Hollywood's Big Talent Agencies Score Major Win In Legal Battle Over Packaging

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UPDATED with Charles Lenhoff statement: In a major legal victory for Hollywood's "Big Four" talent agencies, the 9th Circuit Court of Appeals has affirmed a lower court's ruling that dismissed a lawsuit alleging that "Uber Agencies" illegally conspired to corner the TV packaging business.

The antitrust suit, filed against UTA and ICM in 2015 by the boutique agency Lenhoff & Lenhoff, was dismissed in May, but Lenhoff filed an appeal, which was heard last month. In a ruling handed down today (read it here), the 9th Circuit ruled that Lenhoff's claims either "lack merit" or failed to "adequately state a claim" against the defendants.

During last month's hearing, Lenhoff attorney Gretchen Nelson told the three-judge panel that a "price-fixing scheme" carried out by the four big agencies – WME, CAA and defendants UTA and ICM Partners – has led to "the demise" of "approximately 71% of the smaller agencies" since 2001 due to "the limitations in the numbers of times that the defendants will co-package with small talent agencies."

UNITED TALENT AGENCY

She added that "these four agencies" have "a stranglehold ... over these studios as a result of the volume of these package deals." The existence of such a "scheme," she argued, is proven by the fact that all the agencies charge the same packaging fee – known as "3-3-10," in which they receive "3% at the beginning, 3% at the end, and 10% on the back-end" – and that they've all used the same fee structure for nearly 20 years.

The 9th Circuit, however, didn't buy any of it. "The district court dismissed Lenhoff's third amended complaint with prejudice and denied Lenhoff's motion for reconsideration," the judges wrote. "We affirm."

Lenhoff & Lenhoff owner Charles Lenhoff said in a statement today: "We believe that this was a well-pleaded complaint that satisfied the 'plausibility' standard adopted by the Supreme Court in *Bell Atlantic Corp. v Twombly.* With respect, I salute everyone involved in this challenging dispute."

The appeallate judges said "horizontal agreements among competitors to fix prices or divide markets are per se unlawful" under Section 1 of the Sherman Antitrust Act but noted that "the first requirement" of a complaint "is to allege a contract, combination in the form of trust or otherwise, or conspiracy. The district court found that Lenhoff failed to plead this first requirement of a Section 1 claim, and we agree."

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"Mere allegations of parallel conduct—even consciously parallel conduct—are insufficient," the judges ruled, citing a prior ruling of the court. "Plaintiffs must plead something more, some further factual enhancement, a further circumstance pointing toward a meeting of the minds of the alleged conspirators. That is, plaintiffs must plead evidentiary facts, such as who did what to whom, or with whom, where, and when."

"At best," they ruled, "Lenhoff's third amended complaint pleads parallel conduct without alleging the 'something more' required to state a claim. With respect to Lenhoff's argument that the Uber Agencies conspired to fix a "3-3-10 packaging fee," the third amended complaint makes only passing reference to the Uber Agencies charging such a fee. This is a bare, conclusory allegation of parallel conduct and so does not adequately state a Section 1 claim."

The WGA, which wants to renegotiate its packaging agreement with the Association of Talent Agencies, recently compiled a report that found that 87% of all scripted TV shows that aired during the 2016-17 season were packaged, and that "packaging is dominated by WME and CAA," which the guild said accounted for 79% of all packaged series.

Lenhoff argued that this concentration of packaging by the "Big Four" agencies has squeezed the smaller agencies out of the packaging business, and that the larger agencies are engaged in a "conspiracy" to shut the smaller agencies out of co-packaging deals. But here again, the appeals court found that Lenhoff had failed to make its case.

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"The third amended complaint's other allegations concentrate on the Uber Agencies co-packaging scripted television series 'almost exclusively' with each other and 'coercing' television networks and studios to deal only with them," the judges said in their ruling. "At the same time, however, the complaint acknowledges a market-based reason for why larger agencies might co-package predominantly amongst themselves: larger agencies "are uniquely and advantageously situated to participate in packaging scripted television series because of their large, exclusive, and in-demand talent rosters.

"Although the complaint attaches exhibits purporting to show the number of times the Uber Agencies co-packaged with each other as opposed to with smaller agencies, these exhibits are not particularly helpful to Lenhoff as they in fact show that the Uber Agencies co-packaged with smaller agencies on several occasions in the relevant timeframe. More fundamentally, the complaint nowhere pleads the evidentiary facts that would nudge its claim across the line from conceivable to plausible. Thus, Lenhoff has not stated a Section 1 claim."

The alleged conspiracy to corner the market by the four biggest packagers, Lenhoff's attorney argued, started with the falling out SAG had with the ATA in 2002, when they couldn't come to terms on a new franchise agreement – known as Rule 16g. The main sticking point was that the big talent agencies wanted the right to invest in or be invested in by ad agencies, advertisers and independent producers. SAG viewed such financial interests as an irreconcilable conflict of interest, putting the actor in the position of being represented by an agency that could also be his or her employer.

But here, too, the judged ruled that Lenhoff had failed to make its case. "Lenhoff alleges the Uber Agencies acted through representatives at the ATA to allow Rule 16(g) to expire so as to gain access to outside funding and thereby increase their market dominance," the judges said. "Specifically, Lenhoff contends the 'who' of its alleged conspiracy is the ATA's Strategic Planning Committee; the 'what' is a conspiracy to eliminate Rule 16(g); the 'when' is from the Strategic Planning Committee's formation in 1999 onward; and the 'where' is the ATA's offices. But these facts amount to nothing more than an allegation that defendants participated in a lawful trade organization, and mere participation in trade-organization meetings . . . does not suggest an illegal agreement."

The judges also found no merit to Lenhoff's claims that "the Uber Agencies' conduct threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."

In affirming the lower court's dismissal of the case, the judges noted that the district court permitted Lenhoff "to file three amended complaints, and with each amendment, Lenhoff failed to plead its claims with the requisite particularity.

Lenhoff provides no reason to suppose further amendment would be anything but futile: the declarations attached to its opposition to defendants' motions to dismiss do not address the deficiencies identified above and are merely cumulative of allegations already pled in the third amended complaint. Thus, the district court did not abuse its discretion in denying leave to amend."

Lenhoff still can appeal the three-judge panel's ruling to the full 9th Circuit Court of Appeals, but if today's desicion is any indication, the chances of reversal are slim.

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