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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

DEFENDANTS' CONSOLIDATED OPPOSITION TO PRELIMINARY INJUNCTION MOTIONS

Hearing Date: Dec. 18, 2020
Hearing Time: 10:00am
Location: Courtroom 7B
Judge: Hon. André Birotte, Jr.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL.

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INTRODUCTION

A year and a half after filing suit challenging the conduct at issue in this motion, after all the other Hollywood talent agencies have signed franchise agreements requiring the elimination of problematic conflicts of interest, Creative Arts Agency ("CAA") and William Morris Endeavor Entertainment ("WME"; collectively, "Agencies") now seek preliminary injunctions allowing them to resume their conflicted representation of the Guilds' writer members and awarding them the full injunctive relief their lawsuit seeks. The Agencies' motions are premised on blatant misrepresentations of their own positions in negotiations with the Guilds for a new franchise agreement. Further, as the numerous declarations from prominent respected showrunners, experts, and union officials accompanying this opposition make clear, their motions are premised on a fundamental misrepresentation of both the work performed by the Guilds' showrunner members and the conflicted representation these Agencies' continued ownership interest in affiliated production studios (i.e., the writers' employers) ensures. Moreover, their motions ***ignore entirely*** that Congress has specifically and expressly eliminated the jurisdiction of the federal courts to issue the injunctive relief they seek in this labor dispute.

CAA and WME's motions rest heavily, and critically, on a misrepresentation: Both Agencies paint the false picture that they are currently in compliance with, or willing to comply with, ***all*** of the terms of the agreements the Guilds have reached with the other Hollywood talent agencies. But critically, CAA and WME acknowledge that they are ***not*** willing to agree to a key term that ***all the other talent agencies have agreed to****:* that they and their parent companies—including any private equity managers or other stockholders that own those agencies in whole or in part, and thus are likely to control the agencies' incentives and behavior—be limited to a 20% ownership interest in the production studios that employ the writers WME and CAA seek to represent. In other words, WME and CAA ask this Court to require the Guilds to allow them a privilege no other agency has—the ability to represent the Guilds' writer-members in negotiations with studios while maintaining significant ownership interests in those studios.

It is WME and CAA's insistence on an exemption from this key conflict of interest prohibition—not any Guild animosity or favoritism—that prevents them from reaching a new agreement with the Guilds. Now that ***every*** talent agency (including CAA and WME) has agreed to end packaging fees, and ***every*** talent agency ***except*** CAA and WME has agreed to the 20% limitation on agencies' and agency owners' interests in production companies that employ writers, WME and CAA seek this Court's intervention to place its weight on their side in ongoing negotiations over their ownership interest in employers, and to force the Guilds to accede to their demands for conflicted representation.

This Court should reject the Agencies' request. Most fundamentally, because this controversy arises out of a labor dispute, the Norris-LaGuardia Act ("NLGA") ***expressly*** deprives this Court of jurisdiction to enter any injunction.[1] Even were that not so, the Agencies cannot demonstrate likely success, or even serious questions, on the merits.

Although this Court previously upheld the Agencies' antitrust claims against a ***pleadings*** challenge, the Agencies come nowhere close to presenting ***evidence*** to fulfill their burden to prove the statutory labor exemption is inapplicable to the Guilds' conduct. Rather, the numerous declarations in the preliminary injunction record make clear that the Guilds undertook this membership action to protect writers' legitimate interest in unconflicted talent agent representation, and that the Guilds have not combined with any non-labor parties. Showrunner and expert declarations show that the Agencies' claims rest on fundamental misrepresentations of the work performed by Guild members: showrunners engage in extensive writing work, the core of showrunner work is writing, showrunners have a deep economic interrelationship with other writers (most simply, the more writing showrunners do, the less work is performed by other writers), and the Guilds have instructed members (including showrunners) to terminate their agents ***only*** in relation to their writing work.[2] Notwithstanding their contrary allegations or

[1] Even were that not so, the NLGA would require the Agencies to present live testimony establishing every required element, which they cannot do.

[2] That the Agencies either intentionally misrepresent or misunderstand what

representations to this Court at the motion to dismiss hearing, the Agencies have not identified ***a single instance*** where the Guilds instructed a ***non-writing showrunner*** to terminate an agent in relation to the showrunner's non-writing work pursuant to Working Rule 23 or threatened union discipline. To the contrary, the preliminary injunction record establishes that such members ***were*** permitted to maintain their agents for that work.

Nor can the Agencies show ***any*** combination with managers (who in any event are clearly labor parties for antitrust purposes), much less a combination to restrict competition. Moreover, even if the statutory exemption did not apply, the nonstatutory exemption would, because labor unions have for many decades employed agent conflict-of-interest regulations to protect members in the sports and entertainment industries, and the Guilds' actions have neither reduced the content created in Hollywood nor affected opportunities for other talent.

The equities also do not favor an injunction. Any injuries to CAA and WME in the form of lost clients (customers) and agents (employees) can be redressed through the Sherman Act's treble damages remedy, while entry of the injunction would undermine the Guilds' ability to protect members from conflicted representation and upend Guild agreements with over one hundred other agencies.

Finally, the Agencies have not produced evidence to support their *per se* antitrust merits theory, and the relief they request ignores limitations that the Supreme Court has imposed in cases involving labor unions.

At bottom, the only thing that has changed in the 17 months that this case has been pending is that WME and CAA have decided that ***they cannot obtain the deal that they want, allowing them to maintain their conflicted ownership interests, without this Court's assistance***. That does not establish irreparable injury justifying granting, mid-way through the case, full injunctive relief.

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showrunners actually do demonstrates the degree to which their priorities have diverged from those of the Guild members they now seek to represent.

FACTUAL BACKGROUND

I. The Guilds' Concerns Regarding Agencies' Conflicted Representation of Guild Members

The Guilds have long had concerns about talent agency conflicts of interest. In the 1970s, the Guilds sought to prohibit agencies from accepting packaging fees from studios and expressly reserved their objections to the practice. *See* Declaration of David J. Young ("Young Decl.") ¶5; *see also* Dkt. 104 at 2-3 (harms caused by packaging fees). By the mid-2010s, after agencies had grown increasingly reliant on packaging fees as a source of income, and as the Guilds reviewed data and anecdotal evidence showing that Guild members' overscale compensation was on the decline, the need to address packaging fees—and more generally, agencies' representation of Guild members—became more urgent. Young Decl. ¶¶6-8.

The Guilds' review of agency practices also highlighted the conflicts of interest (and resulting harms) caused by agencies' more recent expansion into film, television, and digital content production. *Id.* ¶7-9. Talent agencies that maintain ownership interests in a production studio themselves—or are owned by a parent company that also owns a studio—are incentivized to steer their clients to projects produced by affiliated studios and away from competing studios. And agencies that sign their clients to affiliated studio projects stand in the untenable position of being both the fiduciary representative ***and*** the employer of their clients. In such an arrangement, agencies are incentivized to keep talent costs low in order to increase the profits of their affiliated studio or parent company, and otherwise disincentivized from advocating for their clients' interests against their production affiliates. Declaration of James D. Reitzes ("Reitzes Decl.") ¶¶7-8. The Guilds received multiple reports of actual, on-the-ground conflicts created by affiliated production. Young Decl. ¶¶8-9.

Even though the Agencies have still produced almost no documents from their individual custodians and thwarted the Guilds' efforts to conduct discovery before the hearing on these motions, *see* Declaration of P. Casey Pitts ("Pitts Decl.") ¶¶9-12, the

limited discovery thus far substantiates the Guilds' concerns about Agency conflicts. Documents from the Agencies' central packaging files confirm, for example, that [redacted], creating an inherent conflict of interest between writers and their Agency representatives. *See id*. ¶¶13-17, Exs. A-E. Documents produced in discovery also demonstrate that, in their packaging fees agreements, the Agencies [redacted]. *See id.* ¶¶24-25, Exs. L, M.[3] The documents additionally show the extremely high profits the Agencies have accrued from packaging fees, [redacted]. *See id.* ¶¶17-23, Exs. E-K. And they show how fights over packaging delay deals, *see id.* Ex. Q, and that the Agencies place their interests above clients'.[4]

II. The Guilds' Efforts to Address Agencies' Conflicted Representation

The Guilds sought to address the harms posed by packaging fees and affiliated production—and thereby ensure that their members receive conflict-free representation—by attempting to negotiate a new representation agreement with the Association of Talent Agents ("ATA"), the official trade association of talent agencies including CAA and WME. Young Decl. ¶¶11, 16. Among other things, the Guilds sought to ensure that agencies representing Guild writers would no longer collect packaging fees from studios for such representation, and would not own or otherwise affiliate with studios. *Id.* Ex. B. The Guilds also sought to ensure that these reasonable restrictions would apply not only to the agencies themselves, but also to any owners or affiliates of the agencies. *Id.*

The Guilds' negotiations with the ATA were spearheaded by an agency negotiating committee comprised of 18 Guild members and the three elected officers from both WGAW and WGAE, with WGAW Executive Director David Young acting as chief

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[3] [redacted].

[4] For example, [redacted]. *See id.* Exs. N, O.

negotiator. Young Decl. ¶12. Only the negotiating committee has the authority to approve strategic negotiating decisions. *Id.*

While the committee negotiated with the ATA, Guild members overwhelmingly voted—95% in favor—to authorize the Guilds to adopt a Code of Conduct ("Code") for talent agencies wishing to represent Guild writers, if the Guilds' negotiations with the ATA proved unsuccessful. *Id.* ¶16. Consistent with the Guilds' proposals to the ATA, the Code prohibited agencies—as well as any parent companies—from collecting packaging fees in exchange for their representation of Guild writers and from owning or otherwise affiliating with production studios. Dkt. 42-1 at 3-4. The Code also contained numerous other provisions to protect writers from conflicted representation. *Id.* at 2-5.

On April 13, 2019, after the Guilds' good-faith efforts to reach a new deal with the ATA failed, and the prior agreement expired, the Guilds implemented the Code. Young Decl. ¶16; Declaration of Sean Graham ("Graham Decl.") ¶8; Dkt. 42-1 (text of Code). The largest talent agencies—including CAA and WME, which collected packaging fees and engaged in affiliated production—refused to sign, so were no longer authorized to represent Guild members for work covered by the Guilds' collective bargaining agreement for writers in film, television, and digital media, known as the "Writers Guild Theatrical and Television Basic Agreement" or "MBA." Graham Decl. ¶¶8-9.

Pursuant to Guild Working Rule 23, which prohibits Guild members from being represented for their writing work by agencies that have "not entered into an agreement with the Guild covering minimum terms and conditions between agents and their writer clients," *id.* ¶24, over 7,000 Guild members terminated their representation by such non-franchised agencies, *id.* ¶27.[5] But, because Working Rule 23 ***does not apply to non-writing work***, the Guilds made clear to members—in publications sent to members as well as in individual member communications—that they could continue to be

[5] The Guilds and several members also filed legal claims against CAA, WME, United Talent Agency ("UTA"), and ICM Partners ("ICM") about their conflicted representation. Young Decl. ¶17.

represented by non-franchised agencies for such work. *See, e.g.*, *id.* ¶¶28-29; *id.* Exs. H, I; Declaration of Charles Slocum ("Slocum Decl.") ¶15; Dkt. 42-4 at 11.

Working Rule 23 *does* apply to Guild members who are primarily engaged in writing work but also perform limited work in an additional capacity, like producing. *Id.* Such work—performed by writers often referred to as "hyphenates"—is expressly covered by MBA Article 14. Slocum Decl. ¶15; *id.* Ex. A. Article 14 reflects the longstanding recognition among the Guilds, their members, and members' employers that the work performed by hyphenates is first and foremost writing work. *Id.* ¶¶8-9. This is true even for hyphenates who act as "showrunners" of a television project: Showrunners' primary function is to lead the other writers on the project and put forth a creatively excellent final product. *Id.* ¶¶10-12; *see also infra* at 21-23. Because the work of hyphenates (including showrunners) is writing work covered by the MBA, the Guilds advised members that such work was subject to Working Rule 23, which could not be evaded by recharacterizing work previously treated as Article 14 work. *Id.* ¶15; Graham Decl. ¶¶28-29; *id.* Exs. H, I; Dkt. 42-5 at 2 (FAQ regarding "TV writer[s]/producer[s]").

III. The Guilds' Franchise Agreements with Individual Agencies

After ATA negotiations proved unsuccessful, and many ATA members refused to sign the Code, the Guilds began engaging individual agencies in arms-length and often protracted talks for franchise agreements. Young Decl. ¶¶18-19; Graham Decl. ¶¶10-23. In doing so, the Guilds continued to insist that restrictions on agencies' ownership of production affiliates extend to entities that owned or were otherwise affiliated with the agencies. Young Decl. ¶20. In an effort to accommodate agencies' legitimate needs while protecting Guild members from conflicts of interest, each franchise agreement contained modest modifications from the Code. The Guilds also agreed to include a "most favored nations" clause, which provided that each agency would receive the benefit of any more favorable provisions in subsequently negotiated franchise agreements, and thus ensured that earlier signing agencies would not face competitive disadvantage as to later signing agencies. Graham Decl. ¶10.

For example, to prevent franchised talent agencies from being at a competitive disadvantage to agencies like CAA and WME that continue to collect packaging fees, individual agency agreements included a sunset period, which was gradually extended by modest increments, during which agencies could continue to accept such fees. Young Decl. ¶21. The Guilds also allowed agencies to preserve existing active packaging deals, because unwinding such deals would be impracticable and likely cause agencies to seek retroactive commissions from Guild members. *Id.* The Guilds also eventually agreed to allow agencies to maintain minor, non-controlling ownership interests in content production or distribution entities, but only after extensive negotiation made it clear that this was essential to reaching a deal, and the negotiating committee determined that such ownership shares were small enough not to pose a material conflict of interest given other protections in the franchise agreement. Graham Decl. ¶¶13, 17, 21-22; Young Decl. ¶23.

On July 15, 2020, after months of negotiating, the Guilds announced a franchise agreement with UTA. Young Decl. ¶23; Graham Decl. ¶22; *id.* Ex. E. Along with CAA, WME, and ICM Partners ("ICM"), UTA is one of the four largest talent agencies (known as the "Big Four") and a former party to this litigation. The Guilds' UTA agreement extended the packaging sunset date to June 30, 2022, and permitted UTA up to a 20% non-controlling ownership interest of a production company. *Id.* The Guilds agreed to these terms only after it was clear they were essential to reaching an overall deal, and upon agreement among negotiating team members that such an ownership interest was still reasonable in light of additional protections in the agreement. *Id.* ¶22.

On August 5, 2020, the Guilds announced that they had also reached an agreement with ICM. Young Decl. ¶24; Graham Decl. ¶23; *id.* Ex. F.

IV. The Guilds' Franchise Agreement Negotiations with CAA and WME

The Guilds also continued discussions with CAA and WME. Unlike the other agencies that the Guilds franchised, however, CAA and WME own—or are commonly owned with—production studios: CAA owns a majority interest in a production company called wiip, and WME is wholly owned by a holding company that also wholly

owns a production company called Endeavor Content. Young Decl. ¶25. CAA and WME are also distinct in that the largest shareholders of both agencies are private equity investors (TPG Partners and Silver Lake Partners, respectively). *Id.* These unique aspects of CAA and WME have posed significant additional complications for the Guilds' good-faith efforts to enter into a franchise agreement with both agencies.

A. Negotiations with CAA

Although the Guilds were hopeful that CAA would agree to the same franchise terms as UTA—which the Guilds sent to CAA on July 17, 2020—CAA initially declined to offer any specific or substantive response to the UTA agreement. Young Decl. ¶39. Only after the Guilds advised both CAA and WME on September 1, 2020, that they were "welcome to sign the [UTA/ICM agreement] as is," but that the Guilds were "not going to keep pushing back the sunset period on packaging" and "not going to allow more than 20% ownership of a production studio," did CAA respond to the Guilds' entreaties. *Id.* ¶¶40, 30. Rather than inquire about the Guilds' stated position or propose changes to other provisions of the UTA agreement, CAA unilaterally demanded that the Guilds agree—within four business days—to an entirely new clause stating that the studio ownership provision would apply only "[f]ollowing sale of existing interests to occur as soon as commercially practicable." *Id.* ¶41; Dkt. 151-2, Ex. B at 10, 12.

The Guilds reasonably viewed CAA's demand—which was also released publicly, in contrast to the private negotiations the Guilds conducted with other agencies—as a bad-faith stunt intended to back the Guilds into a corner. Young Decl. ¶42. Moreover, the Guilds found both the substance and timing of CAA's unilateral demand—which materially changed the terms of the existing UTA agreement—entirely unworkable. First, "commercially practicable" is an indeterminate term that would allow CAA to maintain its majority interest in wiip indefinitely, and the Guilds would have no effective means of enforcing the provision if they agreed to it. *Id.* Second, the unique nature of CAA and wiip's governance structure required the Guilds to seek and review additional information about that structure in order to respond to CAA's demand. *Id.* ¶44. Third,

the democratic and collective nature of the Guilds' agency negotiating committee—as well as the difficulties posed by the COVID-19 pandemic—precluded responding to CAA's demand within the short allotted period of four business days. *Id.* ¶12.

Despite these concerns, the Guilds continued to engage with CAA's counsel in hopes of reaching agreement. *Id.* ¶¶43-44. On September 30, 2020, the Guilds informed CAA that they had retained additional outside counsel for advice on CAA's divestment of its interest in wiip, and requested certain information necessary to understand CAA's business and thereby evaluate CAA's plans to comply with the 20% ownership provision over a "commercially practicable" time. Dkt. 151-2, Ex. E at 30. The Guilds received some of the information requested on October 8, 2020. Young Decl. ¶44.

On November 11, 2020, CAA issued another unilateral demand. CAA informed the Guilds that it would place its wiip ownership interest in a "blind trust," and insisted that this would comply with the 20% ownership provision. Dkt. 151-2, Ex. K at 57-59; Young Decl. ¶45. CAA also stated that it considered the 20% provision to be binding only on CAA and investors in a specific TPG investment fund, rather than on all TPG funds. *Id.* CAA did not broach either of these terms with the Guilds prior to demanding that the Guilds agree to them, even though acceptance of CAA's terms would have materially altered the existing UTA/ICM agreement. *Id.* CAA further stated that if the Guilds did not immediately agree to franchise CAA under the terms CAA had set forth (including allowing CAA to continue possessing a greater than 20% interest in wiip during the trustee's "sell down" process) within five days, it would "ask the Court to address the Guilds' conduct." Dkt. 151-2, Ex. K at 59; Young Decl. ¶45.

The Guilds promptly informed CAA that they would review CAA's insisted-upon terms, but did not commit to responding by November 16 as CAA demanded. Young Decl. ¶46. The Guilds have since carefully considered CAA's terms and consulted with outside expert counsel. *Id.* ¶47. Although the blind trust represents a potential step forward, it raises numerous concerns, including that the trust is not actually blind; there is no time limit on the trustee's disposition of the trust asset; there is no limitation on who

may purchase the asset; and the Guilds were not consulted on the trustee's selection. *Id.*; Reitzes Decl. ¶37. The Guilds also have concerns with CAA's insistence that the 20% provision apply only to a single, specific TPG fund, especially because nothing would prevent TPG from merely transferring its ownership interest in wiip from the specified TPG fund to a different fund. Young Decl. ¶48. The Guilds were preparing a response to CAA when CAA filed the instant motion. *Id.* ¶49.

B. Negotiations with WME

Shortly after ICM reached an agreement with the Guilds on August 5, 2020, WME approached the Guilds. *Id.* ¶26. The parties conducted two virtual negotiating sessions, at which WME demanded at least six material changes from the UTA/ICM agreement, including increasing the 20% affiliate ownership provision to 49%, allowing an indeterminate "sunset period" for this dramatically altered provision, exempting all WME investors from the franchise agreement, and extending the packaging fee sunset period for an additional year. *Id.* ¶¶27-28. After the Guilds advised WME that they could not further increase the permitted affiliate ownership percentage or extend the packaging fees sunset period, WME indicated it could accept the 20% affiliate ownership provision, but still required numerous material modifications of the UTA/ICM deal, including the previously demanded sunset period for affiliate ownership and an exemption for certain WME investors from the franchise agreement. *Id.* ¶¶29-34. At the same time, WME made no commitments regarding how it would reduce its ownership interest in Endeavor Content to 20%, or how Silver Lake—which owned 48% of WME's corporate parent—would comply with the franchise agreement's terms. *Id.* ¶¶36-37.

Accordingly, the Guilds requested the same information requested from CAA regarding corporate structure and governance, which the Guilds intended to review with newly retained outside counsel. *Id.* ¶37. On October 9, 2020, WME provided only a small portion of the requested information the Guilds requested, and did not respond to a subsequent request for the missing information. *Id.* ¶38. The Guilds were waiting for WME to respond to their second request when WME filed the instant motion. *Id.*

ARGUMENT

I. The Norris-LaGuardia Act Deprives the Court of Jurisdiction to Issue the Requested Preliminary Injunction.

This Court has no jurisdiction to enter a preliminary injunction. The case involves a labor dispute governed by the Norris-LaGuardia Act ("NLGA"), and where, as here, the jurisdictional "requirements of the [NLGA] have not been met," *Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 100 (1940), the NLGA "***bars injunctive relief in labor disputes even when the union's actions violate the antitrust laws***." *Burlington N. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174*, 203 F.3d 703, 712 n.12 (9th Cir. 2000) (en banc) (emphasis added); 29 U.S.C. §§101, 104, 107. The "plain mandate of the [NLGA]" prohibits courts from entering injunctions in labor disputes, even when "alleged violations of the Sherman Act are involved." *Milk Wagon Drivers' Union*, 311 U.S. at 103.

A. This Case Involves or Grows out of a Labor Dispute.

The NLGA provides, "No [federal] court … shall have jurisdiction to issue any … injunction in a case involving or growing out of a labor dispute, except in a strict conformity" with the Act's requirements. 29 U.S.C. §101.[6]

Congress intended the NLGA's anti-injunction provisions to apply broadly. It thus defined "labor dispute" expansively to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113(c); *see Burlington N. R. Co. v. Bhd. of Maintenance of Way Emps.*, 481 U.S. 429, 441 (1987) ("Congress made the definition of 'labor dispute' broad because it wanted it to be broad"). "Labor dispute" is broadly

[6] Congress enacted the NLGA to "'tak[e] the federal courts out of the labor injunction business.'" *Burlington N. Santa Fe Ry.*, 203 F.3d at 707 (citation omitted). While a court may still award antitrust damages, the NLGA "drastically … curtail[ed] the equity jurisdiction of federal courts in the field of labor disputes." *Milk Wagon*, 311 U.S. at 101.

construed to "capture a wide range of controversies." *Burlington N. Santa Fe Ry.*, 203 F.3d at 709 & n.6 (citing cases).[7]

The statute's plain terms provide that the controversy between the Guilds and the Agencies is a "labor dispute" because it concerns the "representation of [Guild Writers] in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment," as well as the terms or conditions negotiated through such representation. 29 U.S.C. §113(c). The Agencies challenge the terms under which the Guilds, as their members' exclusive bargaining representative, have chosen to allow talent agents to represent Guild members in negotiating terms and conditions of employment above the minimums established by the Guilds' MBA. Controversies over who represents employees in employer negotiations are quintessential labor disputes. *See, e.g.*, *United States v. Hutcheson*, 312 U.S. 219, 234-35 (1941) (jurisdictional dispute between two unions was labor dispute). Indeed, in *H.A. Artists & Assocs., Inc. v. Actors Equity Ass'n*, an analogous controversy regarding a theater actor union's talent agent regulations was "plainly a 'labor dispute' as defined in the Norris-LaGuardia Act" because it centered on the "'representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment …." 451 U.S. 704, 721 (1981).[8]

B. Section 4 Strips the Court's Jurisdiction to Enjoin the Guilds.

Section 4 enumerates "specific acts against which the federal courts may ***under no circumstances*** issue an injunction" against persons participating or interested in a labor dispute. *Camping Constr. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333, 1341-42 (9th Cir. 1990) (emphasis added); *see* 29 U.S.C. §104. Those specific acts include, *inter*

[7] *See, e.g.*, *Burlington N. R. Co.*, 481 U.S. at 441-42 (secondary picket); *Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711 (1982) (politically motivated work stoppage); *Milk Wagon Drivers' Union*, 311 U.S. at 98-100 (secondary boycott over employer's use of vendors); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 562 (1938) (picketing and boycott by nonlabor civic organization over racial discrimination in hiring).

[8] CAA is judicially estopped from arguing this is not a "labor dispute," having successfully argued otherwise in opposing the Guilds' motion to dismiss. Dkt. 51 at 5; *see Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996).

alia: "(a) Ceasing or refusing to perform any work or to remain in any relation of employment; … (e) Giving publicity to the existence of, or the facts involved in, any labor dispute … by any … method not involving fraud or violence; (f) … organiz[ing] to act in promotion of their interests in a labor dispute; … and (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified …." 29 U.S.C. §104. Boycotts, strikes, work stoppages, and pickets all are protected activities under section 4 and cannot under any circumstances be enjoined, even when performed by a group of persons "engaged in an unlawful combination or conspiracy." *Id.* §105.[9]

The conduct the Agencies seek to enjoin here—maintaining a "boycott" against CAA and WME, i.e., "instruct[ing] all Guild members not to be represented by" CAA or WME until they are franchised; "enforcing, or causing to be enforced, Working Rule 23" against Guild members who engage CAA or WME in violation thereof; and "utilizing or threatening any form of union sanctions or discipline against any Guild member for engaging" CAA or WME in violation thereof—falls squarely within section 4. CAA Mem. 4; WME Mem. 5. The Guilds' conduct is no different from any other strike or work stoppage in which workers withhold labor until disputed conditions are satisfied. In "boycotting" the Agencies until they agree to a franchise agreement, the Guilds and their members are, in effect, "[c]easing or refusing to perform any work" arranged by non-franchised agents. 29 U.S.C. §104(a). The Guilds' nonfraudulent, nonviolent efforts to persuade members to participate in this "boycott" through enforcement of internal union rules are absolutely protected from injunction under section 4(i). *See id.* §104(i). And the concerted activity of the Guilds and their members in maintaining the "boycott"

[9] *See, e.g.*, *Jacksonville Bulk Terminals*, 457 U.S. at 704-08, 724 (politically motivated work stoppage protected under section 4(a)); *New Negro Alliance*, 303 U.S. at 555-57, 562-63 (picketing and boycotting protected under section 4(e), (i)); *Burlington N. Santa Fe Ry.*, 203 F.3d at 711-13 (secondary boycott protected under section 4); *Garner Constr., Inc. v. Int'l Union of Operating Engr's, Local 302*, 2007 WL 1991197, *3 (W.D. Wash. July 9, 2007) (union's refusal to renew labor agreement with contractor, and competitor's solicitation of contractor employees, protected under section 4(a), (i)).

publicizes and promotes their interests in this labor dispute. *See id.* §104(e)-(f).[10]

Because the Guilds' conduct falls within section 4, whether it violates the Sherman Act is ***irrelevant***. "[E]ven if unlawful," courts lack jurisdiction to enjoin "conduct which [section 4] of the [NLGA] declared shall not be enjoined." *Marine Cooks & Stewards v. Panama S. S. Co.*, 362 U.S. 365, 371 (1960).

C. The Agencies Cannot Meet Their Section 7 Burden.

Even if section 4 did not apply here, "section[] 7 … impose[s] a number of substantive and procedural conditions on the availability of injunctive relief in all other cases involving or growing out of a labor dispute." *Camping Constr.*, 915 F.2d at 1341-42. 29 U.S.C. §107 deprives courts of jurisdiction to grant injunctive relief in labor disputes unless, after "hearing the testimony of witnesses in open court (with opportunity for cross-examination)," the court makes specific findings of fact:

> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained …; (b) That substantial and irreparable injury to complainant's property will follow; (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; (d) That complainant has no adequate remedy at law; and (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

The Court lacks ***jurisdiction*** to issue any injunction unless the Agencies meet their burden to establish each element of their claims ***and*** section 7 requirement ***through live testimony in open court***. *San Antonio Community Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1234 (9th Cir. 1997); *New Negro Alliance*, 303 U.S. at 562.[11]

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[10] The Ninth Circuit has instructed that "the list of acts protected from injunction by section 104 should be interpreted with reference to the congressional purpose behind the [NLGA]," which was "to prevent the then widespread use of the labor injunction as a means of defeating the efforts of labor to organize and bargain collectively." *Schuck v. Gilmore Steel Corp.*, 784 F.2d 947, 949-50 (9th Cir. 1986) (quotations omitted). The NLGA's purpose is served by shielding from injunction the Guilds' efforts to protect their members' collectively bargained rights by ensuring conflict-free representation.

[11] "Strict adherence to [these] procedures is not a mere matter of form: A district court has no ***jurisdiction*** under the [NLGA] to issue a labor injunction without adhering to the explicit terms of the Act." *In re District No. 1—Pac. Coast Dist., MEBA*, 723 F.2d 70,

Further, the findings required by subsections (a), (b), and (e)—that "unlawful acts have been threatened and will be committed" against the Agencies' "property," and that law enforcement is "unable or unwilling" to provide adequate protection—present insurmountable barriers to the injunctive relief sought.[12]

First, the Agencies do not even allege, much less prove, that the Guilds have committed or threatened "unlawful acts" within section 7(a)'s meaning. That term is limited to acts of "violence, intimidation, threats, vandalism, breaches of the peace and criminal acts." *Marine Transp. Lines, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 770 F.2d 1526, 1530 (11th Cir. 1985) (citing cases); *see, e.g.*, *Wilson & Co. v. Birl*, 105 F.2d 948, 952 (3d Cir. 1939) ("unlawful acts … do[es] not constitute a general reference to anything that may be considered illegal, but specifically to the acts of violence which the authority of the executive is calculated to control"). This necessarily means more than a violation of antitrust laws; allowing federal courts "to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the [NLGA] and would reverse the declared purpose of Congress." *Milk Wagon*, 311 U.S. at 103 & n.18; *see Burlington N. Ry. Co.*, 481 U.S. at 435 n.3 (NLGA's "ban on federal injunctions … not lifted because the conduct of the union is unlawful under some other, nonlabor statute").

Nor have the Agencies alleged or proved that "the public officers charged with the duty to protect [the Agencies'] property are unable or unwilling to furnish adequate protection." 29 U.S.C. §107(e). Satisfaction of this element is a "prerequisite[]" to issuance of any injunction under the NLGA. *Milk Wagon*, 311 U.S. at 103 n.18; *see Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers v. Int'l Union of United Brewery, Flour, Cereal & Soft Drink Workers of Am.*, 106 F.2d 871, 877 (9th Cir. 1939). The Agencies have not even alleged that their ***property*** has been threatened—CAA contends,

76-77 (D.C. Cir. 1983); *see also N. Stevedoring & Handling Corp. v. ILWU, Local No. 60*, 685 F.2d 344, 349-50 (9th Cir. 1982) (reversing TRO based only on affidavits).

[12] The Agencies' failure to satisfy the other requirements of subsections (b), (c), and (d) is addressed *infra* at 44-48.

instead, that the Guilds' conduct interferes with its "intimate, highly personal relationships" with "clients," CAA Mem. 23—let alone shown public officers are unable or unwilling to protect it. *Cf. San Antonio Cmty. Hosp.*, 125 F.3d at 1238 (7(e) satisfied where police were contacted but could do nothing about allegedly defamatory banner).

The Court therefore lacks jurisdiction to issue an injunction.

II. The Agencies Are Unlikely to Succeed on the Merits of Their Claims.

A. The Statutory Exemption Applies to the Guilds' Conduct.

As both the Supreme Court and this Court (in a case involving the Guilds' own agent regulations) have recognized, the "statutory exemption" immunizes from federal antitrust liability union rules that protect union members from conflicts of interest by agents who represent those members. *See H.A. Artists*, 451 U.S. at 712; *Adams, Ray & Rosenberg v. William Morris Agency, Inc.*, 411 F.Supp. 403, 410 (C.D. Cal. 1976); *see also Collins v. Nat'l Basketball Players Ass'n*, 850 F.Supp. 1468, 1477 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992). That exemption applies so long as the union "acts in its self-interest and does not combine with non-labor groups." *Hutcheson*, 312 U.S. at 232. The Agencies cannot demonstrate the statutory exemption's inapplicability here.[13]

1. The Guilds' efforts to protect members from conflicts of interest created by Agency ownership of production studios reflect a traditional and legitimate union purpose.

The Agencies argue the statutory exemption is inapplicable because the Guilds are purportedly motivated by animus towards the WME and CAA leadership, not a legitimate desire to protect Guild members. They contend this is shown by the Guilds' unwillingness to franchise them "on the same substantive packaging and content affiliate terms that it deemed sufficient for every other franchised talent agency." WME Mem. 12. But this ignores that the Guilds ***are*** willing to franchise WME and CAA on the same terms as other agencies. What the Guilds have been unwilling to do (as the Agencies are

[13] The "serious questions" standard does not apply here, because the balance of hardships do not tip sharply in the Agencies' favor. *See infra* at 47-48. The Agencies do not cite a single case applying the serious questions standard where the injury the plaintiff asserts, as here, is economic in nature. *See infra* at 46.

ultimately forced to admit) is accept ***modifications*** to the most recent franchise agreement that would exempt WME and CAA from complying with the 20% cap on agency ownership interests in production studios that employ the Guilds' members. *See, e.g.*, CAA Mem. 6 (CAA September demand for modification that would give it indefinite additional time to come into compliance); *id.* at 8, 14 (admitting CAA currently maintains its interest in wiip and will not comply with 20% limitation until undefined "sell-down period" is completed); WME Mem. 12 (listing "changes that WME ultimately sought to ICM's and UTA's franchise agreements," including providing undefined "reasonable time" to come into compliance and "grandfathering" existing projects).[14] The Agencies' claim, in other words, is premised on the Guilds' unwillingness to offer them *special* concessions on the 20% limitation that applies to every other agency.

That the Guilds are treating CAA and WME no differently from other agencies defeats their claim that the Guilds' negotiation position reflects an illegitimate motive. As the Guilds have repeatedly made clear, CAA and WME are welcome to sign the most recent UTA/ICM agreement and comply with its terms.[15]

Moreover, nothing about the negotiations suggests that the Guilds' motive in adopting the Code, enforcing Working Rule 23, and refusing to grant special treatment to CAA and WME was to harm CAA and WME rather than to protect its members from talent agent genuine conflicts of interest.[16]

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[14] The Agencies double-speak on this point. CAA states that it "accepted the WGA's offer to sign" the UTA/ICM franchise agreement in September 2020 but then admits two sentences later that its "only" change to the agreement would allow it an undefined period of time to maintain its ownership interest in a studio that employed writers. CAA Mem. 6. WME contends it was willing to sign a franchise agreement on "*the same substantive terms* … as ICM and UTA," but simultaneously acknowledges that it sought "only" two "caveat[s]" or "accommodations," one of which exempted them from compliance with the content affiliate limit for an undefined time period. WME Mem. 6 (emphasis added).

[15] Accepting the Agencies' position would perversely require the Guilds to grant them unique competitive *advantages* over their competitors. Federal antitrust law favors fair competition, and cannot possibly mandate that outcome.

[16] WME and CAA's contention that Guilds' secret purpose is to harm them lacks particular credibility given the lengthy and difficult negotiations that were required for

The Agencies complain primarily that the Guilds have been unwilling to grant either Agency a temporary (but undefined) exemption from complying with the current agreement's limitation on studio ownership. But the Guilds have compelling reasons for declining that modification. The studios CAA and WME partially own are *employers* of the Guilds' members. A talent agent's role is to represent writers in negotiations *across the table* from those very employers. CAA and WME's interests in production studios mean they would effectively sit on *both* sides of the table when representing writers during negotiations—an inherent conflict of interest. *See* Reitzes Decl. ¶¶7-8, 25-33 (describing principal-agent problems arising from Agencies' ownership).[17]

CAA separately contends that the "blind trust" in which it has placed its wiip interest eliminates any conflict-of-interest concerns. CAA Mem. 13-15. But the trust CAA created is not actually "blind": CAA knows exactly what assets have been placed in that trust—the entirety of its interest in wiip—and that, so long as the trust remains in

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the Guilds to reach franchise agreements with the numerous other talent agencies that refused to sign the original Code—including UTA, formerly a plaintiff and counterclaim defendant in this lawsuit. *See* Young Decl. ¶23. Had the Guilds simply wanted to harm WME and CAA, that 15-month process would have been unnecessary. Moreover, WME and CAA offer no plausible reason ***why*** the Guilds would seek to eliminate WME and CAA from the market. They contend (wrongly) that a single executive of one of the two Guilds has personal animosity towards certain WME and CAA executives, *see* CAA Mem. 6; WME Mem. 6; *but see* Young Decl. ¶39; but ignore that the Guilds' strategy has been formulated by a sizeable committee with members of both Guilds, *see id.* ¶12.

[17] CAA contends that the Guilds' concerns about affiliated production are pretextual because the Guilds' counterclaims focused on packaging. CAA Mem. 15. But that in no way undermines the Guilds' concern about the separate conflicts posed by affiliated production studios, which have been regulated by the Code from the start. To the extent briefing on the motion to dismiss focused on packaging rather than affiliated production, that was because the Agencies themselves focused on that issue. *See, e.g.*, Dkt. 50 at 15-16 (arguing inapplicability of non-statutory exemption based on packaging regulation). That the Guilds have not pursued a legal challenge to WME and CAA's affiliation with production companies is not a concession about the lawfulness of that practice.

WME separately argues that the Guilds' failure to allow its affiliated production practices the same "sunset period" the UTA/ICM agreement provides for packaging fees demonstrates the Guilds' animus, but that difference simply reflects the need to ensure that agencies willing to sign the franchise agreement faced no competitive disadvantage vis-a-vis unsigned agencies (like WME and CAA) that continued to seek packaging fees. Young Decl. ¶21. That concern does not arise with affiliated production studios.

place, CAA retains an interest of over 20%. As a result, even with the "blind trust" in place, CAA retains an incentive to favor wiip. Reitzes Decl. ¶37. Indeed, doing so could increase the price CAA ultimately receives for the sale of its interest in wiip. *Id.*[18]

The Agencies also contend that the Guilds demonstrated their animus toward CAA and WME by taking the position that the franchise agreement's limitation on ownership of production studios extends to an agency's owners and investors, including the private equity funds that have majority interests in CAA and WME. CAA Mem. 15-17; WME Mem. 13. But again, this requirement applies in full to talent agencies that have already entered into franchise agreements. Further, the evidence supports the reasonableness of the Guilds' determination that such interrelated ownership structures compromise unconflicted decision-making. Academic research has demonstrated that companies with such interrelated ownership can favor one another instead of acting independently. *See, e.g.*, Reitzes Decl. ¶¶46-49. The Federal Trade Commission and Department of Justice have rejected the view that nominal distinctions in ownership between various funds managed by a single private equity firm obviate concerns that companies owned by those funds will alter their behavior to favor one another. *Id.* ¶¶41-45.

Ultimately, the Agencies' evidence of animus amounts to nothing more than dissatisfaction with the Guilds' negotiations positions—in particular, with the Guilds' refusal to simply accede to their unilateral demands. As the U.S. Supreme Court has admonished, however, courts must not second guess a union's "judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Hutcheson*, 312 U.S. at 232. Given the strong congressional policy of non-interference in such matters of union strategy, abundant evidence supporting the Guilds' positions, and lack of any actual evidence of illegitimate motives, this Court should not second-guess the Guilds' decisions about the pace of negotiations, negotiation strategies, or determination that

[18] This is in stark contrast to the examples of "blind trusts" cited by CAA (CAA Mem. 14), in which the trust beneficiaries are unaware of the particular trust assets.

WME and CAA are not entitled to special treatment simply because their existing ownership interests and structures create especially pervasive conflicts of interest.

2. The Guilds have not combined with non-labor parties.

a. Showrunners are labor parties.

This Court previously held that the Agencies had adequately *alleged* that the Guilds impermissibly combined with "non-labor" showrunners. Dkt. 73 at 10. But it is now clear that the Agencies have ***no actual evidence*** that any showrunner who combined with the Guilds is a non-labor party. In contrast to the unsubstantiated, conclusory Agency submissions (*see*, *e.g.*, Daubert Objection to Snyder Decl.), declarations by two highly qualified experts (Dr. Coleman Bazelon and Dr. Alisa Perren) and numerous well regarded showrunners (*see infra* at 22-23) demonstrate that showrunners ***are*** labor parties.

American Federation of Musicians v. Carroll, 391 U.S. 99, 113 (1968), established that whether artists like showrunners who perform some management functions qualify as labor parties for statutory labor exemption purposes depends on whether there is "job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the" artists. *Id*. at 105. In *Carroll*, such an inter-relationship existed between members of a musician's union and orchestra leaders (who both performed and ***supervised and employed*** other union members) because an orchestra leader who performs "displaces" another union member by securing the job for himself. *Id.* at 108-09. The evidence now makes clear that showrunners' relationship to non-showrunner writers is functionally indistinguishable from the relationship in *Carroll*, which precludes the Agencies from establishing that showrunners are non-labor parties.

Indeed, the Agencies' arguments are premised on a fundamental misrepresentation of the work performed by showrunners. Declaration of Alisa Perren ("Perren Decl.") ¶16. Most television programs are run by a "showrunner" responsible for the program's overall creative direction. *Id.*; Declaration of Coleman Bazelon ("Bazelon Decl.") ¶8; Slocum Decl. ¶10. Nearly all showrunners serve as both writers and producers on

programs they run, and so are sometimes referred to as "writer-producers" or "hyphenates" (for the hyphen in the term writer-producer). Slocum Decl. ¶8; Declaration of Christopher Keyser ("Keyser Decl.") ¶10; Declaration of David Shore ("Shore Decl.") ¶10. Although the Agencies and their purported expert Dr. Snyder purport to compare the time and importance that showrunners accord to writing and non-writing tasks—an analysis that is fundamentally flawed and should be disregarded, as explained *infra* at 25-30—they submitted ***no evidence whatsoever*** from actual showrunners about their day-to-day tasks. ***Actual showrunners overwhelmingly agree*** they spend the vast majority of their time writing and that writing is ***the*** skill above all others they bring to programs. Keyser Decl. ¶¶3-6; Shore Decl. ¶¶3-9; Declaration of Barbara Hall ("Hall Decl.") ¶¶3-8; Declaration of Alex Gansa ("Gansa Decl.") ¶¶3-7; Declaration of Michael Schur ("Schur Decl.") ¶¶3-10; *see also* Bazelon Decl. ¶¶27-29; Perren Decl. ¶¶15, 17.

Although the Guilds bear no burden to establish that showrunners are a labor party, evidence that all showrunners subject to the Code are writers necessarily establishes that "job or wage competition or some other economic inter-relationship" exists among showrunners and other Guild members. *Carroll*, 391 U.S. at 106. This is so because such showrunners, by engaging in writing, "displace[]" another writer-member of the Guilds, who could and would perform that writing and be compensated for it if the showrunner were not performing those writing services. *Id*. at 108. As explained in greater detail in the declarations filed herewith, this happens in several ways:

- Showrunners nearly always earn compensation for writing services. Indeed, ***99% of showrunners*** earn such compensation. Bazelon Decl. ¶31.[19]
- Showrunners are involved in all aspects of the writing process on their shows.

[19] For example, on *over 93%* of scripted television program seasons, showrunners earn "written by" credits. Bazelon Decl. ¶40. Those credits affect other writers' compensation; if showrunners do not earn them, other writers earn compensation for those services. *Id*. ¶38; *see also* Hall Decl. ¶4; Gansa Decl. ¶4; Keyser Decl. ¶4; Schur Decl. ¶4; Shore Decl. ¶5. In earning those credits showrunners thus ***displace*** other writers.

Perren Decl. ¶¶7, 16-18.[20]

- Many showrunners "run" one project before later working on a different project as a non-showrunner member of the writing team. Bazelon Decl. ¶¶33-34; Hall Decl. ¶10; Gansa Decl. ¶10; Keyser Decl. ¶13; Schur Decl. ¶¶19-20.[21]
- The compensation of showrunners and other high-level writers are connected, because beginner showrunners can command only a slight compensation premium over that of high-level non-showrunner writers and because the same Guild members often bounce back and forth between running a show and reporting to a showrunner on another program. Bazelon Decl. ¶48; Keyser Decl. ¶14.

Although a very small number of showrunners do no writing and thus are not *writer*-producers, neither the Guilds' MBA, the Code, nor Working Rule 23 applies to such showrunners, because those non-writing showrunners do not write and thus are not subject to the Guilds' jurisdiction on those projects; such non-writers are normally not members of the Guilds, whose membership is limited to working writers. *See* Slocum Decl. ¶¶15-16; Declaration of Geoff Betts ("Betts Decl.") ¶6.

The MBA applies to showrunners only to the extent that the showrunner is engaged in "writing" as defined in that agreement, *see id*. ¶¶4, 5, and the MBA explicitly

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[20] They create story arcs (i.e. the overall story), develop the stories for each individual episode, write from scratch scripts of individual episodes, assign other scripts to other writers to draft and then provide notes and other feedback, rewrite portions of scripts drafted by others on the writing team, and make adjustments to the script during filming. There is a certain amount of writing that must be done, and if showrunners did not do it, additional writers would need to be hired. Bazelon Decl. ¶43; Perren Decl. ¶7; Hall Decl. ¶¶3, 8; Gansa Decl. ¶¶3, 7; Keyser Decl. ¶3, 6; Schur Decl. ¶¶3, 10; Shore Decl. ¶¶3, 9. In this way too showrunners, by performing MBA-covered services, ***displace*** other writers. *See Carroll*, 391 U.S. at 108 (when orchestra leaders played, "the services of a sub-leader would not be required and the leader may … save the wages he would otherwise have to pay").

[21] For example, ***every single member*** of the writing staff on *Homeland*'s first season had previously worked as a showrunner. Bazelon Decl. ¶34; Hall Decl. ¶11; Gansa Decl. ¶11. When working as members of the writing staff, former showrunners ***displace*** other writers who could and would fill those positions had they not been filled by former showrunners. *Id*.; *see also Carroll*, 391 U.S. at 103 (orchestra leaders performed "at times as leader and other times as" players).

excludes "employment of Producers, Directors, Story Supervisors, Composers, Lyricists, or other persons employed in a bona fide non-writing capacity," Dkt. 43-2 at 21. The Code and Working Rule 23 in turn regulate showrunners' representation ***only when they perform writing work*** governed by the MBA. Dkt. 42-1 at 2 (Code application "limited to the Agent's representation of Writers with respect to the option and sale of literary material or the rendition of writing services in a field of work covered by a Guild CBA"); Dkt. 42-11 at 2 (while work as writer-producer is covered by Code and union working rule, "other producing" not covered); Slocum Decl. ¶15; Betts Decl. ¶8. The Code's application to showrunners is limited to representation on work for which the Guilds serve as the exclusive bargaining representative; non-writer showrunners are not covered.

Guild communications have been clear on this point. *See* Graham Decl. ¶¶28-29 & Exs. H, I; Betts Decl. ¶8. The form letter template that the Guilds set up for writers to terminate their relationships with non-franchised agencies made clear that Guild members were firing their agents ***only*** for "covered writing services." Graham Decl. Ex. G. The Rules of Implementation for the Code Campaign (which appeared on the Guilds' websites) stated that the Code applied only to "future WGA-covered work" and ***affirmatively informed*** members that they were not prohibited from consulting or communicating with a non-franchised agent regarding other matters, including … ***non-WGA-covered employment or services***." *Id*. Ex. H (emphasis added). Similarly, the FAQ regarding the Campaign on the Guilds' websites stated that the Code applied only to "future WGA-covered work," *id.*, and made clear that the "Guild cannot direct you to leave your agency for work that isn't covered by the WGA." *Id*. Ex. I. In individual communications with members, moreover, the Guild staff gave advice consistent with these official Guild statements, Graham Decl. ¶30; Betts Decl. ¶9, and the Agencies submitted no contrary evidence.[22]

[22] CAA asserts that the Guilds "ordered showrunners, even when they act as producers, to boycott CAA." Dkt. 153-3 ¶22 (Cohen Decl.). But here too CAA produces ***no evidence whatsoever*** to support this statement. Besides being unattributed hearsay,

Because Working Rule 23 applies to showrunners ***only*** for MBA work, ***the only*** showrunners who have arguably "combined" with the Guilds are those engaged in writing.

The Agencies' contrary arguments are wrong on both the law and the facts. The Agencies and their professed expert fundamentally misunderstand the inquiry by arguing that showrunners are non-labor parties because "ordinary writers ... lack a showrunner's role in the production process." CAA Mem. 19; *see also* WME Mem. 17-18. This gets matters precisely backward. The test is *not* whether non-manager union members perform all the duties of the artists-managers (nor would such a rule make sense, because what defines hyphenate artists-managers like showrunners and the *Carroll* orchestra leaders is that they engage in ***additional*** duties beyond the artistic duties they share with other union members). Instead, artists-managers are labor parties if they perform ***some*** duties that ***non-manager members*** of the union also perform. Thus, in *Carroll*, orchestra leaders were labor parties because they shared the role of ***non-manager musicians*** in concerts, even if they took on ***additional*** duties beyond those of other union members. 391 U.S. at 108; *see also Home Box Office, Inc. v. Directors Guild of Am.*, 531 F.Supp. 578, 600 (S.D.N.Y. 1982) ("All producer-directors, by definition, perform all the functions generally performed by directors …. in direct competition with other Guild members for Guild-category jobs. Any directing job performed by a producer-director is one that a Guild director who is not also a producer might otherwise perform.").

Accordingly, as Dr. Bazelon explains, Snyder's analysis fundamentally errs by answering the wrong question. Bazelon Decl. ¶¶44-52. It is irrelevant for statutory exemption purposes that non-showrunner members do not perform all the same management tasks that showrunners perform. Indeed, *Carroll* forecloses the argument

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the very next sentence ("a number of showrunners have reported to CAA that the WGA told them they had to stop working with their agents or they would be penalized") does not support the assertion that the Guilds ordered showrunners to terminate relationships with CAA for work solely as producers. In fact, [redacted]

that showrunners are non-labor parties because they perform some managerial work ordinary union members do not. The ***dissent*** in *Carroll* criticized the majority for holding "that because respondents' work includes some 'labor group' tasks, all aspects of respondents' activities are proper subjects of union concern." 391 U.S. at 115 (White, J., dissenting). The *Carroll* majority rejected that argument.

In addition to answering the wrong question, Snyder admits to a complete lack of understanding of the industry (which he apparently did nothing to rectify when preparing his report). His qualifications and experience reveal *no* familiarity with the television industry (*see* Dkt. 153-11 ¶¶1-8), and he admits that his opinions are based upon "interviews with WME [and CAA] senior executives," and certain contracts the Agencies provided to him. *Id*. ¶17. That is, Dr. Snyder spoke to ***no showrunners***, ***no writers***, and ***no production studios***. Instead, he spoke to his clients. Dr. Snyder's key conclusion that showrunners, rather than spending time writing, "manag[e] the hiring, firing, and day-to-day work" of hundreds of people is based on something ***WME and CAA simply told him***. *See id*. ¶¶32-33 ("According to senior executives at CAA and WME ... "). Because he does not grasp the basic facts of what showrunners do, Dr. Snyder's conclusions are wholly without merit.[23] *See generally* Daubert Objection to Snyder Declaration.

Snyder also focuses on asserted differences between showrunner compensation and other writers'. Dkt. 153-11 ¶¶40-50. That is inaccurate (*see supra* at 23) and irrelevant. Nothing in *Carroll* suggests the "economic inter-relationship" that renders artists-managers labor parties turns on whether their compensation is structured like non-manager union members'. What matters is that showrunners earn writing compensation *at all*, which necessarily displaces another Guild member. *Id*. at 108; Bazelon Decl. ¶¶9,

[23] For example, Snyder asserts that the distinction *in general* between showrunners and other writers is illustrated by the list of showrunners whom WME asserts perform no writing or are predominately producers. Dkt. 153-11 ¶54. Even if WME's assertions about the showrunners on that list were accurate (*but see infra* at 28-30), Snyder fails to acknowledge that the mere *32* showrunners at issue (20 of whom WME *admits* write) represent an exceedingly small percentage of the people running the hundreds of television programs in production at any given time. Bazelon Decl. ¶31.

35-43.[24]

Because the only showrunners to whom Working Rule 23 applies are writers who have an economic inter-relationship with other Guild member-writers, the Agencies cannot establish that any showrunner who has combined with the Guilds is a non-labor party. Every showrunner who does some writing on a project is in competition with other Guild members over that writing work, so the only showrunners who could possibly be non-labor parties are those who do no writing at all on a project, and they are not subject to Working Rule 23 for that project. *See* Slocum Decl. ¶¶15-16; Betts Decl. ¶6.

This understanding of the labor exemption as applied to showrunners is consistent with this Court's holding that the Agencies' "***pleadings*** raise a plausible inference that showrunners acting in solely producer capacities do not displace writers." Dkt. 73 at 10 (emphasis added). While the Agencies may have alleged a combination with non-writing showrunners, they submit ***no actual evidence*** that any showrunner terminated an agent for work solely as a producer to comply with Working Rule 23. To make such a showing for any showrunner, the Agencies would need to establish that the showrunner both (1) terminated their ***non-writing*** relationship with WME or CAA and (2) did so ***because Working Rule 23 required it***. That is, evidence of a non-writing showrunner would not be enough without proof that the showrunner ***combined*** with the Guilds—that the showrunner terminated their agency relationship because they were *obligated* to do so (rather than for ideological, solidarity, or other reasons). *See H.A. Artists & Assocs., Inc. v. Actors Equity Ass'n*, 622 F.2d 647, 649-50 (2d Cir. 1980), *aff'd*, 451 U.S. 704 (1981) (no combination with non-labor party for statutory exemption purposes unless non-labor

[24] Showrunners are in fact valued and compensated *because of* their writing abilities. Bazelon Decl. ¶¶31-32; Hall Decl. ¶6; Keyser Decl. ¶7; Schur Decl. ¶¶8-9; Shore Decl. ¶3; Slocum Decl. ¶¶10-11. Production studios often structure showrunner payments as predominantly for "producing" work, but that says nothing about showrunners' actual work; it is driven by studios' authority to minimize payments for services covered by the MBA, which trigger mandatory studio contributions to the Guilds' health and pension plans. Bazelon Decl. ¶¶17; Schur Decl. ¶9; Slocum Decl. ¶9.

party was "bound" to agreement with union).[25]

The Agencies provide ***no evidence at all*** that such a showrunner exists. Dr. Snyder asserts that WME identified twelve showrunners who combined with the Guilds and have performed no writing services since 2017, Dkt. 153-11 ¶54, but the evidence demonstrates that ***every single one of these twelve*** either has performed writing services since 2017 (including, in many cases, on the very programs WME identifies) or used the Guilds' form letter to terminate their agent relationship ***only for writing services***. In many cases, moreover, both of these conditions (each of which is sufficient to rule a showrunner out as a combining non-labor party) is true. *See* Pitts Decl. ¶32. Accordingly, ***all twelve*** are ruled out as possible non-labor parties whose combination with the Guilds would fall outside the statutory exemption:

- WME provides ***no*** evidence that any of these individuals terminated their WME relationship for anything other than representation for writing services.[26]
- [redacted]
- WME submits no ***evidence*** to support its assertion, in an interrogatory response, that these Guild members performed no writing services. Indeed, WME admits

[25] Although the focus of the *H.A. Artists* Supreme Court decision was whether the actors' union unlawfully combined with actors' agents, the Second Circuit decision also addressed another alleged combination between the actors union and theater producers. It concluded that there was no such combination because the producers were under no "obligations" to avoid using non-franchised agents. 622 F.2d at 649-50. Because there was never any actual agreement between the union and theater producers, any actions by producers were "unilateral expressions," not combination. *Id*. The Supreme Court affirmed this as "amply supported by the record." 451 U.S. at 717.

[26] [redacted] There is no evidence in the record suggesting that the other [redacted] individuals terminated their relationships with WME for anything other than covered writing services.

that it has "***not conferred with any of these individuals***" about their work. Pitts Decl. Ex. S at 13 (emphasis added). WME's lack of familiarity with these writers' work is evident.[27]

Accordingly, there is no evidence establishing that ***even a single one*** of these Guild members terminated their relationship with WME ***for non-writing services*** in order

[27] [redacted] As explained, production studios make pension and health contribution based only on compensation for writing services, so these payments establish [redacted] Slocum Decl. ¶9; Stutzman Decl. ¶¶4-5. [redacted]

In fact, [redacted] For example:

[redacted]

Moreover, nearly every Guild member listed on WME's list [redacted] There can be no question that these members are bona fide Guild members who perform writing services.

to comply with Working Rule 23. Absent such evidence, the contention that these individuals are non-labor parties is baseless conjecture.

Dr. Snyder also relies on the bald assertion in WME's interrogatory response that another 20 Guild members who terminated their agents function "primarily" as producers. *See* Dkt. 153-11 ¶54; Pitts Decl., Ex. S at 14-15. This group, as well as those identified by CAA (Dkt. 153-3 ¶22), is irrelevant. The concession that these members provide ***some*** writing services suffices to establish that they are labor parties, because their performance of writing duties conclusively proves that they are in job competition with other Guild members (who also write). *See supra* at 21-23, 25. Regardless, here too there is no evidence that a single one has combined unlawfully with the Guilds. [redacted] and no record evidence suggests that the other [redacted] did anything different. Moreover, [redacted] The record evidence thus shows that these members, who are ***undisputedly*** writers, terminated the Agencies' representation for writing services—making them labor parties under *Carroll*.

b. Managers are labor parties, and the Guilds have not combined with them.

The Agencies' contention that the Guilds have improperly combined with managers is also without merit. CAA Mem. 19-20; WME Mem. 18-20. As a threshold matter, the Guilds' limited delegation of authority to manager representatives does not constitute a combination between the Guilds and managers. A combination requires concerted action around a common scheme, but the Agencies allege only that the Guilds unilaterally made promises to protect and indemnify managers who provide talent representational services and set up a service to facilitate managers' procurement of

employment for Guild members.[28] CAA Mem. 20; WME Mem. 18-19. *See E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1397 (9th Cir. 1989) (essence of Section 1 violation is ***agreement*** to unreasonably restrain trade). Unilateral Guild action cannot violate Section 1. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

Moreover, even if this limited delegation of authority were a combination, it would not unreasonably restrain competition.[29] The Agencies do not allege any behavior that might make the delegation of representational authority to managers anticompetitive. (They do not allege, for example, that managers and the Guilds entered any agreement to discriminate against the Agencies, or that their entrance into the market for talent representational services prevents the Agencies from signing onto the Code and reentering the market themselves.) If anything, managers' participation ***promotes*** competition in the market for representational services. *See H.A. Artists*, 451 U.S. at 715-16 (explaining that union "forfeits" statutory exemption where it "combines with one or more employers *in an effort to restrain trade*" (quotations omitted; emphasis added)).

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[28] The Agencies misunderstand the Guilds' discovery responses. *See* WME Mem. 20 n.10. The Guilds have neither paid nor indemnified any managers. *See* Graham Decl. ¶33. The communications with managers the Guilds acknowledged in discovery (*see* Kessler Decl. Ex. 12 & Ex. B) were mass communications and responses to a few managers' questions explaining the Guilds' unilateral actions—nothing that could support a finding of concerted action. Graham Decl. ¶32.

[29] That fact distinguishes this case from decisions holding that unions forfeited the labor exemption by combining with non-labor groups, which, unlike here, all involved combination that ***restrained the relevant market***. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 619-20, 623 (1975) ("In this case Local 100 used *direct restraints on the business market* to support its organizing campaign"; union agreement prohibited contractor from doing business with any subcontractor that lacked agreement with defendant union) (emphasis added); *United Mine Workers of Am. V. Pennington*, 381 U.S. 657, 659-60, 664-66 (1965) (union agreed with large coal operators on measures to exclude smaller companies and reduce production); *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 799-800 (1945) (agreements barred manufacturers and contractors from dealing with non-signator manufacturers and contractors, driving them out of market and increasing prices); *cf. Jacksonville Bulk Terminals*, 457 U.S. at 714 (stating that statutory exemption does not apply where labor organizations "enter into illegal combinations with nonlabor groups *in restraint of trade*" (emphasis added)).

Even assuming the Guilds' delegation of representational authority to managers ***were*** a combination, the managers are not a non-labor group. In *H.A. Artists*, the Court considered whether certain agents were non-labor parties. 451 U.S. at 717. The Court held that the statutory exemption applied because agents who negotiate employment contracts for union members "perform a *function*—the representation of union members in the sale of their labor—that in most nonentertainment industries is performed exclusively by unions." *Id.* at 721 (emphasis added). This holding straightforwardly applies to managers who represent Guild members. As the Agencies admit, the Guilds' limited delegation of authority to managers "was so that [managers] could stand in the shoes of unfranchised agents subject to the boycott," WME Mem. 19—a role that is by definition that of a labor party. *See H.A. Artists*, 451 U.S. at 721.

The Agencies try to distinguish *H.A. Artists* by arguing that managers are not formally franchised by the Guilds or authorized by state law to procure employment for Guild members. CAA Mem. 19-20; WME Mem. 18, 20. But *H.A. Artists* holds that an agent's *function* as a delegated representative of union members in the sale of their labor makes that agent a labor party; whether such agents are formally franchised or authorized to represent union members under state law is irrelevant to this functional test.[30] 451 U.S. at 721; *see also Collins*, 850 F.Supp. at 1478 (players' agents are "clearly" labor parties "[b]ecause they represent persons in the negotiation of terms of employment").

In a similar vein, the Agencies urge that the Guilds' delegation of representational authority to managers represents a "non-traditional" labor tactic triggering heightened scrutiny of the Guilds' purpose because unlicensed manager representation of writers

[30] In any event, because the Guilds' delegation of bargaining authority to managers falls squarely within the rights accorded employees and unions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151 *et seq.*, the Guilds' decision to delegate authority to managers supersedes any state law with which the delegation might be in conflict, including the Talent Agencies Act ("TAA"), Cal. Lab. Code §1700.5. *See San Diego Bldg. & Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (state law regulating activities that are actually or arguably protected under NLRA §7 are presumptively preempted by federal labor law).

violates California and New York law. CAA Mem. 20; WME Mem. 18-19. But no such heightened scrutiny is warranted, for lawfulness is irrelevant to the statutory labor exemption's applicability. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 508-09 (1940) (unions' "admittedly illegal and outrageous acts" do not forfeit labor exemption); *ILWU v. ICTSI Or., Inc.*, 863 F.3d 1178, 1192 (9th Cir. 2017) (same, re: illegal agreements).

c. The Guilds' supposedly "non-traditional tactics" do not disqualify the Guilds from the statutory labor exemption.

(i) Use of "non-traditional" tactics is irrelevant when done in pursuit of legitimate union objectives.

The Agencies contend that when a union "uses non-traditional tactics to achieve even legitimate union goals" it must "prove that those non-traditional means were not only lawful, but necessary …." WME Mem. 14 (citing *USS-POSCO Industries v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 809 (9th Cir. 1994); *H.A. Artists*, 451 U.S. at 722; *Carroll*, 391 U.S. at 110, 112); *see also* CAA Mem. 11-12. This misstates the relevant standard and misreads the cited authorities.

Courts have been clear that unlawful (even violent) tactics may fall within the statutory labor exemption. *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541 (9th Cir. 1974), specifically explained that "wrongful conduct under state law" does not "pierce labor's exemption under the Sherman Act," because "violations of local law should remain the concern of each state" rather than of federal antitrust laws. *Id.* at 557-59 & nn.48-50. And it noted that a contrary conclusion would be "at odds with" the Supreme Court's holding that "admittedly illegal and outrageous acts" (including "a lawless invasion of petitioner's plant and destruction of its property by force and violence," as well as "acts of violence" against plant employees) were immunized from antitrust liability. *Id.* at 559 (citing *Apex Hosiery*, 310 U.S. at 482, 508-09); *see also ICTSI Or.*, 863 F.3d at 1192.

Contrary to the Agencies' view that it requires unions to show that all "non-traditional" tactics are "necessary," *USS-POSCO* explained that whether a union's tactics are traditional may be a useful guide in evaluating whether its objectives are legitimate.

31 F.3d at 808 ("the *means* employed by the union bear on the degree of scrutiny we will cast on the legitimacy of the union's interest") (emphasis in original). While "activities normally associated with labor disputes" are presumed to be in pursuit of a union's legitimate interests, "[w]here the union's activities are further afield, the scrutiny is more searching." *Id.* at 808-09 (internal citations omitted). In explaining this principle, *USS-POSCO* relied on *H.A. Artists*, which held that a union's collection of franchise fees from agents was for revenue-generating purposes rather than for a *legitimate* union objective. 31 F.3d at 809. As other examples of illegitimate union interests, the court listed commercial profits, illegal activities unrelated to the union's mission (such as drug dealing), and forcing an employer to hire a union official's relative. *Id.* at 808.

Here, there is no evidence that the Guilds are pursuing illegitimate objectives akin to profiteering or criminal activity. Rather, the evidence shows that the Guilds' campaign seeks to protect members against serious representational conflicts of interest. *See supra* at 17-21. Thus, there is no need to inquire whether the "non-traditional" nature of certain tactics might shed light on the Guilds' true objective.

(ii) The Guilds' tactics were "traditional."

Even if this were not the case, the Guilds' tactics were not "non-traditional." The Agencies apparently concede that the Guilds' adoption and enforcement of conflict-of-interest regulations were "traditional" union tactics. Nor could they argue otherwise, given the long, judicially recognized tradition of such regulations by unions in the sports and entertainment industries. *See*, *e.g.*, *H.A. Artists*, 451 U.S. at 707-09 (stage actors' union agent franchising rules adopted in 1928 and enforced through "union discipline"); *cf. Carroll*, 391 U.S. at 103 n.5 (challengers to musicians' union's rules "expelled from membership"); Epstein Decl. ¶¶5-9, Exs. A-E (identifying longstanding analogous conflict-of-interest regulations by professional athletes' unions). CAA suggests that it cannot be "traditional" for the Guilds to refuse to "accept[] CAA's offer to sign [the] same agreement" reached by ICM and UTA, CAA Mem. 12, but that suggestion grossly misrepresents the relevant facts: CAA and WME insist on ***different material terms***.

The Agencies also both focus on the Guilds' delegation of representational authority to and promise to indemnify managers—a communication that the Guilds issued ***to protect members' ability to obtain work***, after the Agencies threatened managers and lawyers in order to block writers who were participating in the Guilds' membership action from obtaining any work in the industry at all. Graham Decl. ¶32.[31] WME asserts without explanation that "to call the Guilds' indemnification offer to managers 'non-traditional' would be charitable." WME Mem. 18. But a union's authority over which entities may exercise the union's delegated representational authority is a fundamental and traditional union power protected by federal labor law. *See supra* at 32 n.30, 34, 38. CAA asserts that the Guilds' communication with managers cannot be deemed "traditional" because it "encourag[ed] … lawbreaking" in that managers who obtained work for writers would exceed their authority under state law. CAA Mem. 20. But as previously noted, whether conduct is prohibited by state or local law is irrelevant to availability of the labor exemption. More fundamentally, the Agencies' argument fails because, as CAA admits, the question is not whether a defendant has engaged in *any* "non-traditional" conduct, but whether "***the challenged restraint***" on trade is "non-traditional." CAA Mem. 12 (emphasis added). The only alleged restraint on trade at issue is the Guilds' Code adoption and enforcement of Working Rule 23—conduct entirely traditional.

(iii) The Guilds' public statements regarding Endeavor's proposed IPO imposed no restraints on trade and involved First Amendment-protected speech.

WME contends that the Guild forfeited the statutory labor exemption by engaging in the allegedly "non-traditional" union behavior of issuing "public statements" alerting potential investors in WME's parent company Endeavor of investment risks and suggesting that members use social media to raise awareness of those risks. WME Mem.

[31] WME's assertion that the Guilds "enter[ed] into indemnification *agreements* with managers," WME Mem. 19:27 & 20 n.10 (emphasis added), lacks any support and is demonstrably false, *see* Graham Decl. ¶¶32-33; Exs. J, K.

14-16. But as with the managers argument, WME's argument fails because its antitrust claim does not arise from the Guilds' communications to potential Endeavor investors.

None of WME's cases support its argument that the Guilds' public statements provide a basis for liability. In each, the "non-traditional" conduct was an integral part of the restraint on trade at issue. In *USS-POSCO*, 31 F.3d at 804, and *Icon at Panorama, LLC v. Sw. Reg'l Council of Carpenters*, 2019 WL 7205899, *1 (C.D. Cal. Aug. 7, 2019), for example, the legal challenges at issue directly interfered with the plaintiff's ability to operate within the relevant market.[32] The Guilds' statements about Endeavor's IPO, by contrast, did not interfere with WME's ability to represent Guild members—the only market at issue with respect to WME's group boycott claim—which arose solely from the Guilds' adoption of the Code. Similarly, *H.A. Artists*, 451 U.S. at 710, and *Carroll*, 391 U.S. at 103-04, considered membership or franchising conditions imposed by unions. Neither suggests that conduct unrelated to the restraint on trade a plaintiff is challenging (here, the Guilds' adoption of the Code and enforcement of Working Rule 23) can remove the protection of the statutory exemption.

In any event, courts have long recognized that expressions of public opinion like those made by the Guilds regarding the Endeavor IPO involve First Amendment-protected speech, and that federal law must be construed to avoid imposing liability on the basis of such speech whenever possible.

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), for example, to avoid "a substantial issue of validity under the First Amendment," the Supreme Court construed the NLRA's "secondary boycott" provision narrowly so that it did not apply to a union's truthful and

[32] WME also fails to acknowledge the high bar facing plaintiffs who premise antitrust claims on government petitioning. As *USS-POSCO* explained, for example, litigation can provide a basis for federal antitrust liability only if it is both objectively baseless and intended to interfere directly with a competitor's business. 31 F.3d at 810. Notably, WME does not challenge the truthfulness of any Guild statements about the Endeavor IPO, and has never pursued any state law remedies for any representations therein.

peaceful request that consumers boycott a particular mall. *Id.* at 570, 575-76, 578. And on facts even closer to those presented here, in *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848 (10th Cir. 1999), the court refused to construe the Sherman Act to permit a claim premised on public statements about risks posed by investing with a plaintiff, explaining that "the First Amendment does not allow antitrust claims to be predicated solely on protected speech." *Id.* at 850, 858-860.

WME seeks to impose federal antitrust liability on the Guilds based on First Amendment-protected speech publicizing a dispute with WME (as in *DeBartolo*) and regarding the risks of investing in Endeavor (as in *Jefferson County School District*). This Court should not read federal antitrust law to apply to constitutionally protected statements that had neither the purpose nor effect of enabling an unlawful combination.

B. The Non-Statutory Exemption Otherwise Applies.

As with the statutory labor exemption, notwithstanding the Agencies' ***allegations***, *see* Dkt. 73 at 11-13, the preliminary injunction ***evidence*** provides ***no*** support for the Agencies' contention that the non-statutory exemption is inapplicable.

The non-statutory exemption allows unions to combine with non-labor groups to pursue "their own interests respecting conditions of employment." *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 682 (1965) (plurality op.). The standard governing any application of the non-statutory exemption to the Guilds is set forth in *California ex. rel Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (en banc), which employed a flexible "totality of [the] circumstances" approach, under which issues like whether the agreement's subject matter is "an accepted practice in labor negotiation," the agreement's "relat[ionship] to any core subject matter of bargaining," and whether it "primarily affect[s] the labor market" are different factors to consider. *Id.* at 1129-31.[33]

[33] The Agencies cite *ICTSI Or.*, 863 F.3d at 1190 and *Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n*, 81 F.3d 858 (9th Cir. 1996). CAA Mem. 20-22; WME Mem. 20, 22. But that test applies only to combinations arising from a collective bargaining agreement

Here, the ***evidence*** before the Court establishes that the non-statutory factors all tip in the Guilds' favor. Talent agent regulations like the Code are "an accepted practice in labor negotiation," and agent conflicts of the sort the Guilds seek to eradicate here are "extensively regulated" in similar contexts. *Harris*, 651 F.3d at 1129. There is a long, judicially recognized tradition of agent regulation by unions in sports and entertainment industries, going back almost a century. *See*, *e.g.*, *H.A. Artists*, 451 U.S. at 707-09 (agent franchising rules adopted by stage actors' union in 1928 enforced "on pain of union discipline"). Indeed, *all* professional sports unions (those representing players in NBA, WNBA, MLB, NHL, and NFL) have agent regulations that contain prohibitions on agent conflicts of interest analogous to those here. *See* Epstein Decl. ¶¶5-9, Exs. A-E.[34]

In ruling on the motion to dismiss, this Court held that because the Guilds had previously tolerated packaging fees, the Code's prohibition of them was not a permissible practice. Dkt. 73 at 12. While banning packaging fees may have been hotly contested at the motion to dismiss stage, both WME and CAA now assert that they have ***agreed*** to cease collecting such fees. *See* CAA Mem. 1; WME Mem. 1. Every other talent agency in the industry has as well. *See supra* at 7-8. Having agreed to such a restriction, the

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with an *employer*, not to combinations of the type asserted here (involving showrunners and managers, both of whom are on the *employees'* side of any bargaining). *See ICTSI Or.*, 863 F.3d at 1183, 1190; *Phoenix Electric*, 81 F.3d at 859, 861. *Harris* considered an agreement wholly among individuals on one side of the collective bargaining relationship (grocery store employers), 651 F.3d at 1122, and rightly did not apply the test applied in *ICTSI Or.* and *Phoenix Electric* because it would have made no sense to apply a test tailored to collective bargaining to an agreement that was not the product of such bargaining. Indeed, CAA all-but concedes that the *ICTSI Or.* test does not apply by omitting from its statement of the test one of the three factors (which just happens to be the factor that is impossible to apply here). *Compare* 863 F.3d at 1190 (exemption requires that agreement "primarily affects the parties to the agreement"; "concerns wages, hours, or conditions of employment"; and "*is produced from bona fide, arm's-length collective bargaining*") (emphasis added), *with* CAA Mem. 20-21 (omitting third element). WME misleadingly suggests that this Court applied *Phoenix Electric* in ruling on the motion to dismiss, WME Mem. 20, but in fact this Court did not decide the issue.

[34] For example, MLBPA's rule prevents agents from "[a]cquiring, holding or seeking to acquire or hold, either directly or indirectly, any ownership or financial interest in any Major League, Minor League or other professional baseball club or in any related business, firm or venture." *See id.* ¶8.c, Ex. D; *see also*, *e.g.*, *id.* ¶9, Ex. E (NHLPA).

Agencies cannot argue that it is beyond the pale. Moreover, nothing in *Harris* indicates that the inquiry for this factor is limited to the ***parties'*** prior practices. To the contrary, *Harris* evaluated prior "regulatory or judicial decisions" (i.e. labor law ***in general***) to decide whether a specific practice was accepted in labor law. 651 F.3d at 1129. Here, the long history of similar conflict of interest regulations in similar industries (and judicial approval thereof) conclusively establishes this factor.

The Code also "relate[s] to [a] core subject matter of bargaining," *Harris*, 651 F.3d at 1130, as courts have long recognized that agent regulations are "intimately bound up with the subject of wages," *Carroll*, 391 U.S. at 113; *see also H.A. Artists*, 451 U.S. at 719-20 (preventing talent agent "conflicts of interest" was legitimate union interest). Agents negotiate writers' compensation, and the Guilds' studies indicated that agents' conflicts depressed writers' compensation. *See* Young Decl. ¶6. Writers' above-scale compensation has *declined* over the last few decades, *id*., and there is ample evidence that agents operating under a financial conflict lack the incentive to negotiate higher pay for their clients. *See* Pitts Decl. ¶¶13-16 & Exs. A-D. The Guilds' determination that raising members' pay required aligning agents' incentives with writers' was entirely reasonable.

Even if *Phoenix Electric* applied, the Agencies would not establish the non-statutory exemption's inapplicability. The Agencies rely on this Court's conclusion that they had sufficiently *alleged* that the Code restricted actors and directors from benefitting from packaging. *See* CAA Mem. 21; WME Mem. 21 (citing Dkt. 73 at 12). Now the Agencies must produce ***evidence***, however, and neither Agency identifies *a* ***single*** client who suffered such harm nor provides evidence that this resulted from the Guild's actions. CAA relies solely on a CAA agent's conclusory assertion that there is "no doubt in [his] mind" that such opportunities were lost, CAA Mem. 21; Cohen Decl. ¶23, while WME simply cites the Court's motion to dismiss order and the pleadings, WME Mem. 21. That is not ***evidence*** of lost opportunities resulting from the Guilds' acts.[35] In fact, the ***actual***

[35] In any case, CAA's unsupported assertion makes no sense. CAA asserts that actors

evidence before the Court demonstrates that the Code has not reduced market opportunities for Hollywood professionals. *See* Slocum Decl. ¶17.[36]

The Agencies next argue that other parties are affected because the Guilds have raised concerns about investments by other funds managed by TPG and Silver Lake. CAA Mem. 21; WME Mem. 21. But neither party provides any ***evidence*** of ***actual*** effects on the Agencies' investors. That is not surprising, since the Guilds made ***no*** demands but instead sought to discuss that issue as part of the negotiations with WME and CAA over a franchise agreement. Young Decl. ¶¶35, 37. Regardless, the Guilds' concerns about the Agencies' investors ***directly*** affect the parties to the present dispute. The Guilds seek only to ensure that regulations in any franchise agreement with WME or CAA not be rendered illusory by their owners' conflicts. *Id.* ¶35. The ***U.S. government*** agrees companies owned by interrelated private equity funds can coordinate conduct, which could provide an end run around the Code. *See* Reitzes Decl. ¶41-45.

Finally, CAA asserts the Guilds' actions are unprotected because they reflect a desire to harm CAA "***despite*** CAA's acquiescence to the Guilds' Franchise Agreement." CAA Mem. 21-22 (emphasis in original). But CAA has ***not*** agreed to the franchise

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and directors who are CAA clients have lost opportunities because CAA does not represent Guild members for the sale of their writing work. *See* Dkt. 153-3 ¶23. CAA does not explain why the Guilds' actions prevent CAA from "connecting" the actors and directors it currently represents, *id*., with a writer it does not currently represent. Hollywood professionals need not work only with talent also represented by their agency.

Likewise, WME illogically argues that the Code's packaging fee restrictions (which WME asserts it has agreed to) unfairly restrict actors and directors from being packaged. *See* WME Mem. 21. The Code bars packaging *fees*, not being packaged, however, and WME produces no ***evidence*** that precluding agents from collecting packaging fees prevents them from connecting writer-clients with other talent.

[36] For the same reason, WME fails to establish that the Code has reduced the amount of content created overall. WME Mem. 21. Although the Agencies have alleged as much (Dkt. 73 at 12), WME submits no ***evidence*** of any reduction in content. Instead, it relies solely upon one statement in a Guild mass email and another from WME's in-house counsel describing negotiations with the Guilds (neither of which even ***mentions*** the amount of content being created). *See* Dkt. 158-2 at ¶26 & Ex. 7. In fact, the uncontroverted evidence before the Court demonstrates that the campaign has led to no reduction in filmed entertainment output. Slocum Decl. ¶17.

agreement signed by CAA's competitors. *See supra* at 9-11.[37]

C. The Agencies Do Not Prove the Merits of Their Antitrust Claim.

Even if the labor exemptions did not apply, the Agencies' cannot demonstrate likely success (or even serious questions) on the merits of the underlying antitrust claim.

1. The Agencies make no showing that the alleged boycott includes competitors of the Agencies.

The Agencies have not stated *per se* claims, which would *presume* the illegality of the challenged conduct. CAA Mem. 22:20-23; WME Mem. 10:12-15.[38] While federal courts routinely *presume* the illegality of competitors' price fixing agreements, courts treat group boycott claims differently, restricting *per se* treatment to claims that a boycott has disadvantaged a competitor of the alleged boycotters. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986) ("[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.").[39]

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[37] The lack of evidence that WME or CAA is being disadvantaged vis-à-vis its competitors is an independent basis why its non-statutory exemption argument fails. *See Bodine Produce*, 494 F.2d at 561 (exemption applied because union had not "offered less advantageous terms to the plaintiffs than to their competitors").

[38] The Agencies incorrectly assert that this Court has already determined that the Agencies' claims should be evaluated under the *per se* rule. WME Mem. 9:8-10. But the Agencies pled their group boycott claim alternatively under the *per se* rule (Dkt. 42 ¶¶171-178) and rule of reason (*id.* ¶¶179-190), and in opposing the Guilds' motion to dismiss argued that the question whether their claims should be evaluated under the *per se* rule or rule of reason was not ripe. Dkt. 96 (12/6/2019 Tr.) at 23:5-12. Rather than resolving that issue, this Court held only that "proof of a dominant market position is indicative of a per se illegal group boycott" and that such proof "is [not] a necessary element of pleading a Section 1 Sherman Act claim." Dkt. 73 at 15. The Agencies have abandoned their rule of reason claim on this motion.

[39] *See also Paladin Assoc. Inc. v. Montana Power Co.*, 328 F.3d 1145, 1154-55 (9th Cir. 2003) ("The Supreme Court generally has treated as per se illegal joint efforts by firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle."); *Adaptive Power Solutions LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 950 (9th Cir. 1998) (because alleged boycott "did not disadvantage a competitor," it "does not fit the per se category");

No such claim is presented here. *First*, it is self-evident that neither the Guilds nor their members, including showrunners, compete with WME and CAA. *Second*, assuming *arguendo* that managers compete with agents, the Agencies allege only that the Guilds offered to "shield" and "indemnify" managers, CAA Mem. 20; WME Mem. 18-19, not that the Guilds *agreed* with any *manager* to boycott or otherwise not to deal with CAA or WME, the *sine qua non* of a group boycott allegation. *Compare Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959) (agreement not to deal with defendants' competitor stated Section 1 claim), *with Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (invitations to collude do not violate Section 1).

In short, the Agencies' claim does *not* present a "paradigmatic boycott" subject to the *per se* rule, because there is no evidence of a "collective action among a group of competitors that may inhibit the competitive vitality of rivals." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135-36 (1998) (quoting P. Areeda & L. Kaplow, Antitrust Analysis: Problems, Text and Cases 333 (5th ed. 1997)). For this reason, one court has already held that a union's decision not to franchise an agent does not establish a *per se* unlawful group boycott. *See Collins*, 850 F. Supp. at 1475 (holding that because "because a group boycott is a concerted refusal by traders to deal with other traders," agent did not state group boycott claim because "[h]e is neither a competitor nor an employer").[40]

2. The Agencies make no showing under the Ninth Circuit test.

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cf. NW Wholesale Stationers Inc. v. Pac Stat. & Printing Co., 472 U.S. 284, 294 (1985) (noting that "there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine").

[40] None of the Agencies' citations support application of the *per se* standard to their group boycott claim. *See Klor's*, 359 U.S. at 212 (***inapposite***; applied *per se* rule because defendant store coerced several manufacturers not to deal with competing store); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542 (1978) (***irrelevant***; "issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable"); *PowerTV Media, LLC v. Street Racing DigNight LLC*, 2017 WL 5665013, *8 (C.D. Cal. Mar 10, 2017) (***inapposite and irrelevant***; observing that per se group boycott claim requires proof of agreement by one of victim's competitors and deferring determination as to the proper standard); *see also Paladin Assoc.*, 328 F.3d at 1155-56 (although alleged conspirators were competitors, *per se* rule did not apply and challenged restraint was not unreasonable).

To comply with the Supreme Court's mandate not to expand the limited category of *per* se illegal group boycotts "indiscriminately," the Ninth Circuit developed a three-factor test "to help guard against the over-application of per se group boycotts." *Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 2016 WL 3880989, *8 (N.D. Cal. July 18, 2016) (citing *Adaptive Power Solutions*, 141 F.3d at 950). These three factors are: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete, (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." *Id. (*citing *Adaptive Power Solutions*, 141 F.3d at 950). The Agencies present no evidence establishing *any* of these necessary elements. The evidence shows that the Guilds prevail on all three.

First, the Agencies present no evidence that the Guilds cut off the Agencies' access to a supply, facility, or market necessary to compete. The Agencies represent a broad range of talent.[41] The Guilds' actions do not prevent CAA or WME from representing actors, directors, athletes, models, musicians or other non-writer artists, and the Agencies each continue to represent several thousand clients each.[42] In fact, the Agencies have said the Guilds' actions had little effect on their business, and that the primary cause of their recent financial struggles (which undoubtedly provoked these motions) was COVID-19, not the Guilds.[43]

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[41] Form S-1 at 85, Endeavor Group Holdings, Inc. (May 23, 2019), available at https://www.sec.gov/Archives/edgar/data/1766363/000119312519155034/d681105ds1.htm; Snyder Decl. ¶10.

[42] Creative Artists Agency, *About Us*, https://www.caa.com/about-us; Form S-1 at 2, Endeavor Group Holdings, Inc. (May 23, 2019), available at https://www.sec.gov/Archives/edgar/data/1766363/000119312519155034/d681105ds1.htm.

[43] A senior CAA executive boasted to Variety last week that CAA's dispute with the Guilds has been "hurting the clients' business way more than it hurts our business." Cynthia Littelton, *It's Quite a Special Place: CAA Insiders Talk Industry Drama, TPG's Influence, and Ties that Bind*, Variety, Nov. 25, 2020. *See also* Justin Kroll, *CAA Furloughs 275 Employees and Lets Go of 90 Agents & Executives in a Bombshell Move*, Deadline (Jul. 28, 2020) (noting "COVID-19 challenges of fiscal year 2021"); Mike Fleming, Jr., *WME Looking at Black Monday: 20% of Employees Will Be Laid Off,*

Second, even assuming, *arguendo*, that the Agencies' pleaded "market for representational services" (Dkt. 42 ¶182) were valid, the Guilds do not possess anything close to a dominant share ***as purchasers*** of representational services. Any effort by the Agencies to argue on reply that the relevant market should be defined around only one group of purchasers—writers—must fail; courts routinely reject such gerrymandered markets. *See, e.g.*, *Power Analytics Corp. v. Operation Tech.*, 2017 WL 5479638, at *14 (C.D. Cal. May 10, 2017) (rejecting market limited to products sold to HR data centers).[44]

Third, the Guilds' actions have plausible efficiency and competition justifications. As explained in the Declaration of Dr. James Reitzes, conflicts of interest between a principal and agent, like those between Guild members and the Agencies, present a classic form of market inefficiency. Reitzes Decl. ¶8 n.1, ¶26 n.36, 25-40. The Guilds' conduct is designed both to change the system of agent rewards in order to better align agent priorities with those of writers, and to improve the flow of information between the agencies and the Guilds. These are common strategies for resolving the principal-agency conflict, *id.* ¶¶ 46-49, and accordingly can plausibly be said to enhance market efficiency.

III. The Agencies Do Not Establish Immediate Irreparable Injury.

The Agencies must demonstrate that, without an injunction, irreparable injury is "*likely*," not speculative or remote, *see Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis in original), and that "remedies available at law, such as monetary damages, are inadequate to compensate for that injury," *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The Clayton Act imposes an even higher standard,

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Furloughed or Cut to Part Time, Deadline (May 7, 2020) (noting "coronavirus fallout" and "expensive acquisitions to create a conglomerate … attractive to Wall Street"); *cf.* Slocum Decl. ¶15.

[44] *See also T. Harris Young & Assocs. v. Marquette Elecs., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991) (rejecting alleged relevant market limited to paper for electrocardiographic recording sold to hospitals with 200 beds); *Lockheed Martin Corp. v. Boeing Co.*, 314 F.Supp.2d 1198, 1226-27 (M.D. Fla. 2004) (same; alleged market limited to federal government); *Glynn-Brunswick Hosp. Auth. v. Becton*, 159 F.Supp.3d 1361, 1380 (S.D. Ga. 2016) (same; alleged markets limited to certain medical devices sold to acute care providers).

authorizing injunctive relief only when "the danger of irreparable loss or damage is *immediate*." 15 U.S.C. §26 (emphasis added); *see also L.A. Mem. Coliseum Commission v. NFL*, 634 F.2d 1197, 1201 (9th Cir. 1980) (future transfer of team did not "satisfy the plaintiff's burden of demonstrating *immediate threatened injury* as a prerequisite to preliminary injunctive relief") (emphasis added). They meet none of these requirements.

Initially, the Agencies must overcome the fact that the acts triggering this dispute (Guild members' collective termination of non-franchised agents) occurred in *April 2019*, this case has been pending for over *17 months*, and they *only now* seek a preliminary injunction that would disrupt the long-existing status quo (which is that WME and CAA may not represent Guild members for MBA-covered writing work). Even far shorter periods of delay "undercut" a plaintiff's claim of irreparable harm.[45] Because "the basic function of a preliminary injunction is to preserve the *status quo*," an ongoing practice should not be enjoined "[w]here no *new* harm is imminent, and where no compelling reason [for the delay] is apparent." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (emphasis added; quotations omitted).[46]

The Agencies attempt to side-step this problem by asserting that over time, as other talent agencies negotiated franchise agreements, more of their former clients have signed with other agents or managers. *See* CAA Mem. 23:16-24:25; WME Mem. 23:14-17. Not only was this all foreseeable, but the Agencies make ***no*** showing (besides CAA/WME executives' conclusory assertions) that these clients ***will not return to them*** once either they reach franchise agreements with the Guilds or this case reaches a final conclusion—

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[45] *See Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (five-month delay); *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (f 9-10 month delay "implies a lack of urgency and irreparable harm"); *cf. also Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.").

[46] WME cites *Arc of Cal. v. Douglas*, 757 F.3d 975, 990, 991 (9th Cir. 2014), but WME's clients' gradual and foreseeable decisions to sign with other agencies and loss of agents over time are in no way comparable to the "cumulative" injury caused by three distinct and successive cuts to ***critical*** home and community-based services provided to ***developmentally disabled recipients***.

much less a showing of "*likely*" or "immediate *irreparable* harm."[47] *Winter*, 555 U.S. at 22 (first emphasis in original); *see also Am. Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) ("conclusory" affidavits cannot establish irreparable injury). Nor could the Agencies make such a showing, given that writers are typically not contractually bound to remain with their agents for any period of time, and change agents freely and frequently. *See* Graham Decl. ¶34. Without such a showing, any argument that these relationships are "intimate," "highly" or "deeply personal and not interchangeable," CAA Mem. 23; WME Mem. 23, is simply irrelevant. Even if the Agencies had shown that the permanent loss of their clients was likely, they fail to articulate any reason why the loss of clients whose value to the Agencies is that they bring in revenue and opportunities cannot be compensated through the ***treble damages*** the Sherman Act authorizes.

The Agencies also contend that some former employees and partners have moved to other talent agencies or management companies. But again, they fail to show that these agents will not return to CAA and WME once those Agencies sign with the Guilds or this case concludes on the merits. Nor do the Agencies submit evidence showing that it would be impossible to quantify the lost business attributable to these agents.

In any event, the Agencies' clients and employees' impatience with their failure to agree to the Guilds' conflict-of-interest prohibitions, while all other talent agencies have done so, can hardly be the triggering event for an emergency injunction, particularly when discussions about an appropriately protective franchise agreement are ongoing.[48]

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[47] WME's declarant simply states, that "there is *good reason to expect* that such writers or showrunners *may not* return to WME," but does not identify that reason. Dkt. 157-2 ¶4; *see also id.* ("difficult, if not impossible, to repair" relationships). Similarly, CAA's declarant speculates, without explaining why, that CAA will "permanently lose relationship they have established with clients." Dkt. 151-4 ¶13; *see also id.* ¶14 (clients "appear to have been permanently lost"); *id.* ¶17 ("CAA has been *told* [by unnamed sources] that some of its clients are permanently moving on") (emphasis added); *id.* ¶19 ("some of these [unidentified] former clients" told CAA they will not return to CAA).

[48] CAA cannot rely on injuries that have resulted from the acts of third parties like

Unsurprisingly, the Agencies find no support in authority. The Ninth Circuit has specifically held that in antitrust cases, where "treble damages [may] be awarded to compensate for any loss," lost contracts, customers, or business are ***insufficient to support injunctive relief without a showing that the plaintiff "is threatened with extinction."*** *Am. Passage Media Corp.*, 750 F.2d at 1473-74 (emphasis added). None of the Agencies' cases, CAA Mem. 23-24; WME Mem. 22-24, are antitrust cases, involve the loss of identifiable clients and employees, or have a treble damages remedy available. For that reason, they are inapposite. The Agencies' supposed injuries are not comparable to, e.g., harm caused by unauthorized intrusions into confidential proprietary information or trade secret violations. And the only Ninth Circuit authority the Agencies cite involved the since-overruled "possibility" of irreparable harm standard. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 840-41 (9th Cir. 2001); *Rent-A-Ctr. v. Canyon Television & Appliance Rental*, 944 F.2d 597, 603 (9th Cir. 1991).[49]

IV. The Balance of Equities and Public Interest Disfavor an Injunction.

As previously explained, the Agencies fail to demonstrate likely, much less immediately threatened, irreparable injury. Their allegations that 34 former CAA clients and 11 former WME clients have signed with other agencies is de minimis given that these two agencies are multi-billion-dollar operations representing thousands of creatives. *See Earth Island Institute v. Elliott*, 290 F.Supp.3d 1102, 1124 (E.D. Cal. 2017) (even in context of environmental harm, which is typically irreparable, plaintiffs not entitled to preliminary injunction because asserted harm was "objectively minimal under the circumstances"). Moreover, this is harm of the Agencies' own making, given that these

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Range Media Partners. *See Timbisha Shoshone Tribe v. Salazar*, 697 F.Supp.2d 1181, 1190 (E.D. Cal. 2010) (plaintiff not entitled to injunction where asserted harm not caused by defendant but by actions of third parties).

[49] *See Nelson Levine de Luca & Hamilton v. Lewis Brisbois Bisgaard & Smith*, 2014 WL 12560690, at *4 n.4 (C.D. Cal. July 17, 2014) (*Rent-A-Center* "is unpersuasive because that case relied on the pre-*Winter* standard"). *American Rena Int'l Corp. v. Sis-Joyce Int'l Co.*, 534 Fed. App'x. 633, 636 (9th Cir. 2013), is unpublished and non-precedential, so does not describe the evidence that met the irreparable injury standard.

Agencies are refusing to agree to important conflict-of-interest prohibitions and spent many months watching other talent agencies negotiate agreements with the Guilds while declining to undertake serious negotiations. Young Decl. ¶¶26, 39.

In contrast, the Guilds will suffer substantial irreparable harm if the requested injunction is granted. The requested relief will deprive the Guilds of any ability to regulate these Agencies, including through franchise agreement provisions that no one argues are illegal or problematic (such as limiting commissions to 10%). *Id*. ¶52. Even the prohibition on packaging, which CAA and WME have agreed to, will no longer apply to those Agencies; nor will ***any*** protections against conflicts of interest. CAA and WME would gain a huge competitive advantage over all the talent agencies that have heretofore signed agreements protecting Guild members from agent conflicts of interest, potentially threatening the future viability of *those* agreements as well. *Id*. Such an injunction would severely undermine the solidarity required to maintain a collective action by thousands of union members, effectively depriving one side of this labor dispute of all leverage. *Id.* Far from promoting the public interest, the requested injunction would directly undermine the express national public policy enacted almost a century ago to protect workers' ability to exercise their freedom of association and engage in "concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. §102.

V. The Injunction the Agencies Seek Far Exceeds the Relief Potentially Available on Their Antitrust Claim.

Contrary to their claims, CAA and WME seek far more than a "narrowly tailored" injunction requiring compliance with the law; they ask this Court to force the Guilds to accede to their demands and end the collective membership action, awarding them the full relief they sought in this case. Specifically, they ask this Court to prohibit the Guilds "from continuing the group boycott through which they have instructed all Guild members not to be represented by [the Agencies];" from enforcing Working Rule 23 "against any Guild member who has chosen to engage [the Agencies] as a talent agent;" and from "utilizing or threatening any form of union sanctions or discipline against any

Guild member for engaging [the Agencies] as a talent agent." Dkt. 157-7 at 4; *see also* Dkt. 151-10 at 4-5. Even if the Agencies could show they were entitled to some relief, their requested injunction far exceeds the scope of available relief.

The Agencies appear to believe that if the Guilds exceed the scope of the labor exemption in any respect, this Court may enjoin *all* of the Guilds' conduct. But the Supreme Court squarely rejected that position 75 years ago in *Allen Bradley Co.*, which held that the union defendant had exceeded the scope of the labor exemption by combining with a non-labor group, but overturned the broad injunction that the district court had issued. The Court explained that the injunction could prohibit ***only the union's unlawful combination with non-labor groups*** because, "[w]ithout such a limitation, the injunction as issued r[an] directly counter to the Clayton and the Norris-La Guardia Acts." 325 U.S. at 810-12; *see also National Elec. Contractors Ass'n, Inc. v. Nat'l Constructors Ass'n*, 678 F.2d 492, 502-3 (4th Cir. 1982) (requiring comparable modification of injunction based on *Allen Bradley*).[50]

The Agencies commit the same error as the *Allen Bradley* district court. They argue that the Guilds combined with two purported sets of non-labor parties—managers and showrunners—but seek an injunction limiting the Guilds' dealings with *all* Guild members, including many non-showrunner members whom the Agencies admit are labor parties. *See, e.g.*, Dkt. 50 at 1. Similarly, the Agencies contend that the Guilds have exceeded the scope of the labor exemption by treating them (supposedly) differently from other talent agencies that have signed franchise agreements with the Guilds, but do not seek an order requiring that they be treated the same as those other agencies. Instead, they seek an order requiring the Guilds to allow them to represent their members without accepting ***any*** of the limitations or protections to which other agencies have agreed (including such presumably uncontroversial limitations as a 10% commissions cap).

[50] The NLGA allowed the *Allen Bradley* injunction only because the union was simply an accessory to a combination of businessmen illegally associated to sell commodities. *L.A. Meat & Provision Drivers Union, Local 62 v. U.S.*, 371 U.S. 94, 102 (1962).

In both respects, the order the Agencies seek far exceeds the scope of their theories. *Allen Bradley* prohibits such a broad injunction, and requires limiting any relief to the specific conduct this Court concludes falls outside the Guilds' labor exemption.

VI. If an Injunction Is Granted, a Substantial Bond Should Be Ordered.

WME and CAA assert, without factual support, that no bond should be required under FRCP 65(c). But the Clayton Act (the statutory authority for the injunction the Agencies seek) makes a bond mandatory: "a preliminary injunction may issue" "upon the execution of proper bond against damages for an injunction improvidently granted." 15 U.S.C. §26; *see H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 16 (2d Cir. 1963) (bond was "specifically required by" 15 U.S.C. §26); *Robinson v. Benbow*, 298 F. 561, 572 (4th Cir. 1924) (bond is "required by the express terms of the Clayton Act").

A substantial bond is also required under traditional equitable principles to protect the Guilds if they "had the right all along to do what [they were] enjoined from doing." *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994); *see also Disney Enterprises, Inc. v. VidAngel, Inc.*, 224 F.Supp.3d 957, 978-79 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017) (requiring $250,000 bond). The Guilds have invested significant staff and financial resources into this membership action, which would be wasted if the injunction were granted. *See Western Watersheds Project v. Zinke*, 336 F.Supp.3d 1204, 1245-47 (D. Id. 2018) (requiring bond where injunction would result in wasted personnel work and costs). Thus, in the unlikely event that this Court issues a preliminary injunction, it should require a very substantial bond.[51]

CONCLUSION

For the foregoing reasons, the Agencies' motions should be denied.

[51] "When setting the amount of security, district courts should err on the high side." *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000); *see also Konecranes, Inc. v. Sinclair*, 340 F.Supp.2d 1126, 1134 (D. Or. 2004) (stating that bond would have been much higher than plaintiff proposal if preliminary injunction had been granted because "[l]iability for a wrongful injunction is generally limited to the amount of the injunction bond, even if actual damages are greater") (citing *Buddy Systems, Inc. v. Exergenie, Inc.*, 545 F.2d 1164, 1167-68 (9th Cir. 1976)).

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