John Wells, the venerable show's executive producer, who wrote a scathing three-page letter to the studio, resulting in "sensitivity training" for all the guards.

On the macro side, Barclay said that even today, those making casting decisions sometimes still have to be reminded to avoid stereotypical casting. "Micro-aggression becomes macro-aggression just like that," he said, snapping his fingers. He noted, however, the he sees less of the macro these days "because people that I choose to work with are already at least halfway woke, and some are totally."

Reed described how in the early days of her career, after casting Spike Lee's *School Daze*, she was then only asked to cast black-themed shows. "And from that point on, I only got offered projects that had predominantly African-American casts. And I was like: 'I'm a casting director. I know talent. Consider me for all things.' And every studio, every network, they wanted to work with me, but when those 'mainstream projects' came along, they were never given to me. For a long time I fought that. And then, after a while, accepted the blessing that I had for being the casting director for African American projects."

She is currently VP Talent and Casting for Original Programming at BET.

Said Yvette Nicole Brown, host of Disney+ game show *The Big Fib*: "You can't be just a black actress. You also have to be a black hairstylist and a black makeup artist. We have been fighting this fight as long

as I've been in the industry to make sure that the people in the makeup and hair trailer actually know how to do black hair and black faces. I did not say they have to be black people; I just said they have to have a proficiency for doing black hair and black faces. Because that does not exist for the most part in our industry, and because the ones that do have that proficiency are always working. Every black actress that has worked in this industry has had to do her own hair and makeup at some point in her career. And that is a black tax, a black toll that is added to our day. We have to get up an extra two hours to make sure that we look presentable to the camera.

"I feel that we are our brothers' and our sisters' keepers," Brown said, noting that she routinely reaches out to emerging black actresses to share her experiences about acting-while-black in Hollywood.

Hurd, with a head of admittedly "curly crazy hair," recalled an incident several years ago on a popular TV series that she didn't name. After the first day's shoot, she got a call from the producers. "We love your hair," they said. "It's so pretty. But what we've done is, we've done some research, and we found out that in our research, a woman of color can't own a business unless she has straightened hair."

"They actually said this to me," she said, trying not cuss but doing so anyway. "That is some bullshit!" And the impact on her as an artist was profound. "When you go to work the next day, you know that there's been a discussion from producers, writers, networks, studios that this is a problem," she said, holding her hair up with both hands. "That," the *Star Trek: Picard* actress said, "we can no longer stand for. We all have such organic, innate beauty; we don't need to be homogenized into one type of beauty."

"Amen," chimed in Sterling K. Brown. "The medium can be used in a couple of different ways. We can hold a mirror up to society to show it as it is, and then we can also point it in the direction it needs to go."

Brown, who won an Emmy for playing prosecutor Christopher Darden in the FX limited series *The People v. O. J. Simpson: American Crime Story*, recalled an incidentof micro-aggression some years ago on Lifetime's *Army Wives*, in which he played the civilian spouse of a soldier. When he asked one day why his photo was never included on posters the network's marketing department released every year depicting the wives, he said he was told by the head of marketing and advertising, "What would it look like if we put a black man on a poster with four white women?"

"That's what came out of his mouth," he said, laughing as he recounted the story.

"I've had micro-aggressions against me," said David White, SAG-AFTRA's chief executive. "As an example, going to a closed event with a series of other executives, and someone there introducing me there to a large group of people and introducing me and talking to me believing I was Isaiah Washington, or someone else who is black who is front-and-center in their minds."

"You get that too?" Brown asked knowingly.

"We all get that," George laughed.

"By the way," White said incredulously, pointing to his face. "Me, Isaiah Washington?"

"Take the win, David. Take the win," George laughed.

"But what I get mostly is structural racismy," White continued, "I am frequently the only black executive in a room. Now, in Hollywood, unlike in some other places where I've worked, people tend to see

themselves as progressives. They tend to see themselves as liberal. So in those rooms, there are many efforts to avoid the micro-aggressions. What you hit are the macro-aggressions. The only black executive yesterday; the only black exec today. When there's a conversation that seems, to the room, that it does not have a racial component, my responsibility then is to raise the racial component. So that can be as easy as … oh, we're in a Pension Plan meeting and we're talking about our investment advisers. So who are we bringing in to interview? Whether or not they're going to be our investment adviser. Do we have black candidates? Do we have diverse candidates?

"You know," he mused, "we have talked about this being about race and people of color, but in this moment, when we are focusing on Black Lives Matter, I just want to emphasize that for me, there are always at least two components: It's always I'm not going to dilute what's going on with black people; the black people and the black community have a very unique relationship to the state, here in the United States. But there is also another conversation about people of color; there is also a conversation about diverse groups, etc. So long as that conversation doesn't dilute the moments when we need to focus on what it means to be black Americans, I'm good with that. I'm always sort of working on that level. But those are the moments where I find it doesn't matter how articulate I become in explaining the need to add an additional element – to bring in someone who is either black or someone who is of color or a woman, etc. – it always eventually runs into very nice, neutralized 'No.' And every time it doesn't run into that, that's considered a real victory."

Carteris said at the start of the pane: "I actually believe that we are at a crossroads," And finally, I hope, we are at a point where we can make lasting change. But change, you know, is not something that's given. It's something we have to fight for: sometimes incrementally; sometimes globally; sometimes on the streets; sometimes on social media; sometimes in board rooms and on sets."

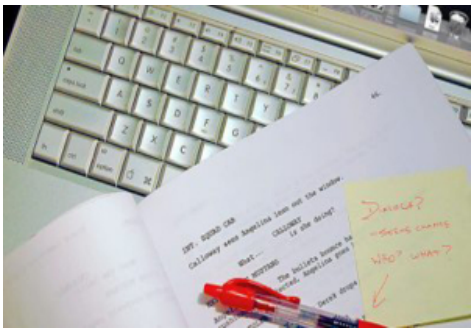
WGA West Reaches $5.25 Million Settlement With Disney For Interest On Late Residuals On Five Fox Animated Series

By David Robb
June 19, 2020 1:04pm

CREDIT: Fox/Disney

The WGA West has reached a $5.25 million settlement with Disney for interest owed on late-paid residuals for five Fox animated series: *The Simpsons*, *Family Guy*, *The Cleveland Show*, *American Dad!* and *Futurama*.

The guild, which says it's the largest interest-only settlement in its history, already has sent checks to more than 250 affected writers for their portions of the interest collected.



CREDIT: Rex/Shutterstock

In 2017, a tri-guild audit conducted by the WGA West, SAG-AFTRA and the DGA revealed that Fox had failed to make certain residuals payments on these series. The WGA West said that after it contacted Fox, "the studio found that an internal error had led to a widespread failure to pay the residuals for reuse in the foreign free television markets over several years. Fox paid millions of dollars in late paid residuals to the guild in 2018, which was then distributed to the credited writers."

The WGA said that it followed this action with a claim for the interest owed on these late payments and set the arbitration for early March 2020. "Despite some resistance from Disney, including an attempt to delay

the hearing, the company ultimately agreed to pay the entire amount due and the writers received $5.25 million in interest," the guild said, noting that it "aggressively pursues interest when writers are not paid on time."

A SAG-AFTRA spokesperson said: "SAG-AFTRA partners with the WGA and DGA on Tri-Guild matters. We applaud the WGA settlement with Disney. It highlights the importance and value of the unions' Tri-Guild Program. SAG-AFTRA has related issues that are ongoing and being handled by counsel. Members may contact us for status updates on those matters."

WGA Says Dispute With Big 3 Agencies Over Packaging Fees Has Cost It "Millions Of Dollars"

By David Robb
June 15, 2020 12:45pm

CREDIT: WGA

EXCLUSIVE: The WGA East and West have told a federal judge that they've had to spend "millions of dollars" to help find work for thousands of writers who fired their agents last year as part of the guilds' ongoing efforts to end packaging fees.

"The Guilds have been forced to expend millions of dollars to replicate services the Agencies would otherwise provide," they said in their latest court filing (read it here), which is intended to show that they have suffered real damages in their battle against the Big 3 agencies' alleged price-fixing practices. "The Agencies' refusal to forgo packaging fees has also forced the Guilds to expend over a million dollars to create and administer a website to replace the representational services previously provided by the Agencies," they said.

In April 2019, the WGA ordered its members to fire their agents who refused to sign its agency code of conduct, which banned packaging fees – money the studios pay the agencies to package the talent on their films and TV shows. Last July, the WGA launched a Staffing and Development Platform to help its newly agentless writers find work, and then debuted an enhanced online staffing platform two months ago.

WME, CAA and UTA are seeking to dismiss the guilds' lawsuit on grounds that the WGA does not have standing to bring the suit, saying that the alleged injury the guilds say they've suffered by having to help find work for their agentless members is "self-inflicted." In the agencies recent motion to dismiss the guilds' suit entirely, they said that "the Guilds allege that they have spent money to create a self-designed staffing system to replace services formerly performed by talent agents, including those at the Agencies here. Running an independent staffing service is of course a decision made by the Guilds, not a choice forced upon them by any conduct of the Agencies. This fact alone dooms any claim of Article III standing" under the Unfair Competition Law.

But the guilds, in their latest opposition to the Big 3's motion to dismiss their suit, said that "organizational standing requires an entity to demonstrate only that the defendant's actions run counter to the organization's purpose, that the organization seeks broad relief against the defendant's actions, and that granting relief would allow the organization to redirect resources currently spent combating the specific challenged conduct to other activities that would advance its mission."

On April 27, U.S. District Court Judge Andre Birotte Jr. threw out major portions of the WGA's lawsuit, ruling that the guild lacks antitrust standing to pursue its federal price-fixing claim; lacks organizational standing to bring claims for breach of fiduciary duty and constructive fraud on behalf of its members; lacks Article III standing to bring an Unfair Competition Law cause of action on its own behalf; failed to plead racketeering activity by the agencies, and failed to state claims upon which relief can be granted with respect to its group boycott claims.

The judge, however, allowed the guild to proceed with its state price-fixing claim and will allow several individual plaintiffs to pursue their claims for breach of fiduciary duty, unfair competition and breach of contract.

Since then, the WGA has amended its complaint, followed in short order by the Big 3 agencies filing a motion to dismiss all the guild's remaining claims that the judge had allowed to go forward. And now the guilds have filed a motion in opposition to the agencies' motion to dismiss its remaining claims.

"The Agencies' motion to dismiss should be denied because the First Amended Consolidated Counterclaims (FACC) include plausible, non-conclusory allegations that correct the deficiencies this Court identified in its prior order," the guilds said in their latest filing.

"First," the guilds maintain, "the FACC establishes the Guilds' associational standing to bring fiduciary duty and constructive fraud claims against agents – fiduciaries under California law – in three key ways: (1) The FACC alleges the specific ways that an inherent, blatant conflict of interest exists in every packaging fee arrangement (including because higher writer pay directly reduces Agencies' profit sharing). (2) The FACC plausibly and nonconclusorily alleges that the Agencies, despite being fiduciaries, have a uniform policy of failing to disclose the existence of that conflict or the material terms of the packaging arrangement as required for informed waiver. And (3) the FACC makes clear that the claims are brought as equitable claims for injunctive relief only and not as tort claims.

"Second, the FACC establishes the Guilds' Article III standing by alleging specific injuries to the Guilds and their members that have continued despite the Guilds' adoption of the Code of Conduct and that will be remedied by the injunctive relief they seek. Third, the FACC alleges the Agencies' unlawful nondisclosures with the specificity required for constructive fraud claims involving fraudulent omissions. Fourth, and finally, the Agencies have not satisfied the standard to justify reconsideration of this Court's prior holding that Counterclaimants have standing under the Cartwright Act. In any event, that holding was correct. The Agencies' attack on this Court's prior holding is based on outdated federal cases contrary to the applicable California standard."

Initially, the guilds argue, their FACC "plausibly alleges the existence of an inherent, blatant conflict of interest, which must be disclosed, in every single packaging fee arrangement," and that "every packaging fee arrangement creates an inherent conflict of interest between the Agency's interest in maximizing its profit participation, and its writer-client's interest in maximizing her own compensation."

This is true, the guilds say, because the third component of the agencies' allegedly standard 3-3-10% packaging fee is based on so-called "gross profits," and as such, "any amount paid to writers as

compensation directly reduces the amount the Agency receives. In other words, in every packaging fee arrangement, higher payments to writers result in lower potential profits to the fiduciary – the Agency.

“Similarly, the payment of the first component of the packaging fee from production budgets diverts financial resources that otherwise could be used to pay writers more or hire additional writers – another direct, inherent conflict of interest that exists in every package agreement.

“The Agencies could disclose these inherent conflicts and obtain waivers from their clients. Instead, as a matter of uniform policy, the Agencies not only fail to disclose to their clients even the existence of these inherent conflicts, but also continue to contend that packaging fees are beneficial to their clients.”

Because of that, the guilds say, they have “associational standing to seek declaratory and injunctive relief – not damages – on behalf of their members to prevent the Agencies from continuing these practices. The Guilds allege these practices harm all the Agencies’ writer-clients by depriving them of information they are entitled to know as principals in the fiduciary relationship.”

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC, *et al.*,

Plaintiffs and Counterclaim Defendants,

v.

WRITERS GUILD OF AMERICA, WEST, INC., *et al.*,

Defendants and Counterclaimants,

and PATRICIA CARR, *et al.*

Counterclaimants.

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

OPPOSITION TO PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COUNTERCLAIMS

Hearing Date: July 10, 2020
Hearing Time: 10:00 a.m.
Location: Courtroom 7B

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Other Authorities

The Agencies' motion to dismiss should be denied because the First Amended Consolidated Counterclaims (Dkt. 112, "FACC") include plausible, non-conclusory allegations that correct the deficiencies this Court identified in its prior order (Dkt. 104). *First*, the FACC establishes the Guilds' associational standing to bring fiduciary duty and constructive fraud claims against agents—fiduciaries under California law—in three key ways: (1) The FACC alleges the specific ways that an inherent, blatant conflict of interest exists in ***every*** packaging fee arrangement (including because higher writer pay directly reduces Agencies' profit sharing). (2) The FACC plausibly and non-conclusorily alleges that the Agencies, despite being fiduciaries, have a ***uniform policy*** of failing to disclose the existence of that conflict or the material terms of the packaging arrangement as required for informed waiver. And (3) the FACC makes clear that the claims are brought as ***equitable claims for injunctive relief only*** and not as tort claims.

Second, the FACC establishes the Guilds' Article III standing by alleging specific injuries to the Guilds and their members that have continued despite the Guilds' adoption of the Code of Conduct ("Code") and that will be remedied by the injunctive relief they seek. *Third*, the FACC alleges the Agencies' unlawful nondisclosures with the specificity required for constructive fraud claims involving fraudulent ***omissions***. *Fourth*, and finally, the Agencies have not satisfied the standard to justify reconsideration of this Court's prior holding that Counterclaimants have standing under the Cartwright Act. In any event, that holding was correct. The Agencies' attack on this Court's prior holding is based on outdated federal cases contrary to the applicable California standard.

I. The Guilds have associational standing to prevent the Agencies from continuing to engage in uniform conduct that harms members.

The Agencies challenge the Guilds' associational standing to bring equitable claims for breach of fiduciary duty and constructive fraud on behalf of members. MTD at 11-15. But the FACC includes detailed, non-conclusory allegations that

inherent conflicts of interest between agents—who are fiduciaries no less than lawyers, trustees, executors, and the like—and their writer-clients exist in *every* packaging fee arrangement, and that the Agencies had a uniform practice and policy of failing to make required disclosures and procure valid waivers of those conflicts.[1] These uniform policies violate blackletter fiduciary law and California's statutory prohibition on constructive fraud. In the FACC, the Guilds pursue purely equitable claims for declaratory and injunctive relief to address those violations—which do not require any individualized damages determinations or otherwise require individual members' participation as parties in this litigation.

Initially, the FACC plausibly alleges the existence of an inherent, blatant conflict of interest, which must be disclosed, in ***every single packaging fee arrangement***. That conflict exists ***regardless*** of (i) an arrangement's specific terms or (ii) whether the agent's representation is actually compromised (or the agent ultimately provides fair representation). "[E]very packaging fee arrangement creates an ***inherent*** conflict of interest between the Agency's interest in maximizing its profit participation, and its writer-client's interest in maximizing her own compensation," because the third component of all packaging fee deals is based on "gross profits," so "any amount paid to writers as compensation ***directly reduces the amount the Agency receives.***" FACC ¶81 (first emphasis in original). In other words, in every packaging fee arrangement, higher payments to writers result in lower potential profits to the fiduciary—the Agency. Similarly, the payment of the first component of the packaging fee from production budgets

[1] As this Court earlier recognized in denying the Guilds' motion to dismiss, Rule 12(b)(6) requires only that "the complaint … provide enough factual detail to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" Dkt. 73 at 7 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "The complaint must … 'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The same rules apply to a Rule 12(b)(1) motion where the moving party challenges standing on the basis of the pleading's allegations. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

diverts financial resources that "otherwise could be used to pay writers more" or "hire additional writers," another "***direct, inherent*** conflict of interest" that "exists in every package agreement." *Id.* ¶83 (emphasis in original).[2]

The Agencies ***could*** disclose these inherent conflicts and obtain waivers from their clients. Instead, "as a matter of ***uniform policy***," the Agencies not only fail to disclose to their clients even the ***existence*** of these inherent conflicts, but also "continue to contend that packaging fees are beneficial to their clients." FACC ¶87; *see also id.* ¶¶11, 14, 80-87, 119-20, 218, 261-65. Indeed, they have continued to take that position in this very litigation. *See* Dkt. 42 ¶¶46, 48, 105.

The FACC alleges that the Agencies also, "as a matter of ***uniform policy***," fail to disclose to writer-clients "the ***material terms*** of their packaging agreements, including terms defining the Agencies' upfront and backend payments"—information writers are ***entitled to know*** as principals in the fiduciary relationship. FACC ¶87 (emphases altered); *see also id.* ¶¶11, 14, 80-87, 119-20, 218, 261-65. The Agencies are able to hide this information from their clients because "[t]he packaging agreement, including the profit definition, is negotiated directly between an Agency and the studio, with no notice or disclosure of the agreement's terms, or even of the agreement's existence, to … writer-clients." *Id.* ¶85; *see also id.* ¶264.[3]

The FACC's allegations regarding the inherent conflict of interest in every packaging arrangement, and the Agencies' across-the-board nondisclosure policies, establish a violation of the writer-clients' ***right to receive information*** to which they are entitled. The amended allegations thus plausibly allege that the Agencies have breached their fiduciary duties to ***all*** their writer-clients (and committed

[2] The FACC further identifies a "***direct, inherent*** conflict between the interests of an agency and … a writer-client … in every package agreement where a writer-client receives or would otherwise be entitled to profit participation" because "packaging fees ***reduce[] the profit participation of*** … writer-clients." *Id.* ¶82.

[3] These non-conclusory allegations regarding the Agencies' uniform nondisclosure policy are plausible. Indeed, the Agencies continue to strenuously object to disclosure of their packaging fee agreements in discovery. FACC ¶263.

constructive fraud) as a matter of law. Under California law, an agent breaches the fiduciary duty of loyalty or "duty to avoid conflicts of interest" by failing to disclose to the principal the ***existence*** of any conflict of interest, which is a necessary precondition for obtaining valid consent to waive any such conflict. *Knutson v. Foster*, 25 Cal.App.5th 1075, 1095 (2018). Likewise, this Court recognized that an agent also breaches her fiduciary duty by failing to "'to disclose ***material information*** to the principal,'" because the principal is entitled to all material information that would bear on her decision-making. Dkt. 104 at 16 (quoting *Assilzadeh v. Cal. Fed. Bank*, 82 Cal.App.4th 399, 415 (2000)).[4]

The Guilds have associational standing to seek ***declaratory and injunctive relief*** (not damages) on behalf of their members to prevent the Agencies from continuing these practices. The Guilds allege these practices harm ***all*** the Agencies' writer-clients by depriving them of information they are entitled to know as principals in the fiduciary relationship. *See* FACC at ¶267. ***No further damages inquiry*** is required to establish the Guilds' claim. *See Knutson*, 25 Cal.App.5th at 1095 (failure to inform principal of conflict is, by itself, harm).

This Court previously concluded that the third requirement of *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977) (members' participation in the litigation not required) was not satisfied because the Guilds' original allegations about the Agencies' systemic practices were "conclusory." Dkt. 104 at 15. But the FACC adds significant, non-conclusory detail plausibly alleging that the Agencies (1) have a ***uniform policy*** of failing to procure valid waivers of (2) blatant, ***inherent*** conflicts of interests that exist in ***every*** representation involving packaging fees. Indeed, the Agencies continue to deny, in this litigation, that packaging fees create any inherent conflict of interest—which supports the FACC's nondisclosure allegations (as the Agencies could hardly disclose a conflict

[4] *See also, e.g.*, *Michel v. Moore & Assocs.*, 156 Cal.App.4th 756, 762 (2007) (agent must disclose all information that is "material to the principal's interests").

they still refuse to acknowledge even exists). FACC ¶¶87, 120, 263-64. That uniform practice harms writers by depriving them of the ability to make informed choices about their employment and representation, *regardless* of whether they also end up incurring financial harm.[5] FACC ¶¶14-15, 85-86, 119-20, 261-65.

The Agencies contend that the individual participation of Guild members is required because the actual terms of particular packaging fees agreements and quality of representation received by writers must be considered to determine "whether agents put Agency interests above those of individual writers in literally thousands of separate transactions." MTD at 12. But a fiduciary's disclosure obligations do not depend upon whether the agent ultimately acts in her own or in the principal's interests: the rule is that an agent ***cannot*** benefit from a transaction undertaken on the principal's behalf unless the agent "*fully* discloses the nature *and amount* of the benefit" *and* "receives the [principal's] approval," and under California law, "*[i]t is totally immaterial that the transaction is otherwise fair to the principal*." *Roberts v. Lomanto*, 112 Cal.App.4th 1553,1563 (2003) (emphases in original).[6] The ***principal alone*** has the right to decide whether to waive a conflict, which is why the principal must be apprised of the material facts. An agent's failure to make the required disclosures thus constitutes a breach of fiduciary duty ***whether or not*** the principal would have consented if the disclosures had been made.[7]

[5] The Agencies argue that individual participation is required because the law does not "compel[] a particular form of disclosure." MTD at 15 n.11. But the FACC alleges that the Agencies do not meet the minimum legal requirements for disclosure in ***all*** cases. Disclosing both the fact of the conflict *and* the terms of packaging fees agreements is necessary because the amount and nature of the financial benefit to the agent is necessary for the writer-client to make an informed decision about whether to waive the conflict.

[6] *See also* Rest. (3d) Agency §8.02, cmt. b (Though "the agent may believe that no harm will befall the principal, the agent is not in a position disinterestedly to assess whether harm may occur or whether the principal's interests would be better served if the agent did not pursue or acquire the benefit from the third party.")

[7] The Agencies' contention that the Court must consider "what information

This Court previously noted that the elements of a *tort* breach of fiduciary duty claim—*i.e.* a claim at law seeking money damages—include "'damage proximately caused by th[e] breach.'" Dkt. 104 at 14 (quoting *IIG Wireless, Inc. v. Yi*, 231 Cal.Rptr.3d 771, 787 (Ct. App. 2018)). But the damage element is *not* required to plead a purely *equitable* claim for breach of fiduciary duty—the only claim the Guilds pursue on an associational basis in the FACC. As the California Court of Appeal explained, harm is an element *only* of "the tort cause of action for breach of fiduciary duty." *Fair v. Bakhtiari*, 195 Cal.App.4th 1135, 1153 (2011).[8] "It makes sense to require proof of damages where the client seeks compensatory damages as a tort remedy for breach of fiduciary duty, but not if the client seeks only" equitable remedies, because such claims for prospective relief are designed

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each individual received with respect to the details of each packaging agreement" and "whether any member(s) assented to those packaging terms after receiving such information," MTD at 12, disregards the FACC's plausible allegation that the Agencies had a uniform policy of failing to provide sufficient disclosures and that writers were "never informed" of any conflict and "never provided with" the material terms of their agents' packaging fee deals, which must be accepted as true. FACC ¶¶85, 87, 11, 14, 80-87, 119-20, 218, 261-65; *cf.* Dkt. 73 at 10 (denying Guilds' motion to dismiss based on "plausible inference" from Agencies' allegations regarding alleged combination with non-labor parties); *see also Wolfe*, 392 F.3d at 362 (allegations taken as true on facial 12(b)(1) motion). And even if the Agencies later show that they sometimes procured valid waivers, the Guilds need not establish that the challenged practices violated Guild members' rights 100% of the time to obtain injunctive relief, only that "at least some" of their members were so harmed. *UAW v. Brock*, 477 U.S. 274, 286 (1986). When an "association seeks a declaration, injunction, or … other … prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of *those members of the association actually injured*." *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (emphasis added); *cf., e.g.*, *J.D. v. Azar*, 925 F.3d 1291, 1314 (D.C. Cir. 2019) (permitting class claim based on class members' "common entitlement" to be free from state interference in choosing whether to terminate pregnancies, "even if various class members might make varying ultimate decisions about how to exercise their choice").

[8] The Restatement makes clear *Fair*'s holding that equitable claims for breach of fiduciary duty do not require harm is not limited to the context of equitable *defenses*. Rest. (3d) Agency §8.01 cmt. d (equitable breach of fiduciary duty claim "does not condition the availability" of remedy "on whether a principal can establish damage"); *id.* ("a principal need not establish harm resulting from an agent's breach to require the agent to account" in equity); *but see* MTD at 13 n.9.

to "deter[] … misconduct" and because "damage caused by [such] misconduct is often difficult to assess." *Id.* at 1153.[9]

The Guilds therefore need not allege that their members were ***harmed*** by the Agencies' uniform failure to procure valid conflict waivers to plead a purely ***equitable*** claim for breach of the Agencies' fiduciary duties. But in any event, the Guilds ***have*** alleged that all writers were harmed, by being deprived of information they were entitled to know and of the opportunity to make an informed decision about whether to waive agents' conflicts. FACC at ¶267 (Guild members "have … been deprived of loyal, conflict-free representation, and have been denied information to which they were entitled when making employment decisions and choosing talent agents"); *see also id.* ¶¶14-15, 119; *Knutson*, 25 Cal.App.5th at 1095 (failure to inform principal of conflict itself constitutes harm).[10]

The Guilds allege "systemic" legal violations that are quintessentially suitable for group treatment under *Hunt*. The Agencies' uniform policy of failing to make required disclosures can be established through evidence of the Agencies' uniform practices, and will be remedied with an injunction prohibiting such practices, which will benefit all Guild members who were or will be represented by the Agencies. *See Warth*, 422 U.S. at 515. The California Courts of Appeal have expressly held that a "cause[] of action for breach of fiduciary duty" ***may be pursued on a representational basis***. *Mkt. Lofts Cmty. Ass'n. v. 9th St. Mkt. Lofts,*

[9] *See also Werschkull v. United Cal. Bank*, 85 Cal.App.3d 981, 1004 (1978) ("[W]here any abuse of [fiduciary] relation is discovered, the complaining party is entitled to relief, whether any actual damage be established or not."); Rest. (3d) Agency §8.01 ("agent's breach *or threatened breach of fiduciary duty* is a basis on which the principal may receive specific nonmonetary relief through an injunction" without proof of harm) (emphasis added). Because the Guilds bring only an equitable claim on behalf of members, not a tort claim for damages, the Agencies' citation to California *jury* instructions for tort claims, *see* MTD at 13, is unavailing. The propriety of injunctive relief is for this Court, not a jury, to decide.

[10] Even as to a breach of fiduciary duty *tort* claim, pleading "damage" only requires alleging ***some form*** of "a damage," including noneconomic harm, not "bottomline damages." *Werschkull*, 85 Cal.App.3d at 1003.

LLC, 222 Cal.App.4th 924, 932 (2014); *see also Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal.App.3d 783, 795-6 (1981) (same). Indeed, the Agencies' own authority, *United Farmers Agents Association, Inc. v. Farmers Group, Inc.* ("*UFAA*"), holds that an allegation of a "uniform practice" is sufficient to establish associational standing at the pleading stage. 32 Cal.App.5th 478, 493 (2019). *UFAA* concluded that the association failed the third *Hunt* prong only *after trial*, because the trial evidence "failed to establish" that the defendant actually had a "uniform practice" as the association had alleged. *Id.* The Guilds here are likewise entitled to present evidence at trial establishing that the Agencies have a "uniform policy" of failing to disclose their conflicts and the material facts relating thereto. FACC ¶87; *cf.* Dkt. 73 at 9-11 (this Court permitting Agencies to conduct discovery to develop evidence that Guilds combined with non-labor parties).[11]

These principles apply with equal force to the Guilds' constructive fraud claim, because "[m]ost acts by an agent in breach of his fiduciary duties constitute constructive fraud," including an agent's "failure … to disclose a material fact." *Assilzadeh*, 82 Cal.App.4th at 415; *see also, e.g.*, *Michel*, 156 Cal.App.4th at 762 (agent's failure to disclose material information is constructive fraud). Because California law "presume[s] reasonable reliance upon [a] … nondisclosure," *Estate of Gump*, 1 Cal.App.4th 582, 601 (1991), there is no need to plead additional "actual reliance," as the Agencies contend. MTD at 14. In any event, the FACC ***does*** allege that members "justifiably relied, to their detriment, on the Agencies' …

[11] Nor is there any merit to the Agencies' assertion that the custodian searches the Guilds seek somehow undermine allegations regarding the Agencies' systemic policies. MTD at 14. The Guilds primarily seek this information to establish their labor exemption to the Agencies' antitrust claims by showing writers have suffered both noneconomic and economic harm as a result of the Agencies' packaging fee and affiliate production practices. Dkt. 105-1 at 13-14. Moreover, the existence of a uniform policy is often established through "sample testimony," which does not defeat associational standing. *Pa. Psych. Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 286 (3d Cir. 2002); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 306 (1st Cir. 2005) (association's reliance on some "proof specific to individual members … does not mean the members are required to participate as *parties*").

concealment of … their conflicts" and their nondisclosure of their packaging deal terms "by allowing the Agencies to continue to represent them." FACC ¶121.[12]

II. The Guilds have Article III standing.

A. The Guilds have Article III standing to pursue equitable claims for breach of fiduciary duty and constructive fraud and a Cartwright Act claim on behalf of Guild members.

The Agencies argue that the Guilds lack Article III standing to pursue claims on behalf of members because whether the Agencies will again represent writers or continue their packaging fee practices is "speculative." MTD at 17; *see id.* at 16-20. That assertion defies common sense: The Agencies sued the Guilds ***to obtain that very outcome***. The Agencies' lawsuit seeks an injunction allowing them to ***resume*** their "writer-representation and packaging business[]." Dkt. 42 ¶14; *see also id.* ¶190 (alleging that, without injunction, "Plaintiffs have and will continue to lose work, lose clients (thousands so far), lose packaging fees, and suffer irreparable harm"); *id.* Prayer for Relief ¶¶1-2 (seeking injunctive relief). The Agencies have affirmatively alleged that they still "want to be able to serve their clients" who terminated representation after the Code's enactment. Dkt. 42 ¶100; *see also id.* ¶114 (alleging some writers "want their agents back"). Indeed, this Court concluded that the Agencies have plausibly alleged that they "need" their relationships with writers to remain "competitive" in Hollywood. Dkt. 73 at 14.

Moreover, as the FACC alleges, "hundreds or thousands of Guild members … would choose to be represented by the Agencies but for the Agencies' … packaging fees practices," and "[i]f the Agencies' packaging fees practices are held

[12] The Agencies' argument that the Guilds lack associational standing to bring Cartwright Act claims also fails. This Court already held that Individual Counterclaimants have Cartwright Act standing, and the analysis applies equally to other Guild members. *See infra* Section IV. Since the Guilds seek only declaratory and injunctive relief on behalf of their members, there is no need for individualized assessments of injury or damages. *See, e.g.*, *Coalition of Human Advocates for K9's & Owners v. City & Cty. of S.F.*, 2007 WL 641197, at *5 (N.D. Cal. 2007) (citing Ninth Circuit precedent).

to be unlawful and the Agencies end those practices, many Guild members would once again be represented by the Agencies." FACC ¶137; *see also id.* ¶¶23-24 (but for fees, "many [Guild] members … would choose to be represented by the Agencies"); *id.* ¶¶25-31 (same for Individual Counterclaimants). Given that all parties agree to these facts, no speculative chain of "independent choices to be made by third parties not before the court" is required to establish Guild members will benefit if the Agencies are barred from accepting packaging fees. MTD at 20.

This case in no way resembles *City of L.A. v. Lyons*, 461 U.S. 95 (1983), which the Agencies cite, MTD at 16. *Lyons* held that a victim of an illegal chokehold lacked standing to seek injunctive relief because the attenuated chain of events that would have to occur for him to suffer the same injury again was too "speculative." *Id.* at 111. It is not at all "speculative" that the resolution of the parties' packaging fees dispute will directly and immediately result in the resumption of relationships that both sides have repeatedly stated they desire and that all parties agree have been interrupted solely because of that dispute.

Because each Agency "want[s]" to and will serve at least some former writer clients when this dispute is resolved, Dkt. 42 ¶100, prospective relief will redress Guild members' injuries by ending the Agencies' packaging fee practices. The Court need not determine "which Agencies will represent which writers, or whether or to what extent packaging will persist," MTD at 19 (emphases omitted), when all parties agree that each Agency will represent ***some*** Guild members, and ***the Agencies*** expressly seek to be allowed to continue to receive packaging fees as part of their "writer-representation and packaging business[]." Dkt. 42 ¶14. Article III causation and redressability requirements are satisfied as long as "one or more [Guild] members" will again be harmed by the conduct sought to be enjoined and thus will benefit from the injunction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992). And an order barring the Agencies from receiving packaging fees without a valid waiver will benefit not merely "one or more" Guild members but

all members, numbering in the thousands, who wish to be represented by their former agents and would currently be but for the Agencies' unlawful practices.

The Guilds also have standing to seek prospective relief on members' behalf because the Agencies continue to receive packaging fees from deals negotiated while they represented their former clients—including on projects that are still in production or that continue to generate profits through continuing distribution. *See* FACC ¶¶20, 95-96, 132-33, 135. The relief the Guilds seek would bar the Agencies from continuing to receive those fees, benefitting former clients of the Agencies who continue to be harmed by their former agents' receipt of packaging fee payments, such as Guild members whose ***own continuing profit participation is reduced*** by such payments. *See id.* ¶¶82, 95-96, *id.* Prayer for Relief ¶5.[13]

Finally, the Agencies have represented to the Court that they *currently* represent one or more "Guild members who have not terminated their agency relationship." Dkt. 119-1 at 16. The Agencies thus admit that they *currently* owe fiduciary duties to some Guild members. This alone establishes this Court's jurisdiction to issue an injunction governing the Agencies' conduct in those relationships. *See Hangarter v. Provident Life & Acc. Ins.*, 373 F.3d 998, 1022 (9th Cir. 2004) (existence of "current[] … contractual relationship" establishes standing to seek injunction governing party's conduct in that relationship).

B. The Guilds have Article III standing to pursue UCL and Cartwright Act claims on their own behalf.

The FACC now alleges numerous ways that the Agencies' packaging fees

[13] For the same reasons, contrary to the Agencies' assertion, MTD at 15, 23-24, the Guilds also have standing to bring a Cartwright Act claim on members' behalf. Prohibiting the Agencies from continuing to receive packaging fees pursuant to unlawfully price-fixed deals entered into before Spring 2019 would benefit those Guild members whose own compensation continues to be reduced by those unlawful payments—all that is required. *See Brock*, 477 U.S. at 286; FACC ¶¶82, 95-96. In addition, the Agencies have represented to this Court that there are "Guild members who have not terminated their agency relationship," Dkt. 119-1 at 16, and who are therefore are at risk of being included in future packaged projects.

practices continue to cause harm following adoption of the Code, FACC ¶¶132-137, correcting the deficiencies identified in this Court's prior order. Dkt. 104 at 18. The FACC specifically alleges that the Agencies' practices injure the Guilds by reducing Guild dues revenue, requiring them to expend significant resources to combat the harms caused by packaging fees, and forcing them to create expensive new staffing systems. FAC ¶¶123-37. That ongoing harm would be remedied by the injunctive relief the Guilds seek. For the same reasons, the FACC establishes the Guilds' Article III standing to assert Cartwright Act claims on their own behalf.

1. The Agencies' ongoing receipt of packaging fees reduces the Guilds' dues revenue.

The Agencies do not (and could not) challenge the FACC's allegations that the Agencies' ongoing receipt of packaging fees from studios that employ Guild members reduces the Guilds' dues revenue by reducing some members' profits and the amount all writers are paid. FACC ¶135.[14] Prohibiting the Agencies' continued receipt of such payments (which constitutes an unfair business practice and is the result of ongoing unlawful price-fixing), *see* Prayer for Relief ¶¶5, 6(b), would therefore increase both Guild member compensation and Guild dues revenue. ***No more is required to establish Article III standing***. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).

The Agencies contend that the injunction would not remedy this ongoing injury because some agreements under which they currently receive packaging fees predate the Code. MTD at 22-23. But this confuses the Code (which bars ***new*** packaging fee agreements) with the relief requested in this lawsuit (an injunction barring the Agencies "from *receiving*" packaging fees and continuing their conspiracy). FACC Prayer for Relief ¶¶5-6 (emphasis added). Whether or not *the Code* would invalidate prior agreements, the requested injunction would remedy

[14] Dues are calculated based on members' compensation, so reduced writer compensation directly reduces Guild dues revenue. FACC ¶129.

the unlawful *continued receipt* of packaging payments (which causes decreased dues). *Id*. ¶135 (alleging that injury exists "even for dues payments made after adoption of the Code"); *see also Big Sky Ventures I v. Pac. Capital Bancorp*, 2008 WL 11334474, at *8 & n.10 (C.D. Cal. May 6, 2008) (plaintiff could seek to enjoin contract enforcement under UCL); *see also, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 595-96 (N.D. Cal. 2010) (antitrust plaintiff can obtain injunction against "collusive practices and policies").[15]

2. The Agencies' continued packaging fee practices prevent the Guilds from prohibiting talent agents who are still authorized to represent their members from accepting packaging fees.

The Agencies' insistence on continuing to receive packaging fees also injures the Guilds by forcing them "to accept Code revisions that phase out the ability of Guild-franchised talent agents to accept packaging fees on future projects instead of immediately barring such fees." FACC ¶132.[16] And the Guilds have

[15] Nor is there any merit to the Agencies' argument that any packaging fees received for deals completed after the Code's adoption are based on such non-writer representation and that the Guilds lack standing to stop them from providing "packaging services" to non-writers . MTD at 23. First, the relief requested does not prevent Agencies "from providing packaging services that their non-writer clients continue to desire." *Id.* Instead, it would simply bar them from *demanding studio payments* as a condition of providing the services. Second, the Guilds' organizational injury does not depend on *Guild members* being packaged. It is enough under the UCL and the Cartwright Act that packaging fees are unfair, unlawful, or the result of illegal price-fixing, and that the Guilds are harmed by those practices, *regardless* whether the Agencies entered into their unlawful agreements based on representation of Guild members or other talent. *See* FACC ¶135 (alleging such fees decrease writer compensation *on all projects subject to packaging fees*, because they "reduce[] the money available in the production budget to compensate writers"). In any event, the Agencies have told this Court that they *do* still represent some Guild members, and they are bound by that admission. *See* MTD at 15 n.10 (pleadings are binding judicial admissions).

[16] Since adopting the Code, the Guilds have signed franchise agreements with a number of smaller talent agencies. But some of those smaller talent agencies have insisted on provisions that phase out (rather than ban) packaging fees, with the phase-out being contingent on one or more of the Agencies ending such fees.

also suffered further, knock-on injuries by being required to continue monitoring packaging fee abuses and educating their members about those abuses. *Id.* ¶133.

The Agencies argue that these injuries are "self-inflicted." MTD at 22. But this ignores the FACC's allegations that the Agencies represent "a dominant share of … actors, directors, and other creative workers involved in the American television and film industries," FACC ¶58, and that their "dominant position in the supply of talent," *id.* ¶9, enables them to exert oligopoly control, through their conspiracy, within those industries and to insist that the payment of packaging fees remain the dominant mode of production therein, *id.* ¶¶58-59. As a result of the Agencies' illegal conduct, "the Guilds have been required to accept Code revisions that phase out the ability of Guild-franchised talent agents to accept packaging fees on future projects instead of immediately barring such fees, and that are *contingent in part upon at least one of the Agencies agreeing to the revised Code*." *Id.* ¶132. These injuries are not self-inflicted, but result from the Agencies' power to shape the representational services market.

The Agencies also contend that these allegations are insufficient to establish Article III standing because they involve "third parties who are not before the Court." MTD at 22 (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989)). *ASARCO* is inapposite. There, teachers argued they had standing to challenge a state tax statute because increased revenue would lead to increased salaries, a speculative theory that depended on multiple discretionary policy choices by state and local authorities about how to spend any increased revenue. *Id.* Here, some of the Guilds' franchise agreements with other talent agencies make phasing out packaging fees *directly* contingent on at least one of the Agencies ceasing to collect such fees. FACC ¶132. The requested injunction would thus *directly* enable the Guilds to require *all* talent agencies that represent their members to stop accepting packaging fees, eliminating any need to continue monitoring packaging fees and the resulting abuses. It is as if, in *ASARCO*, a statute mandated that any

increased tax revenue go to teacher salaries.[17]

3. The Guilds have been forced to expend millions of dollars to replicate services the Agencies would otherwise provide.

The Agencies' refusal to forgo packaging fees has also forced the Guilds to expend over a million dollars to create and administer a website "to replace the representational services previously provided by the Agencies." FACC ¶136. The Agencies say this injury is "self-inflicted," MTD at 22, 21, but organizational standing requires an entity to demonstrate only "that the defendant's actions run counter to the organization's purpose, that the organization seeks broad relief against the defendant's actions, and that granting relief would allow the organization to redirect resources currently spent combating the specific challenged conduct to other activities that would advance its mission." *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019). Allegations that the Agencies' continued receipt of packaging fees undermines the Guilds' purposes of protecting members, FACC ¶132; *see also id*. ¶¶46-48;[18] that the Guilds' requested injunction would protect *all* Guild members, *id*. Prayer for Relief ¶5; and that, if the Agencies were precluded from receiving packaging fees, the Guilds could redirect their staffing systems resources to other activities, *id*. ¶¶136-37, easily satisfy that standard.[19]

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[17] That the Guilds might expend resources monitoring packaging during a very brief phase-out/transition period does not defeat redressability.

[18] The Guilds have a duty under federal law to protect and fairly represent members. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998).

[19] The Agencies argue that an injunction would not eliminate the need for the staffing service because the Guilds continue to provide that service even though other talent agencies have agreed to the Code. MTD at 21. This ignores the Guilds' allegations that the Agencies possess extraordinary market power and represent a majority of the talent in the industry (*supra* at 14), so that the current franchise agreements do not obviate the need for continued assistance to Guild members. Similarly, the Agencies' argument that they might refuse to represent Guild members even if packaging fees are banned (MTD at 21) defies common sense and their own binding judicial admissions (MTD at 15 n.10), which acknowledge their desire to resume "writer-representation" and their need to

Ignoring the Ninth Circuit's most recent statement of the standard for associational standing in *Rodriguez*, the Agencies rely on *ATLF v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010). But *ATLF* does not help the Agencies because the Guilds ***have*** alleged that they "would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *Id*. at 1088. The FACC's allegations make clear the Guilds faced the Hobson's choice of either permitting members to be represented by talent agencies that insist on receiving packaging fees (injuring Guild members, frustrating the Guilds' organizational purpose, and decreasing dues revenue, *see supra* at 11-15) or having their members frozen out of the job market (which would inflict similar injuries). The Guilds' creation of a safety system to help members obtain employment is an injury resulting from this dilemma that establishes standing under *ATLF*.[20]

III. Counterclaimants plead constructive fraud with sufficient particularity.

The FACC "satisf[ies] the heightened pleading standards of Rule 9(b)," MTD at 24, by concretely alleging the specific "who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geiby Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). "When," as here, "a claim rests on allegations of ***fraudulent omission***," the Rule 9(b) standard is necessarily "relaxed" for the obvious reason that "a plaintiff cannot plead either the specific time of [an] omission or the place, as he is not alleging an act, but a failure to act." *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F.Supp.3d 1306, 1325 (C.D. Cal. 2013) (citation omitted; emphasis added); *see also, e.g.*, *Falk v. Gen. Motors Corp.*, 496 F.Supp.2d 1088, 1098-99 (N.D. Cal. 2007) ("plaintiff in a fraud by omission suit will not be able to specify

represent writers to be "competitive" in Hollywood. Dkt. 42 ¶190; Dkt. 73 at 14.

[20] The Guilds also allege that the Agencies' packaging fees practices cause them ongoing harm because the Guilds cannot offer members a broad range of agent options while ensuring that the agents to whom they delegate bargaining authority provide conflict-free representation consistent with the principles the Guilds themselves must follow when representing members. FACC ¶137. This injury, which the Agencies ignore, would also be redressed by the relief the Guilds seek.

the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim," so "can succeed without the same level of specificity"). Rule 9(b) thus requires pleading only "'what' was omitted and/or concealed …, 'why' the information was not disclosed … and 'how' defendants allegedly concealed the information." *Asghari*, 42 F.Supp.3d at 1326-27.

The FACC amply meets this standard. Individual Counterclaimants allege that the Agencies, through each agent who represented them, "committed constructive fraud ***each time they represented the Individual Counterclaimants in procuring or seeking to procure employment*** with a studio from which the Agencies received or sought to receive a packaging fee, by failing ***ever***," throughout ***the entirety of the relationship***, "to disclose either (i) that they were operating under inherent conflicts of interest, including the inherent conflict created by the Agencies' financial incentive to reduce writer compensation, or (ii) the material facts of their package fee deals." FACC ¶225 (emphasis added). These "omissions constituted an ongoing breach of the duty of loyalty and of the duty to disclose material information that the Individual Counterclaimants were entitled to know," harming them by depriving them of the ability to make an informed choice about their employment and representation. *Id.*; *see also id.* ¶225(a)-(d). The Individual Counterclaimants "justifiably relied, to their detriment, on the Agencies' misleading concealment of the above facts by allowing the Agencies, instead of another talent agency, to continue to represent them." *Id.* ¶226. The Guilds plead the same facts, seeking purely equitable declaratory and injunctive relief on behalf of Guild members. *See id.* ¶¶271(a)-(d), 272.

These allegations satisfy the "relaxed" 9(b) standard appropriate to claims grounded in "omission." *Ashgari*, 42 F.Supp.3d at 1325-26; *id.* 1326-27. The FACC alleges "'what' was omitted": both the fact that the Agencies operate under multiple, inherent conflicts of interest, FACC ¶¶11-12, 14, 80-87, 225-26, 271-72, and the material terms of their packaging fee deals, *id.* ¶¶14, 80, 87, 225-26, 271-

72, which "'reasonably obtainable material information'" this Court has previously concluded the Agencies had a "'duty to disclose'" under California law. Dkt. 104 at 16 (quoting *Assilzadeh*, 82 Cal.App.4th at 415). The FACC similarly alleges in ample detail "'[w]hy' the information was not disclosed": to induce writers to continue to allow the Agencies to represent them so that the Agencies could continue to obtain packaging fees. *See* FACC at ¶¶64-70, 120-22. And the FACC repeatedly explains "'how' [the Agencies] concealed the information": by failing to make these disclosures to their clients throughout the course of the agency relationship, and "by falsely informing their writer-clients that packaging *benefits* the client." *Id.* ¶120. This is entirely plausible, as the Agencies continue to make that same representation in this litigation, *see, e.g.*, Dkt. 42 ¶30.

These allegations give the Agencies fair notice of the allegations against them. Requiring the FACC to exhaustively list every email, phone call, or text message Counterclaimants or other Guild members exchanged with their agents throughout the course of their years-long relationships in which the required disclosures were *not* made, as the Agencies imply should have been done, *see* MTD at 24-25, would be an absurd waste of both the parties' and the Court's resources, and is in no way what is contemplated by Rule 9(b)'s flexible, contextual particularity requirement. "As its text suggest, the Rule is designed in large part to ensure that those defending fraud actions are protected from the filing of vague complaints to which no intelligent response is possible," which "purpose is necessarily ill-served" by rote application of "mechanical requirements" without regard to the specific fraudulent conduct at issue. *Thomas v. Tramiel*, 105 F.R.D. 568, 571 (E.D. Pa. 1985); *see also Asghari*, 42 F.Supp.3d at 1326-27.

Nor is there any merit to the Agencies' suggestion that Counterclaimants insufficiently plead detrimental reliance or damage. MTD at 25. This Court has previously held that Counterclaimant Hall's allegation that UTA's misleading actions that "induced Hall to continue retaining UTA as her talent agency …

satisfy[] the detrimental reliance element" of her promissory estoppel claim. Dkt. 104 at 20. The same analysis necessarily applies to allegations that Guild members "justifiably relied, to their detriment, on the Agencies' misleading concealment" of their conflicts of interest and of the material facts of their packaging fee deals "by allowing the Agencies, instead of another talent agency, to continue to represent them." FACC at ¶¶120, 226. California law "presume[s] reasonable reliance upon the misrepresentation or nondisclosure." *Estate of Gump*, 1 Cal.App.4th at 601. And the FACC concretely alleges that all Guild members were harmed by the nondisclosure, which deprived them of information to which they were entitled. *See supra* at 4, 7; *see also* FACC at ¶¶14-15, 119, 272. As this Court has previously concluded, to plead monetary damages for the Individual Counterclaimants, it is sufficient to "allege that, as a result of the Agencies' failure to disclose material terms of packaging arrangements, they suffered damages, including "lost wages, [and] lost employment opportunities." Dkt. 104 at 16.

IV. This Court has already rejected the Agencies' Cartwright Act arguments, and in any event they are meritless.

A. The Agencies do not satisfy the standard for reconsideration.

The Agencies' previous motion to dismiss made the very same argument raised herein—*i.e.*, that Counterclaimants lacked standing under California law to bring Cartwright Act price-fixing claims. Dkt. 54 at 14-15; Dkt. 69 at 6 n.6 (citing *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000)). The Court *rejected* that argument, holding that "Counterclaimants' Cartwright Act claims do not suffer from the same standing deficit as their Sherman Act price-fixing claims." Dkt. 104 at 10 n.3. "To the extent that [the Agencies'] current motion repeats arguments that were made in the earlier motion to dismiss," it must be "deem[ed] a motion for reconsideration subject to Local Rule 7-18," and rejected for failure to satisfy the high standard for reconsideration thereunder. *Hayley v. Parker*, 2002 WL 925322, at *2 (C.D. Cal. Mar. 15, 2002).

Under Local Rule 7-18, the Agencies may move for reconsideration of this Court's prior holding that Counterclaimants have standing to pursue their Cartwright Act claims only on the basis of a material fact or law that was not previously considered by the Court because (a) the fact or law was unknown and could not have been discovered through reasonable diligence, (b) the fact came to light or the law changed after the decision had been rendered, or (c) the Court failed to consider such material facts or laws. The Agencies do not even attempt to satisfy that standard, nor could they. The Agencies' motion raises the same argument (that Counterclaimants lack antitrust standing to bring Cartwright Act claims), relies on the same Ninth Circuit law (*Knevelbaard*), and cites the very same facts as their prior motion. Indeed, the Agencies themselves assert that Counterclaimants' "factual allegations" are "substantially unchanged," MTD at 1, and do not cite any authority decided after the Court ruled on the Agencies' original motion that might require a different outcome. The Court expressly considered the facts cited by the Agencies, citing the very case that the Agencies cite here, and rejected the Agencies' contentions. Dkt. 104 at 10 n.3.

Because the Agencies "have not shown a material difference in law or fact that would justify a reconsideration of those allegations of the consolidated complaint that were [previously] found to satisfy the standards of 12(b)(6)," *Hayley*, 2002 WL 925322, at *2, this Court should reaffirm its prior holding that Counterclaimants have Cartwright Act standing, and "only consider[] those arguments in the [Agencies'] current motion that address the amended portions of the complaint and those allegations that the Court found insufficient and subject to dismissal in the original consolidated complaint." *Id.*[21]

[21] Absent a proper motion for reconsideration, "law of the case doctrine … ordinarily preclude[s a court] from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988); *see also* 18B Wright & Miller, Federal Practice & Procedure §4478; *Rhodesman v. Ocwen Loan Servicing, LLC,* 2020 WL 1698709, at *3 (C.D. Cal. Apr. 3, 2020); *Rodriguez v. Mahony*, 2012 WL 1057428, at *4

B. Counterclaimants have Cartwright Act standing.

Even if the Agencies' challenge were proper, this Court's prior decision was correct. The Agencies' motion relies almost exclusively on federal court decisions applying federal standards to state law claims, MTD at 5-11, all of which rely on *Vinci v. Waste Management Inc.*, 36 Cal.App.4th 1811 (1995). But the California Supreme Court has since twice rejected *Vinci*'s central premise that California courts should look to federal antitrust law when interpreting the Cartwright Act. *See In re Cipro Cases*, 61 Cal.4th 116, 160 (2015) ("The Cartwright Act is broader in range and deeper in reach than the Sherman Act."); *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal.4th 1185, 1195 (2013) ("[T]he 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.").[22] The Ninth Circuit recognized the import of those decisions in *Samsung Electronics v. Panasonic Corp.*, 747 F.3d 1199 (9th Cir. 2014), which reversed a district court decision premised on the erroneous belief "that the interpretation of California's antitrust statute was coextensive with the Sherman Act," which "is no longer the law in California." *Id.* at 1205 n.4.[23] The Agencies tellingly ignore *Samsung*, *Aryeh*, and *Cipro* in their briefing.

The Cartwright Act's text provides that civil actions may be pursued by "[a]ny person who is injured in his or her business or property by reason of

(C.D. Cal. Mar. 26, 2012).

[22] Federal antitrust standing standards do not apply to state claims absent "a clear directive" from those states' legislatures or highest courts to apply them. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F.Supp.2d 1109, 1123 (N.D. Cal. 2008); *In re Capacitors Antitrust Litig.*, 106 F.Supp.3d 1051, 1072 (N.D. Cal. 2015) (same); *In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011, 1025 (N.D. Cal. 2007) (same); *In re Lithium Ion Batteries Antitrust Litig.* ("*Batteries*"), 2014 WL 4955377, at *11 (N.D. Cal. Oct. 2, 2014) (same).

[23] Commentators recognize *Samsung*'s acknowledgement that *Aryeh* and *Cipro* "prohibit the application of *AGC*"—*Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983), the federal antitrust standing standard—to the Cartwright Act. P. Riehle & E. Varanini, "Antitrust Standing Under the Cartwright Act," Cal. Anti. & Unfair Comp. L. §14.02(G)(1) (2016).

anything forbidden or declared unlawful by [the Act]." Cal. Bus. & Prof. Code §16750(a). To the extent that the California courts have imposed additional, *non-textual* standing requirements, they have held only that a plaintiff's injury must fall within the "target area" of the antitrust violation. *Cellular Plus, Inc. v. Superior Court*, 14 Cal.App.4th 1224, 1232 (1993) (quoting *Kolling v. Dow Jones & Co.*, 137 Cal.App.3d 709, 723 (1982)).[24] This "target area" test requires that the injuries suffered be *within the zone of the economy endangered by the antitrust violation*. *Kolling*, 137 Cal.App.3d at 723-24 (distributor terminated for failing to comply with price fixing agreement had standing). This test is akin to a proximate cause analysis, which bars claims based on injuries that are merely incidental. *Id.*

In *Cellular Plus*,[25] two categories of plaintiffs—cellular service purchasers and corporate sales agents—challenged a cellular telephone service price-fixing scheme. The court held the sales agents had standing because the inflated price charged to consumers caused the agents to lose sales and earn lower commissions. 14 Cal.App.4th at 1235. In so holding, the court *explicitly rejected* the argument that sales agents lacked standing because they were neither defendants' competitors nor consumers of their products, *i.e.*, because they did not participate in the relevant market. *Id.* at 1234. Instead, the court held that the sales agents had standing because their "injuries were sustained by reason of the unlawful price fixing," *even though that fixed price was paid by third parties*. *Id.*

Counterclaimants have standing to pursue Cartwright Act claims for the same reasons. The Agencies act as intermediaries between Guild members and their studio employers, "procuring employment" for writers in return for a fee. The alleged conspiracy concerns how Agencies are compensated for procuring those opportunities for writers who, like the *Cellular Plus* sales agents, lost out on

[24] The "target area" test was discussed positively in the legislative history of Cartwright Act amendments. Riehle & Varanini, *supra* n.23, at §14.02(B).

[25] The Agencies do not dispute that *Cellular Plus* sets forth the applicable standard under California law. MTD at 8 (citing *Cellular Plus* with approval).

writing opportunities or were paid less because of the alleged conspiracy.[26] Under *Cellular Plus*, the writers' injuries (like the sales agents') are not too "secondary, consequential, or remote," and Counterclaimants have standing. *Id.* at 1233.[27]

Finally, while disclaiming reliance on *AGC*, the Agencies attempt to smuggle the federal "market participant test" into California law. In doing so, they cite only cases that either pre-date *Aryeh*[28] or that ignore *Aryeh* and *Samsung* and cannot be reconciled with those binding statements of California law.[29] In arguing

[26] The FACC alleges that the Agencies' agreement to fix packaging fees prices resulted in a "dollar for dollar" reduction of production budgets, proximately causing a reduction in the number of available writing jobs and writers' wages. FACC ¶¶15, 60, 83, 93, 104, 106, 194, 206. The FACC further alleges that the Agencies' price-fixing conspiracy proximately caused a reduction in quality of the representational services sold to writers. *Id.* ¶¶104, 195, 206, 208, 210.

[27] The Agencies' cited cases are distinguishable or not on point. The farm worker plaintiffs in *Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346, 1347 (9th Cir. 1973), had no relationship with the defendants' customers, and the alleged conspiracy did not target the workers' labor (whereas here the packages the Agencies broker *include* Guild members' labor). In *Solinger v. A&M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), the CEO's injuries (losing his job) resulted from the acquisition of his company, not from a reduction of competition in the production and distribution of recorded music. In *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 53-54 (9th Cir. 1951), the plaintiffs lacked antitrust standing because the alleged conspiracy did not lessen commercial competition among the studios. *Id.*

[28] The Agencies rely on *Vinci*, which applied federal antitrust standing precedents based on the Cartwright Act's "similar language" to the Sherman Act. In *Knevelbaard*, the Ninth Circuit relied on *Vinci* to do the same. Prior to *Aryeh*, the federal courts largely followed *Knevelbaard*. *See*, *e.g.*, *MGM Studios, Inc. v. Grokster, Ltd.*, 269 F.Supp.2d 1213, 1223-24 (C.D. Cal. July 2, 2003). But, as many courts have since opined, "*Aryeh* casts a significant shade over the reasoning of *Vinci*, which based its application of [federal standards] to Cartwright Act claims on the fact that the Cartwright Act and federal antitrust law have 'similar language.'" *Batteries*, 2014 WL 4955377, at 11. Since 2014, a majority of courts have declined to apply *AGC* to Cartwright Act claims for this reason. *See, e.g.*, *Los Gatos Mercantile, Inc. v. E.I. DuPont de Nemours & Co.*, 2015 WL 4755335, at *19 n.10 (N.D. Cal. Aug. 11, 2015) (reversing prior ruling in light of *Aryeh* and concluding that "the California Supreme Court would not . . . apply *AGC*").

[29] Each of the Agencies' post-*Aryeh* citations ignore the California Supreme Court's command that the Cartwright Act should *not* be interpreted as "coextensive with the Sherman Act," *Samsung*, 747 F.3d at 1205 n.4; *see Dang v. S.F. Forty Niners*, 964 F.Supp.2d 1097, 1103 (N.D. Cal. 2013); *Ixchel Pharma, LLC v. Biogen Inc.*, 2017 WL 4012337 at *2-3 (E.D. Cal. Sept. 12, 2017); *Munguia v.*

that these claims create a risk of duplicative recovery and complex problems apportioning damages, the Agencies rely entirely on such pre-*Aryeh* law wrongly applying federal antitrust standing precedents to the Cartwright Act. *See, e.g.*, *In re WellPoint, Inc. Out of Network UCR Rates Litigation*, 903 F.Supp.2d 880, 902 (C.D. Cal. 2012). Concerns with indirectness and duplication of damages apply with little force to the Cartwright Act, which explicitly permits lawsuits by indirect purchasers. *Cf., e.g.*, *Clayworth v. Pfizer*, 49 Cal.4th 758, 787 (2010).[30]

V. There is no basis to dismiss the UCL or declaratory relief claims.

Even if this Court were to conclude that the fiduciary duty, constructive fraud, or Cartwright Act claims fail on standing grounds, no authority supports the Agencies' contention that Counterclaimants could not premise their UCL or

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Wells Fargo Bank, 2015 WL 1475996 at *8 (C.D. Cal. Mar. 30, 2015); *Synopsys, Inc. v. ATopTech, Inc.*, 2015 WL 4719048 at *9 (N.D. Cal. Aug. 7, 2015); *Eastman v. Quest Diagnostics Inc.*, 2016 WL 1640465 at *6 (N.D. Cal. Apr. 26, 2016).

[30] Only Individual Counterclaimants seek damages, and their injuries are not duplicative of the studios', which cannot suffer writers' particular injuries like diminished quality of talent representation and lost job opportunities. FACC ¶ 210. Those injuries are also not duplicative of those suffered by other talent, since each individual suffers their own particular harm, and dollars that should have been in production budgets can only be spent once. *Cf. Cellular Plus*, 14 Cal.App.4th at 1235 n.4 (sales agents' injury not "duplicat[ive]" of cellular service purchasers because "price fixing resulting in artificially high prices can cause two separate types of injuries"—for consumers, a higher price, and for sales agents, the "certain portion of the potential market [that] is 'priced out of the market'").

The Agencies' separate challenge to Counterclaimant Simon's standing is premised on their narrow and incorrect assumption that antitrust injuries are limited to harms from working on a packaged program. The FACC alleges that the Agencies adopted their price-fixing agreement to preserve packaging and dominate the industry. FACC ¶¶1, 15, 89, 105, 143, 210. That has harmed writers like Mr. Simon in multiple other ways, including by reducing writer compensation throughout the industry, *id.* ¶¶15, 89, 105, 210; suppressing the ability of writers to sell their services in an open and unconstrained market, *id.* ¶¶15, 58-59, 93, 104, 118, 195, 210; and blacklisting, delaying, and interfering with efforts to staff non-packaged programs like those Mr. Simon has created since *Homicide*, *id.* ¶¶15, 58-59, 90-91, 93, 101, 104, 118. In any event, the amended counterclaims are entirely consistent with the conclusion that *Homicide* was packaged pursuant to the Agencies' conspiracy. *Compare* MTD at 11 n.8 (program first aired in 1993), *with* FACC ¶193 (conspiracy began "*around* 1995-1996") (emphasis added).

declaratory relief claims on the Agencies' unlawful breaches of fiduciary duty, constructive fraud, or price-fixing. MTD at 25. The Agencies' authority stands for the limited proposition that where a substantive claim fails ***on its merits***, so that there was no unlawful conduct, derivative UCL or declaratory relief claims must also be dismissed. *See Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1161 (9th Cir. 2016) (party whose breach of contract claim was dismissed on merits for lack of third-party beneficiary status could not premise UCL claim on same breach); *Junod v. Dream House Mortg. Co.*, 2012 WL 94355, at *6 (C.D. Cal. Jan. 5, 2012) (where plaintiff's substantive allegations did not establish illegal conduct by defendant, corresponding claims for declaratory relief also dismissed). Unlike such merits rulings, dismissing a substantive claim for lack of associational or antitrust standing does not require dismissing derivative UCL or declaratory relief claims, because the applicable standard differs. To establish standing to pursue a UCL claim premised on unlawful conduct, for example, Counterclaimants need only allege "a causal connection between the harm suffered and th[at] unlawful business activity," which the Guilds have done (as explained above). *Daro v. Superior Court*, 151 Cal.App.4th 1079, 1099 (2007); *see also Clayworth*, 49 Cal.4th at 789 (UCL's "simple threshold condition[s]" to establish standing should not be narrowed by imposing requirements beyond those in statutory text).[31] Likewise, to establish standing to pursue declaratory relief, the Guilds must merely satisfy the requirements of Article III—which they have done. *See, e.g.*, *MedImmune, Inv. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007).

[31] With respect to the "unlawful" conduct prong of the UCL, the Court has already determined that Counterclaimants adequately allege that the Agencies violated both their fiduciary duties to their writer-clients and the Cartwright Act's prohibition on price-fixing, Dkt. 104 at 18-19, and the FACC adequately alleges constructive fraud. *See supra* Section III. The Guilds have also adequately alleged that the Agencies' packaging fee practices constitute "unfair" conduct for UCL purposes (as the Agencies now implicitly concede).

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Big 3 Talent Agencies Ask Judge To Dismiss Remainder Of WGA's Packaging Lawsuit

By David Robb
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CREDIT: Shutterstock

The Big 3 talent agencies, having already won a partial victory in their yearlong legal battle with the WGA over packaging fees, now are asking a federal judge to dismiss all of the guild's remaining claims.

In a 25-page motion filed Wednesday, WME, CAA and UTA asked U.S. District Court Judge Andre Birotte Jr. to toss out the WGA's remaining claims of price-fixing, unfair competition and breach of fiduciary duty.

Read the agencies' latest motion here.

On April 27, the agencies declared that they'd won a "resounding victory" after Birotte dismissed major portions of the WGA's case when he ruled that the WGA lacks antitrust standing to pursue its federal price-fixing claim; lacks organizational standing to bring claims for breach of fiduciary duty and constructive fraud on behalf of its members; lacks standing to bring an Unfair Competition Law (UCL) cause of action on its own behalf; failed to plead racketeering activity by the agencies, and failed to state claims upon which relief can be granted with respect to its group boycott claims.

The WGA filed an amended complaint on May 11 that sought to reinstate many of the claims the judge had dismissed, asking the court to "declare that packaging fees constitute a breach of the agencies' fiduciary duties to their writer-clients," and to find that "the agencies' packaging fee practices constitute constructive fraud."

CREDIT: WGA

The agencies, however, are now asking the judge to throw the WGA's case out entirely, arguing that the counterclaimants – the WGA East and West and seven of their members – "fail to correct any of their prior pleading defects and assert a revised collection of counterclaims based upon substantively unchanged factual allegations."

The judge allowed the guilds to proceed with their price-fixing claims under California's Cartwright Act, but the agencies now argue that that claim "fails for a lack of antitrust standing," and that "the guilds cannot bring claims for breach of fiduciary duty, constructive fraud, or a Cartwright Act claim on behalf of their members."

The agencies also argue that the Cartwright Act claims should be dismissed in their entirety "because neither the guilds nor any of their members have standing under California law."

The agencies also told the judge that he should not reinstate the constructive fraud claims – which he already dismissed – that have been re-submitted by the seven individual writers in the case, because they have made "no new factual arguments" in their amended complaint – "just more rhetoric about how packaging constitutes fraud all of the time."

Arguing against the WGA's request for a court-ordered injunction that would bar packaging fees outright, the agencies also took issue with the WGA's claim that it's been harmed because it had to install a staffing submission system to help find jobs for its agentless members who in April 2019 were ordered by the WGA to fire their agents who refused to sign the WGA's code of conduct, which banned packaging fees and agency affiliations with related production entities. Those mid-tier agencies that have signed the guild's revised code can now continue packaging until the end of next year, unless any two of their competitors at the Big 3 and ICM Partners agree to sign the code before then.

"The Guilds allege that they have spent money to create a self-designed staffing system to replace services formerly performed by talent agents, including those at the Agencies here," the Big 3 said in their latest motion. "Running an independent staffing service is of course a decision made by the Guilds, not a choice forced upon them by any conduct of the Agencies. This fact alone dooms any claim of Article III standing" under the Unfair Competition Law.

“Further, it is pure speculation that the Guilds’ ostensible need to provide this staffing service would be cured by an injunction to end packaging or to require the Agencies to make more specific packaging disclosures. Indeed, many talent agencies have already succumbed to the Code of Conduct, have resumed representing writers, and agreed to eventually cease providing packaging services to their writer-clients. Yet, the Guilds nonetheless allegedly continue to provide their staffing services. Further still, there is no way to know whether one or more of the Agencies here would ever agree to the Code of Conduct, which bans not only agency packaging but also content affiliates. Thus, it is not at all clear how an Unfair Competition Law injunction against Agency packaging would redress the Guilds’ purported need to provide staffing services.”

The agencies, noting that the issue of the WGA’s negotiations with these other talent agencies who have signed its code is not before the Court, said that the WGA East and West “also contend that they are suffering ongoing harm because ‘the Guilds have been required to accept Code revisions that phase out the ability of Guild-franchised talent agents to accept packaging fees on future projects instead of immediately barring such fees, and that are contingent in part upon at least one of the Agencies agreeing to the revised Code.’

“More specifically, the Guilds allege that because of their decision to permit other talent agencies — i.e., not the Agencies here– to temporarily continue packaging, the Guilds have been required, at least temporarily, to continue to ‘monitor’ packaging by other agencies and ‘educate’ their members about packaging.

“Putting aside the extraordinary nature of the Guilds’ acknowledgment that they are franchising agencies who continue to package – a practice that the Guilds purport to believe always amounts to a tort – it hardly supplies Article III standing. For one thing, it is hard to imagine a more obviously self-inflicted harm. For another, these allegations center around franchise agreements that the Guilds negotiated and executed with third parties who are not before the Court, and the conduct of third parties is insufficient to confer Article III standing as a matter of law.”

The agencies also told the judge that the packaging they still do involving actors and directors is not even involved in this matter, and will continue no matter the final disposition of this case. “Finally, the Guilds allege that packaging fees paid in deals involving other parties, e.g., an actor or a director, reduce Guild dues revenue. But the injunction the Guilds seek – against the Agencies packaging writers – does not even purport to stop the Agencies from continuing to package actors and directors and thus would not redress the purported – and implausible – harm of which the Guilds complain. Nor would the Guilds conceivably have standing to seek any injunction to stop the Agencies from providing packaging services that their non-writer clients continue to desire. This is yet another implausible over-reach to try to manufacture non-existent Article III standing under the UCL.”

A hearing of both sides’ motions has been set for July 10.

SAG-AFTRA Tells Members They Should Get Its Approval Before Accepting Jobs During Pandemic

By David Robb
May 14, 2020 6:49pm

CREDIT: SAG-AFTRA

SAG-AFTRA, in an urgent safety notice, is telling its members that they should not return to work or accept a contract for new employment without first getting the okay from the union. It's the first time the guild has ever required that of its members.

"In light of the COVID-19 global pandemic and the attendant high risk to the health and safety of actors returning to work in the commercials and entertainment industry, no member should return to work under an existing contract or accept a contract for new employment without first securing the approval of the union," the notice states.

"Members must contact the union to ensure that they are accepting work that SAG-AFTRA has evaluated and established that the producer/employer has made provision for, and met adequate health and safety standards. In addition, such work offers must be consistent with all local, state and federal guidance regarding social distancing, essential business closures, and shelter in place orders and must be consistent with applicable, existing collective bargaining agreements.

"The employers and producers remain solely responsible for ensuring the health and safety of all members they employ and no member shall sign any document releasing the employer from such responsibility."

The statement also notes that the union's elected leaders, staff and medical experts, "in conjunction with other unions and industry allies, are working around the clock to develop safety protocols in accordance with the best medical and safety information on COVID-19."

WGA Files Amended Complaint In Yearlong Legal Battle With Big 3 Talent Agencies

By David Robb
May 11, 2020 9:55pm PT

CREDIT: WGA

After a stinging loss in federal court two weeks ago, the WGA has filed its first amended complaint in its ongoing legal battle with the Big 3 talent agencies over packaging fees.

The latest filing reframes many of the guild's claims that U.S. District Court Judge Andre Birotte Jr. threw out on April 27, including his ruling that the guild "lacks organizational standing to bring claims for breach of fiduciary duty and constructive fraud on behalf of their members." In its amended complaint, the guild asks the judge to "declare that packaging fees constitute a breach of the Agencies' fiduciary duties to their writer-clients," and that "the Agencies' packaging fee practices constitute constructive fraud."

Birotte also had ruled that the guild "lacks Article III standing to bring an Unfair Competition Law (UCL) cause of action on their own behalf," but the guild is now urging him to "declare that packaging fees constitute an unfair and/or unlawful practice under California's UCL because they breach the Agencies' fiduciary duties to their writer-clients; constitute constructive fraud and deprive writers of loyal, conflict-free representation, divert compensation away from the writers and other creative talent that are responsible for creating valuable television and film properties, and undermine the market for writers' creative endeavors."

The judge had allowed the WGA to proceed with its price-fixing claim against WME, CAA and UTA for allegedly violating California's Cartwright Act, and allowed several individual plaintiffs to pursue their claims in court, including their individual claims of breach of fiduciary duty and their Unfair Competition

Law claims. The individual counterclaimants include Patricia Carr, Ashley Gable, Barbara Hall, Deric A. Hughes, Deirdre Mangan, David Simon, and Meredith Stiehm.

The guild, however, does not appear to have attempted to resurrect its "racketeering" and "group boycott" claims, which the judge had also dismissed. The guild, however, continues to accuse the Big 3 agencies of operating like a "cartel." From today's filing:

"Talent agencies have represented writers for almost a century. But what began as a service to writers and other artists in their negotiations with the studios has become an unlawful price-fixing cartel dominated by a few powerful talent agencies that use their control of talent first and foremost to enrich themselves," the guild said in its filing today – an argument it has made throughout the year-long court battle.

"Historically, the agents whom writers retained were compensated by receiving only commissions on any payments made to the writers by studios for work that the agents helped them procure. By calculating the agents' compensation as a percentage of the writers' compensation, commissions aligned the interests of the agents with the interests of their writer-clients, as required by black letter agency law principles.

"Today, however, the three largest talent agencies make money not by maximizing their clients' earnings and charging a commission, but by bundling the representational services sold to writers and other talent with services provided to studios and collecting what are known as 'packaging fees.' Packaging fee amounts are not directly tied to the Agencies' clients' compensation but instead come directly from television series and film production budgets and profits.

"The power exerted by the Agencies in Hollywood is enormous and pervasive. Even the Hollywood studios—powerful entities in their own right— agree to pay hundreds of millions of dollars in packaging fees annually to the Agencies for what, according to industry insiders, 'amounts to extortion,' because they are 'afraid of not getting pitches and opportunities if they take a hard line against [packaging fees].' The studios, like everyone else in Hollywood, '[are] afraid to challenge the agencies for fear of being blackballed.'

"The Agencies pursue packaging fees 'über alles' because the Agencies now make the vast majority of their revenues from packaging fees, which are far more lucrative than simple commissions."

And as before, the WGA is also asking the judge to:

- Enjoin the Agencies from receiving any monetary payments or other things of value from any production company that employs any of its writer-clients;
- Require the Agencies to pay restitution to the Individual Counterclaimants in an amount equal to the funds that would have been paid to the Individual
- Counterclaimants in the absence of the Agencies' unlawful and unfair packaging fees;
- Award the Individual Counterclaimants compensatory and punitive damages based on the Agencies' breaches of fiduciary duty and/or constructive frauds;
- Award the Individual Counterclaimants treble damages for the Agencies' violations of the Cartwright Act
- Award Counterclaimants their costs and attorneys' fees;
- Award such further and additional relief as is just and proper.

IATSE Petition Telling President Matt Loeb To Hang Tough In Netflix Contract Talks Grows To 11,0000 Signatures

By David Robb
February 27, 2020 4:49pm

EXCLUSIVE: More than 11,000 IATSE members and their supporters have signed a petition urging IATSE president Matt Loeb to work out a contract with Netflix "that moves us above and beyond" the union's basic agreement with the major studios and networks. The giant streaming service agreed to bargain with the union last October, but the two sides have yet to reach a deal. Up until now, Netflix has only dealt with the union through third-party companies that have signed IATSE's basic film and TV agreement.

"We, the undersigned, believe in the strength and leadership of the IATSE," the petitioners said in letter to Loeb and IATSE vp Mike Miller, who heads up the union's West Coast office. "The ongoing national Netflix contract negotiations must build on the terms and conditions that already exist in the Basic Agreement to ensure a bright future for the skilled tradespeople who are creating the content of tomorrow.

"We believe you'll agree that any and all contract negotiations should strengthen worker conditions and build on existing contracts. This new national contract must not weaken any of our existing working conditions, benefits or wages. Streaming is the future and that future is in your hands. Please fight for us, our families, and a stronger contract that protects us all. We thank you for your time and effort and look forward to a Netflix contract that moves us above and beyond the Basic." The letter was signed "In Solidarity" by "Your IATSE Brothers and Sisters."

Protecting the union's pension plan is a chief concern among many of the signers, as it was in January when members from a dozen IATSE locals urged Loeb "to be relentless" at the bargaining table in order to provide "much needed income to secure the future funding of our pensions."

Last April, the trustees of the union's Motion Picture Industry Pension Plan reported that its funding level had dipped to 66.8% — bringing it closer to "critical" condition, which by federal law is defined as anything below 65%, as measured by a plan's assets divided by its liabilities.

“Protect our pensions. Protect our jobs. That’s your number one job to do. Netflix is not just the future; it’s our present,” wrote one of the petition’s signers.

“Netflix is now in the top tier of powerhouse producers,” wrote another. “Our contracts should reflect the success that our labor has helped to create. Quality of life provisions, rates, vacation pay, should reflect this success. Thank you!”

“The future of our union is at stake here,” said another. “We need to stand strong and be firm in our demands. Our pension money is dwindling to a near emergency situation.”

Last July, Netflix signed its first companywide contract with SAG-AFTRA, which until then had been dealing with the streamer on a production-by-production basis.