"No Conflict, No Interest"

–Ari Emanuel, WME co-CEO, 2015

How the Major Hollywood Talent Agencies Put Their Interests Ahead of Their Clients' Interests

WGAW WRITERS GUILD OF AMERICA WEST

Introduction

Talent agencies have represented Hollywood actors, writers, and directors for almost a century. But what began as a service to artists in their negotiations with film studios has become a cartel dominated by a few powerful agencies that use their control of talent primarily to enrich themselves. Today, the major Hollywood agencies make money not by maximizing their clients' earnings and charging ten percent commission, but through direct payments from studios known as "packaging" fees, which are unrelated to their clients' compensation and come directly from TV series and film production budgets and profits. More recently, an even more overt form of conflict has taken root. The largest talent agencies have themselves formed production entities that hire and employ their own clients.

These conflicted practices systematically favor the interests of the major agencies at the expense of their clients, and constitute a violation of fiduciary duty under multiple bodies of law. During a period of unprecedented prosperity for the major media companies, these conflicts have contributed to declining writer pay. In each of the last three years, the companies that dominate the entertainment industry—Disney, Fox, Time Warner, Comcast, CBS, and Viacom—generated more than $50 billion in operating profits. Meanwhile, television writer-producers' median weekly earnings declined 23 percent between 2014 and 2016.

Conflicted practices have driven agency profits, attracting billions in investments from private equity firms and institutional investors that now own majority stakes in the two largest agencies, William Morris Endeavor (WME)[1] and Creative Artists Agency (CAA), and have a minority stake in the third, United Talent Agency (UTA). The influx of capital has fueled expansion efforts into sports ownership, marketing and advertising, investment banking, and content production and distribution. With these agencies increasingly representing companies that employ clients, and even becoming the employer themselves, conflicts of interest are at the heart of the dominant agencies' business model. This fact is not in dispute, as co-CEO of WME Ari Emanuel said in 2015 of his agency's operations, "No conflict, no interest."[2] More recently, Emanuel was quoted in *The Telegraph* stating, "If you don't have a conflict you don't have a business."[3]

While the major agencies have pursued growth through conflicts of interest, these practices contravene how agents are required to act under state and federal law. When representing clients, agents act as fiduciaries, who have specific responsibilities under the law in California and virtually every other state. A fiduciary is a person to whom power is entrusted on behalf of a client, giving the fiduciary a duty "to act loyally for the principal's benefit" and requiring that the fiduciary "subordinate [its] interests to those of the principal and place the principal's interests first."[4] Whether negotiating directly with a studio for their own compensation or becoming a producer-employer, the major agencies are clearly not abiding by the standard of fiduciary duty required under the law.

This report provides an overview of talent agency representation in Hollywood and details the extent to which the major agencies' business model is based on conflicts of interest that harm their clients and violate the law. It shows how, by maximizing their own profits and now the profits of their outside investors, these agencies have strayed from their core purpose of representing the interests of their clients.

Talent Representation:
Conflicted Agencies In Control

The primary responsibility of talent agents in Hollywood is to help clients procure employment and to negotiate an individual client's compensation above the minimum rates established by an applicable collective bargaining agreement.[5] In a freelance industry, where talent may hold multiple jobs in a single year and work on dozens of television and film projects over their careers, agents help identify job opportunities.

What Is a Fiduciary?

What is the role of a fiduciary?

▶ To represent the interests of a client (or "principal") with a legal and moral obligation to put the client first.

What are a fiduciary's obligations regarding conflicts of interest?

▶ A fiduciary is expected to refrain from acting for his/her private advantage or otherwise contrary to the interests of his/her client; the fiduciary should fully, without compromise, assert the complete and unmitigated interest of the client.

How are agents fiduciaries?

▶ Talent agents owe fiduciary obligations to their clients under state and common law principles.

What are the penalties for violating fiduciary duty?

▶ Penalties can include compensatory and punitive damages, as well as professional sanctions such as loss of license.

In California, only agents who are licensed by the state can legally help individuals procure employment in the entertainment industry. Talent agents are "fiduciaries" under general agency principles found in the common law and in the statutes of virtually every state, including California[6] and New York.[7] Fiduciaries are required to refrain from acting for their own advantage, or otherwise contrary to the interests of their client, and to assert, without compromise, the complete and unmitigated interest of the client. The laws governing this relationship prohibit fiduciaries from having any self-interest adverse to a client's interest, unless the conflict is fully disclosed and the client chooses to accept it. Hollywood talent agencies today engage in pervasive practices that place the agencies' interests in conflict with their clients' and rarely, if ever, disclose the existence or extent of the conflicts, thereby violating their fiduciary obligations.

Talent Agencies Today

Over 100 agencies represent members of the Writers Guild of America West and its sister union, Writers Guild of America East (jointly, WGA), but consolidation among several large agencies over the past two decades has created an oligopoly of four agencies that control the representation business in Hollywood. Together, William Morris Endeavor (WME), Creative Artists Agency (CAA), United Talent Agency (UTA), and International Creative Management Partners (ICM) account for more than 75 percent of WGA member earnings.

It is also the case that the largest talent agencies are no longer primarily owned by their agent-partners. Their control of the rep-

> ***"The light went off for me that this is not only an agency, it is a content play because of their extraordinary access to a very large pool of content."*** [8]
>
> **Jim Coulter, TPG co-founder**

resentation business, their access to key film and television talent, and the lucrative revenue stream of packaging fees have attracted outside investors. As a result, the largest outside shareholders of the top three agencies are now private equity firms that expect strong returns on their investments. This trend began in 2010, when private equity firm Texas Pacific Group Capital (TPG)[9] purchased a 35 percent stake in CAA for $165 million.[10] TPG then invested an additional $175 million, with $50 million more committed for further acquisitions, increasing its stake to over 50 percent.[11] Foreign investors added more than $100 million, for a total of over $440 million invested to date in CAA.[12]

WME has followed a similar path. In 2012, private equity firm Silver Lake Partners acquired 31 percent of WME for $250 million, and has subsequently invested approximately $500 million more.[13] WME has also received approximately $1.8 billion in investments from pension funds, institutional investors, and sovereign wealth funds,[14] including a $400 million investment from Saudi Arabia that WME announced it would return following the murder of *Washington Post* journalist Jamal Khashoggi.[15] In total, roughly $3 billion in outside capital has been invested into WME and CAA.[16] More recently, UTA has followed suit, announcing in August 2018 that private equity firm Investcorp and Public Sector Pension Investment Board (PSP Investments), a pension investment manager, had invested $200 million into the agency.[17]

Using this new cash, the two largest agencies have accelerated expansion and diversification, transforming themselves from businesses focused on client representation into global media and entertainment conglomerates. WME and CAA now own or have stakes in investment banks, consulting firms, venture capital firms, marketing and advertising agencies, production companies, and sports leagues and tournaments. They negotiate licensing agreements in sports, sell feature films, and work with corporations and celebrities to manage and license their brands across various platforms.

The capital from private equity and other investors has also facilitated WME's and CAA's expansion into content production and ownership. Both CAA and WME are now financing and producing feature films and scripted series for television and online platforms, either through direct investment or partnerships with traditional content producers. UTA is the latest entrant, announcing a joint venture to finance and produce TV series with Valence Media and its subsidiary, Media Rights

> ***"We were intrigued by CAA because they're in the middle of the ferment that's going on in this industry, but they've been brokers instead of principals, and we think they have plenty of opportunities to be principals."*** [18]
>
> **David Bonderman, TPG co-founder**

Conflicted Representation: Packaging

Capital, in October 2018. As a result of this expansion, three of the four biggest agencies have now become content producers, in effect employers of their own clients.

The result of this outside investment and expansion is a representation business dominated by talent agencies that are focused on increasing agency and affiliated operations' revenue and profit for the benefit of private equity owners, a pursuit that is far afield from the fiduciary duty owed to agency clients.

> ***"So they hated when [an agent] sold a writer to somebody that wasn't a package, even though selling a writer to somebody else might have been better for the client's career… Inside CAA it was always about package über alles [translation: package above all]—that was literally a phrase."[19]***
>
> **David Greenblatt, former CAA agent**

Packaging:
Agencies Paid Directly by Their Client's Employer

When a writer creates a television series, instead of the agency commissioning ten percent of the writer's pay, the agency negotiates its own compensation directly from the studio producing the series through what is known as a "package" or "packaging fee." The standard packaging fee consists of three parts: an upfront fee of approximately $30,000 to $75,000 per episode that is paid out of the production budget; an additional $30,000 to $75,000 per episode that is deferred until the series achieves "net" profits, if any;[20] and a percentage of the TV series' "modified gross" profits[21]—usually ten percent—for the life of the show.[22] This model is known as 3/3/10: 3 percent of the series license fee upfront (an amount which may be negotiated or imputed), 3 percent of the license fee deferred, and 10 percent of defined profits.

Packaging is an historical practice with roots in radio and the early days of television, when agencies provided both talent and program sponsors and took a percent of revenue. The WGA has long had concerns about the conflict of interest inherent in an agency receiving compensation directly from a client's employer and expressly reserved its objections to the practice in its 1976 Artists' Managers Basic Agreement (AMBA), which regulates the way agencies represent TV and film writers. Since that time, however, agency consolidation and the increased market power of the oligopoly agencies has led to the packaging of nearly all television and online series. According to WGA research, almost 90 percent of scripted series in the 2016-2017 television season were packaged, with WME or CAA involved in 80 percent of those packaged series.[23]

Through packaging, an agency can collect tens of millions of dollars from a successful series it played little to no role in creating or producing. The agency collects its packaging fee regardless of how much its clients make, and even collects higher profits if the series' costs—including its own clients' compensation—are lower. This practice leaves the agency with significantly less incentive to increase any individual client's compensation or otherwise advocate on their behalf. Writers have felt the consequences of this conflict through declining compensation. WGA surveys have found that the median weekly compensation for writer-producers declined 23 percent between 2014 and 2016. The surveys have also revealed declines in the per-episode fees that agents negotiate for television writer-producers. According to WGA data, these per-episode fees are barely higher than they were in the late 1990s, and have actually declined when adjusted for inflation.

Once an agency has negotiated its packaging fee, the agency collects the fee for the life of the series and sometimes from spin-offs or related productions. For example, in a recently filed lawsuit over packaging fees on the new *MacGyver* series, the successor to the agency that packaged the original 1985 series (Major Talent Agency, or MTA) claims it is owed a percentage of the network license fee on the rebooted series, despite acknowledging that “there is no requirement in the 1984 agreement that MTA perform any services, or be requested to perform any service, in order to receive the payments.”[24] The major agencies have made packaging their dominant form of compensation in television because the practice can generate significantly more money than a traditional ten percent commission.[25] As former CAA agent David Greenblatt noted regarding the agency, “They were a big fan of packaging, because packaging [is where] you make all your money.”[26]

The practice of packaging is not limited to television. The major agencies also extract packaging fees from independent films, taking a percentage of the film’s budget or financing, ***in addition*** to charging ten percent commission on their clients’ earnings. On top of this, the agencies seek to charge retainer fees from some producers, financiers, and film sales companies for access to agency clients’ projects, or demand the right to represent the project for distribution and collect another fee for that service. A packaging fee of five percent of the film’s budget or a cut of the film’s distribution sales can substantially outweigh agency income from the ten percent commission, which provides the agency with a greater incentive to ensure the project moves forward rather than to increase their client’s compensation.

Conflict of Interest in Practice

Packaging is harmful to clients and violates agents’ fiduciary duty. The key incentive for an agency to increase its clients’ pay is the alignment of agency and client pay through a ten percent commission structure; because agency packaging fees are unrelated to their clients’ compensation, that incentive is substantially weakened. Instead of negotiating for the client, as a proper fiduciary should, packaging introduces direct negotiations between the agency and the client’s employer over ***how much the agency will be paid.*** Talent agencies use their representation of television series creators as leverage to improve their own compensation, a fundamental violation of the agent’s fiduciary duty. Clients are told few, if any, details about their agency’s packaging compensation, another aspect of the system that violates fiduciary obligations. Several lawsuits and numerous writer accounts have revealed information about these opaque practices and brought the harms of packaging to light.

CAA and *Head of the Class*

Michael Elias and Richard Eustis, creators of the hit 1980s television series *Head of the Class,* sued CAA in 2011 for breach of fiduciary duty when they discovered that the agency had received a greater share of the TV series' profit than they had. In the lawsuit, Elias and Eustis stated that after the initial success of the show, they had asked CAA to renegotiate an improved profit definition for them, one based on a percentage of "gross" profits (as opposed to a "net" profits definition which deducts more costs). According to the writers, CAA reported it was unable to make that gain. The lawsuit revealed that CAA had a superior profit definition, which actually reduced the profit available to the show's creators.[27] According to Elias and Eustis, CAA never disclosed these facts, but was nevertheless paid more than $12 million in upfront fees and profit payments and received more in profit than the creators

WARNER BROS.
ENTERTAINMENT INC.
DISTRIBUTION REPORT NO. 35

TO: CREATIVE ARTISTS AGENCY
TITLE: HEAD OF THE CLASS
RELEASED: PILOT & SERIES

MODIFIED COMMISSION

	12 MOS ENDED Jun 30, 2009	CUMULATIVE TO DATE
GROSS RECEIPTS		
Domestic		
US Network - Prime Time	$0	$0
US Network - Other	0	0
Syndication/Barter	0	114,968,677
Foreign		
Foreign Syndication	0	13,023,199
Non-Theatrical	1,200	108,139
Pay T.V.	1,076	3,540,337
Video Cassette	0	0
Music	389	411,090
Merchandising	0	482
Miscellaneous Royalties	0	712,546
TOTAL GROSS RECEIPTS	2,665	132,764,470
DISTRIBUTION FEE	0	0
NET RECEIPTS AFTER DISTRIBUTION FEE	2,665	132,764,470
EXPENSES		
Prints	0	1,245,629
Preprint, Dubbing, Subtitles, Editing, etc.	0	1,115,587
Advertising and Publicity	7	1,522,674
Taxes, Duties, Customs and Fees	0	703,416
Freight, Cartage, Handling and Insurance	0	67,769
Miscellaneous	0	58,622
Guild, Union and Residual Payments	1,591	10,720,285
TOTAL EXPENSES	1,598	15,433,982
NET RECEIPTS (LOSS) AFTER DISTRIBUTION FEE AND EXPENSES	1,067	117,330,488
INVESTMENT AND OTHER DEDUCTIONS		
Negative Cost and/or Advance	0	25,876,509
Interest	0	0
Gross Participation	0	0
Deferments	0	0
Agency Package Fee	0	3,181,310
TOTAL INVESTMENT AND OTHER DEDUCTIONS	0	29,057,819
NET RECEIPTS (DEFICIT)	1,067	88,272,669
Previously Reported	0	
NET RECEIPTS (DEFICIT)	$1,067	$88,272,669
PARTICIPANT SHARE OF NET RECEIPTS (10.00%)	$107	$8,827,267
AMOUNT ADVANCED	0	0
GUILD RESIDUALS PAID ( )	0	0
PREVIOUSLY PAID		8,827,160
(OVERPAID)	0	
	0	8,827,160
AMOUNT DUE (DEFICIT)	$107	$107

As a courtesy to you, we are supplying you with this statement showing cumulative figures, upon the understanding, however, that the furnishing of this report shall be without prejudice, and shall not vary or affect in any way the provisions of the agreement between us relating to said picture.

CONFIDENTIAL WB_HOTC_000307

Agency Package Fee 3,181,310
Upfront 3%

PREVIOUSLY PAID 8,827,160
Profit participation

CAA Receives More Than Clients in Profit Participation

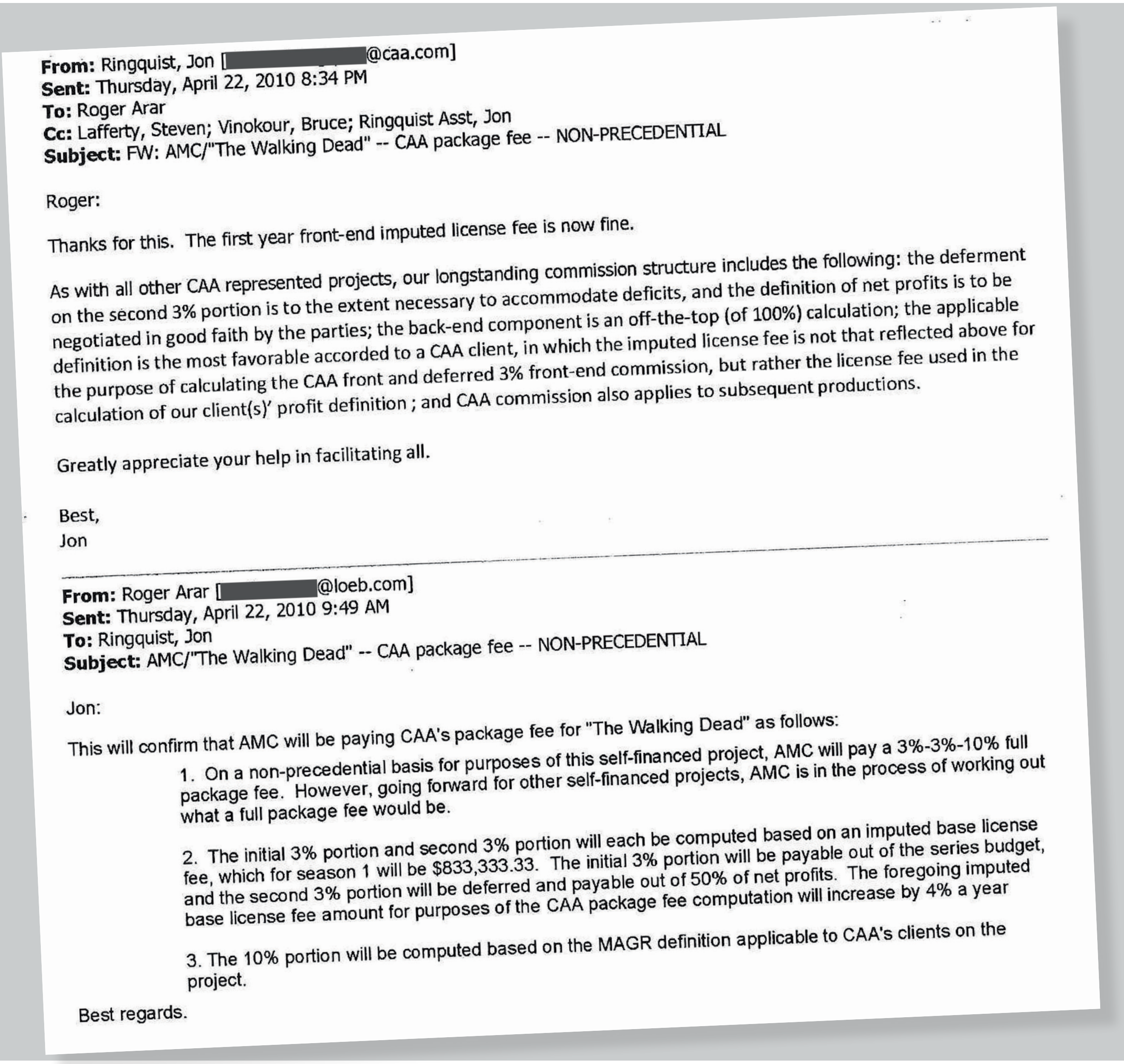
CAA's profit participation statement from June 2009 for the *Head of the Class* pilot and series reveals that the agency received over $12 million, including $8.8 million in profit compared to the $8 million received by the creators.

who worked on the series' five seasons and were responsible for its success.[28]

CAA and *The Walking Dead*

CAA represented Frank Darabont, a well-known writer-producer, in his deal with AMC Network to develop, write, direct, and produce *The Walking Dead*, which he did until he was fired during production of the second season. CAA leveraged its representation of Darabont to secure a packaging fee on the series, as well as on the spinoff *Fear the Walking Dead.*[29]

Emails produced in subsequent litigation reveal that before Darabont's contract for *The Walking Dead* was finalized and signed, CAA representatives were negotiating on their own behalf with AMC over the amount of CAA's package fee and whether they would receive a package fee on future subsequent productions.[30] The correspondence puts



From: Ringquist, Jon [[redacted]@caa.com]
Sent: Thursday, April 22, 2010 8:34 PM
To: Roger Arar
Cc: Lafferty, Steven; Vinokour, Bruce; Ringquist Asst, Jon
Subject: FW: AMC/"The Walking Dead" -- CAA package fee -- NON-PRECEDENTIAL

Roger:

Thanks for this. The first year front-end imputed license fee is now fine.

As with all other CAA represented projects, our longstanding commission structure includes the following: the deferment on the second 3% portion is to the extent necessary to accommodate deficits, and the definition of net profits is to be negotiated in good faith by the parties; the back-end component is an off-the-top (of 100%) calculation; the applicable definition is the most favorable accorded to a CAA client, in which the imputed license fee is not that reflected above for the purpose of calculating the CAA front and deferred 3% front-end commission, but rather the license fee used in the calculation of our client(s)' profit definition ; and CAA commission also applies to subsequent productions.

Greatly appreciate your help in facilitating all.

Best,
Jon

From: Roger Arar [[redacted]@loeb.com]
Sent: Thursday, April 22, 2010 9:49 AM
To: Ringquist, Jon
Subject: AMC/"The Walking Dead" -- CAA package fee -- NON-PRECEDENTIAL

Jon:

This will confirm that AMC will be paying CAA's package fee for "The Walking Dead" as follows:

1. On a non-precedential basis for purposes of this self-financed project, AMC will pay a 3%-3%-10% full package fee. However, going forward for other self-financed projects, AMC is in the process of working out what a full package fee would be.

2. The initial 3% portion and second 3% portion will each be computed based on an imputed base license fee, which for season 1 will be $833,333.33. The initial 3% portion will be payable out of the series budget, and the second 3% portion will be deferred and payable out of 50% of net profits. The foregoing imputed base license fee amount for purposes of the CAA package fee computation will increase by 4% a year

3. The 10% portion will be computed based on the MAGR definition applicable to CAA's clients on the project.

Best regards.

the lie to the notion that packaging is done for the benefit of agency clients. Instead, it confirms that packaging allows the major agencies to use demand for their clients for their own financial benefit.

The emails *(below and on preceding page)* lay bare the conflict inherent in packaging. Not only does CAA get to benefit from a profit definition that is based on its client's MAGR (modified adjusted gross receipts) definition, but the agency's share of profits is actually paid *before* its client's as an "off-the-top deduction." This means that CAA's share of profits reduces the pool of profit available to its client. Further, CAA's client receives no benefit if the agency negotiates a packaging fee on a spinoff of the series.

From: Vinokour, Bruce [[redacted]@caa.com]
Sent: Thursday, April 22, 2010 9:48 PM
To: Ringquist, Jon; Roger Arar
Cc: Lafferty, Steven; Ringquist Asst, Jon
Subject: RE: AMC/"The Walking Dead" -- CAA package fee -- NON-PRECEDENTIAL

Roger: Why doesn't our commission apply to subsequent productions...we should all be so fortunate to have a spin-off occur, for example. Would not that mean success and a "win" for all?

From: Ringquist, Jon
Sent: Thursday, April 22, 2010 6:24 PM
To: Roger Arar
Cc: Lafferty, Steven; Vinokour, Bruce; Ringquist Asst, Jon
Subject: RE: AMC/"The Walking Dead" -- CAA package fee -- NON-PRECEDENTIAL

Roger:

We respectfully maintain our positions, as we do with everyone else.

Thanks, as always,
Jon

From: Roger Arar [[redacted]@loeb.com]
Sent: Thursday, April 22, 2010 6:00 PM
To: Ringquist, Jon
Subject: RE: AMC/"The Walking Dead" -- CAA package fee -- NON-PRECEDENTIAL

Jon:

Responding:

1. The deferred portion is not conditioned on any deficit accommodation notion.
2. Net profits will be per AMC's definition, subject to good faith negotiation within AMC's customary parameters.
3. CAA's 10% of MAGR will be an off-the-top deduction vis-a-vis the talent MAGR participations.
4. CAA's MAGR definition will be in accordance with Frank Darabont's MAGR definition, which will have its own imputed license fee amount.
5. CAA's commission will not apply to subsequent productions.

Best regards.

In addition, Darabont's profit participation deal required him to "vest" his share in stages by working on the series for a prescribed period of time.[31] No such requirement applied to CAA. Moreover, CAA continued to profit from their packaging fees, even negotiating for increased fees in subsequent seasons after Darabont was fired from the show.[32]

William Morris Agency and *Who Wants to be a Millionaire*

Packaging, and the conflict of interest inherent in the practice, is harmful to agency clients across the board—including production companies—as demonstrated by the lawsuit over the ABC game show *Who Wants to Be a Millionaire.* When UK company Celador sold the North American rights to its successful game show *Who Wants to Be a Millionaire?* to ABC and Buena Vista Television (two Disney subsidiaries) in 1998, WME-predecessor William Morris Agency (WMA) represented both Celador and the two Disney entities in the negotiation without informing Celador, and negotiated a packaging fee for itself.[33] The lack of disclosure likely constituted a violation of WMA's fiduciary duty. Once the show became a huge hit, however, WMA negotiated an increase to its own packaging fee, reportedly without informing Celador or offering to renegotiate Celador's deal.[34]

Despite the runaway success of the American version of the game show, Celador received little in profit and was ultimately forced to sue the Disney subsidiaries for breach of the agreement negotiated by WMA. A jury awarded Celador more than $300 million after it was revealed that ABC had paid its related company Buena Vista Television an artificially low license fee in order to retain more of the show's profits and deprive Celador of its appropriate share.[35] During the court case, the lawyer representing the Disney companies stated, "If [Celador is] unhappy with the deal that was negotiated on their behalf, the answer lies in William Morris."[36]

Writer Stories

In addition to these lawsuits, numerous writers have shared experiences that demonstrate how packaging drives agencies to put their own interests first, to the detriment of their clients at all levels of the industry—from series creators to writers working on the staff of a TV series. These experiences reveal that packaging not only takes money away from the TV series but can even lead agencies to drive down their clients' compensation.[37]

▶ "I put an entire show together, but I didn't want my agency to get the package. In the end, they held the deal hostage and I had to cave to get the project through. **Every network I showed the project to made a bid on my show. I wanted it to go to one network, but my agent thought they'd get a bigger package if they went with another network, so they sold the package to them.** My agent told me that there was a bigger penalty [guaranteed payment if the show isn't made] with the network they preferred, but I found out later that wasn't true. Then, **a network executive told me that my agency was holding the project hostage with the packaging fee.** My agency was not representing my best interest—they were representing theirs." **—WGA Writer, 2018**

▶ "My agency did nothing to help me get my project going. They didn't even set the meeting at the company I sold my show to. I had no idea it was packaged until I saw the line item in my budget and I was totally taken aback. **I had been struggling to figure out how I could hire more writers and compensate them fairly and the agency packaging fee could have paid for three more writers.** My budget was stretched so thin that I could only hire a skeleton crew and shoot in a warehouse with questionable conditions. It was so bad that I cut my own fees to put money on the screen and better take care of my crew. And as I was doing this, I found out from the studio that my agency had been calling to improve their own compensation. While I was working more for less, the agency wanted a bigger packaging fee." **—WGA Writer, 2018**

▶ "My current show is not packaged. One of the producers on the show is represented by an agency who assumed they would split the packaging fee.[38] When this other agency found out they wouldn't be getting a package fee, the agent called to scream at me. He said, 'We don't make our money off the ten percent.' **He went on to assure me that they 'earn' their share of the package, citing the fact that he had gotten his client (not a writer) to accept a fee substantially below his quote. The agent was bragging about harming their own client.** That's what the incentives created by packaging and conflicts of interest do to writers." **—WGA Writer, 2018**

▶ "As a showrunner, I have had my agent come to me and say, basically, **'Since we're packaging this, we can help you out with some of our clients. This writer has a $20,000 quote, but I think I could get them for $14,000.'** And then the agency would turn around and sell it to that writer by telling them they're saving money not paying commission, or that the writer will get a title bump in the second year. But it's because the agency is taking out their packaging fee that there isn't more room in the budget." **—WGA Writer, 2018**

Producing:
Your Agent Becomes Your Employer

Fueled by billions of dollars from private equity and other investors, the three largest talent agencies—WME, CAA, and UTA—have recently expanded into producing and owning content. No longer satisfied with collecting lucrative packaging fees, these agencies now intend to develop, finance, and produce series for television networks and digital platforms like Netflix and Amazon. Doing so would allow the agencies to capture an even greater share of profits while at the same time increasing the conflicts between agencies and their clients, who will now become employees of their own agencies' production arms. This is a clear violation of the fiduciary duty owed to clients, who simply cannot be properly represented in contract negotiations by an agency that is affiliated with their employer.

Agencies As Producers

In 2014, WME acquired International Management Group (IMG), a global sports and entertainment company that represented athletes; staged sporting, arts, and fashion events; and produced and distributed sports, reality, and entertainment programming.[39] This acquisition marked WME's entry into content production and distribution. In 2017, WME announced the creation of a new division, Endeavor Content, which finances and produces content.[40] Also in 2017, WME acquired a majority stake in Bloom, a film production, finance, and sales company and announced a partnership with Chernin Entertainment to finance, develop, and produce scripted series. Endeavor Content is set to be the producer or co-producer for at least ten scripted television and online series such as *Are You Sleeping* on Apple and *Half Empty* on Amazon, and has produced or financed films such as *Book Club* and *Icebox*.[41]

CAA and its private equity owner, TPG, are similarly expanding into content production. In 2017, CAA launched a $150 million film fund with Chinese company Bona Film Group[42] and established a studio called Wiip,[43] which is producing several scripted series for Facebook and Apple.[44] TPG is invested in a TV studio called Platform One Media,[45] digital media company Vice,[46] and STX Entertainment, a film and TV finance and distribution company.[47]

UTA is the most recent agency entrant into content production following private equity investment in August 2018. In October 2018, UTA announced a joint venture with independent studio Media Rights Capital (the producer of *House of Cards*) called Civic Center Media, which will develop, produce, and finance television series.[48]

"Who are you representing? Do you have [the writer's] back or your back?... How do you have both backs?" [49]

Bryan Besser, Verve co-founder and partner

Conflict of Interest in Practice

Talent agencies launching production companies that employ their own clients creates an indefensible conflict of interest. Acting as an employer and representing a client in salary negotiations are fundamentally at odds: an employer's incentive is to maximize its profits and keep labor costs low, while the agency is duty-bound to get the best deal it can for its client.

Agencies as Producers Creates Numerous Conflicts that Harm Talent:

- An agency-producer has the incentive to keep talent costs low in order to increase profits, in direct violation of an agent's fiduciary obligation to negotiate the best compensation possible for the client. While the agency-producer may decide to give a TV series creator a more lucrative deal to ensure the project is produced by the agency, the incentive to control costs will put pressure on compensation for the rest of the writing staff and others working on the series.
- An agency may not present outside employment offers to its client because it wants the client to work on an agency production.
- If an agency-producer has a dispute with a client—over pay, hiring, or creative differences—the client has little recourse or protection.
- An agency-producer may compete against its own clients for access to intellectual property, key talent, or funding from a television network or online platform.

In addition, talent agency expansion into production raises a number of unfair competition concerns, the very concerns that lay at the heart of the Justice Department's 1962 antitrust case against MCA, the largest agency-producer of its day. An agency that produces content can use the leverage it gains from this vertical integration to harm both agency and producing competitors. For instance, talent represented by competing agencies may be foreclosed from access to employment at the agency-produced projects. As a result, talent may leave competing agencies for fear of losing job opportunities, further increasing the power of these dominant agencies. Studios and production companies could find themselves in direct competition with the entities that control access to the talent needed to make film and television projects. Agency-producers have a strong incentive to withhold talent from competing employers because it will benefit their own production business.

Agency Producing Prompts Federal Action: The Case of MCA

MCA (Music Corporation of America) began as a music talent agency in the 1920s, and expanded into representing film talent in the 1930s. Over the next several decades, it grew through acquisitions of competing agencies until it was judged to have "the largest list of the most important name talent in the United States and…Great Britain." MCA also expanded into producing television and film, eventually trying to acquire 80 percent of Universal Studios' parent, Decca Records.

MCA's growth and dominance attracted the attention of the U.S. Department of Justice, the government agency responsible for enforcing federal antitrust laws. The Justice Department filed an antitrust lawsuit against MCA, alleging that MCA's dominance as both a talent agency and a producer constituted an unlawful restraint of trade, harming competing agencies, competing producers, and talent, including MCA's talent, "by virtue of MCA's conflicting interests arising from its dual position as talent agency and television film producer." In order to resolve the case, MCA agreed to divest its talent agency business in 1962.[50]

Conclusion

The fundamental duty of a talent agency is to represent the interests of its clients. This report reveals how far the dominant agencies have strayed from this mission. With private equity owners that demand strong growth and sizeable returns on their investments, the largest agencies are focused on increasing their bottom lines, often at the expense of their clients. As the agencies expand and diversify, conflicts compound.

For film and television writers, this system of conflicted representation is no longer acceptable. Under federal labor law, the WGA has the exclusive right to delegate representation of writers to talent agencies, meaning the union has the right to regulate how agencies represent its members. The WGA has proposed terms of a new agency agreement that would restore the proper fiduciary relationship between talent agencies and their writer-clients by tying agency compensation to client compensation through a ten percent commission structure, and by prohibiting the conflicted agency practices of packaging and producing. The current authorization for WME and CAA and other franchised agencies to represent WGA members expires in April 2019. The talent agencies will soon have to choose between their conflicted practices and representing talent for the proper ten percent commission.

Endnotes

[1] This report refers to the holding company currently doing business as Endeavor and its subsidiaries collectively as WME, except where a specific subsidiary is identified by name.

[2] Christopher Clarey, *At Wimbledon, a Power Broker Gambles to Reassert Its Marketing Magic*, The New York Times (June 28, 2015), https://www.nytimes.com/2015/06/29/sports/tennis/at-wimbledon-imggambles-to-reassert-itself-with-william-morris.html.

[3] Christopher Williams, *Endeavor's Ari Emanuel goes from Tinseltown power broker to global mogul with deal after deal*, The Telegraph (Oct. 7, 2018), https://www.telegraph.co.uk/business/2018/10/07/endeavors-ari-emanuel-goes-tinseltown-power-broker-global-mogul/.

[4] Restatement (Third) Of Agency §8.01 (2006).

[5] Every three years, the WGA negotiates a collective bargaining agreement with major Hollywood studios to establish minimum rates of pay for television and feature film scripts as well as residual compensation, health care and pension benefits.

[6] California Civil Code §2322(c) and California Probate Code §16002; see also *Arnold, et al. vs Triad Artists, Inc.*, No. TAC 40-91 at 6-7 (Cal. DLSE Feb. 20, 1992).

[7] See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 995 (2d Cir. 1983). George Harrison's business manager was found to have acted as his agent, indicating a fiduciary obligation under New York law.

[8]James Andrew Miller, Powerhouse: The Untold Story of Hollywood's Creative Artists Agency at 619 (2016) (*"Powerhouse"*).

[9] This report refers to TPG and its various investment arms and funds collectively as TPG unless otherwise noted.

[10] Content regarding private equity and other investments is based on available information and may be incomplete; financial information is approximate.

[11] Josh Rottenberg, *Wall Street Investors to Hollywood Talent Agencies: 'Show Us the Money'*, The Los Angeles Times (July 10, 2015), https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-talentagencies-private-equity-20150710-story.html; Moody's Investors Service Rating Action, Creative Artists Agency, LLC: Moody's assigns Creative Artists Agency a B2 CFR and assigns ratings to new credit facility; outlook stable (Nov. 21, 2014), https://www.moodys.com/research/Moodys-assigns-Creative-Artists-Agency-a-B2-CFR-and-assigns--PR_313397; Moody's Investors Service Credit Opinion, Creative Artists Agency, LLC: Update to Discussion of Key Credit Factors (Nov. 9, 2017). In 2014, TPG invested another $75 million into CAA and committed another $150 million for possible acquisitions; $50 million remained on standby as of November 2017.

[12] Lisa Wang, *Taiwan Mobile Co Invests in Creative Artists Agency*, Taipei Times (Oct. 6, 2017), http://www.taipeitimes.com/News/biz/archives/2017/10/06/2003679790; Taiwan Mobile Co., Ltd. And Subsidiaries, Consolidated Financial Statements for the Six Months Ended June 30, 2017 and 2016 and Independent Auditors' Review Report, https://english.taiwanmobile.com/english/upload/investor/TWMconsolidated_106Q2_e.pdf; Taiwan Mobile Co., Ltd. And Subsidiaries, Consolidated Financial Statements for the Three Months Ended March 31, 2017 and 2016 and Independent Auditors' Review Report, https://english.taiwanmobile.com/english/upload/investor/TWMconsolidated_106Q1_e.pdf.

[13] William D. Cohan, *The Inside Story of Ari Emanuel's Big, Risky WME-IMG Merger*, Vanity Fair (Mar. 2015), https://www.vanityfair.com/news/2015/02/wme-img-merger-ari-emanuel; Matthew Garrahan, *Silver Lake looks to turn WME into gold*, Financial Times (Nov. 21, 2014), https://www.silverlake.com/Images/Uploads/docs/Silverlake20111709432928705.pdf.

[14] Gene Maddaus, *WME-IMG to Receive $1.1 Billion Cash Infusion*, Variety (Aug. 2, 2017), https://variety.com/2017/biz/news/silver-lake-wme-img-1-1-billion-investment-1202513182/; James Rainey, *WME-IMG Lands $55 million Investment from Fidelity*, Variety (Apr. 20, 2016), https://variety.com/2016/film/news/wme-img-fidelity-management-investment-1201757635/; Press Release, Canada Pension Plan Investment Board, *Canada Pension Plan Investment Board Invests US$400 Million in WME-IMG* (Aug. 2, 2017), https://www.cppib.com/en/public-media/headlines/2017/cppib-wmeimg/; Ann Williams, *GIC, Canadian fund to invest US$1b in powerhouse Hollywood agency WME-IMG*, The Straits Times (Aug. 3, 2017), https://www.straitstimes.com/business/companies-markets/gic-canadian-pension-fund-to-invest-us1b-inpowerhouse-us-entertainment.

[15] Trey Williams, *Endeavor to Exit $400 Million Saudi Arabia Investment Deal*, The Wrap (Oct. 15, 2018), https://www.thewrap.com/endeavor-exit-400-million-saudi-arabia-investment-deal/.

[16] This total includes the $400 million from Saudi Arabia, which WME has announced it will return.

[17] Cynthia Littleton, *UTA Sells Minority Stake to Investcorp and PSP Investments*, Variety (Aug. 7, 2018), https://variety.com/2018/biz/news/uta-jaysures-david-kramer-1202896205/.

[18] *Powerhouse* at 617-18.

[19] *Powerhouse* at 169.

[20] "Net" profits generally refers to gross receipts after the deduction of costs including the cost of production, distribution fees, distribution expenses, interest, overhead, and third party participations. The fees associated with distribution, interest, and overhead are typically higher under a net profit definition than a gross profit definition, thus reducing the likelihood of a profit.

[21] "Gross" profits generally refers to modified adjusted gross receipts, which is computed by deducting distribution fees, distribution expenses, the cost of production and other expenses from gross receipts.

[22] This is referred to as the 3/3/10 model: 3 percent of the series license fee upfront, 3 percent of the license fee deferred, and 10 percent of profits.

[23] Out of more than 300 WGA-covered scripted series.

[24] Complaint, *Hanzer Holdings and Arlita, Inc. v. CBS Studios, Inc.* (Cal. Super. Ct. 2018).

[25] *Powerhouse* at 168-169.

[26] *Powerhouse* at 168.

[27] Exhibits 16 and 18 to the Plaintiff's Compendium of Evidence (July 11, 2011) in *Elias v. Creative Artists Agency* (Cal. Super. Ct. 2011).

[28] Exhibit 18 to the Plaintiff's Compendium of Evidence (July 11, 2011) in *Elias v. Creative Artists Agency* (Cal. Super. Ct. 2011).

[29] Sept. 25, 2015 Deposition of Daniel Grover, CAA Co-Head of Business Affairs at 16-19, 53, 81-83 in *Darabont v. AMC Network Entertainment LLC*, 128 A.D.3d 472 (N.Y. 1st Dep't 2015) (*"Grover Deposition"*).

[30] Exhibit AAA to the Affidavit of Aileen Candace Frazier In Support of Defendants' Motion for Summary Judgment (July 12, 2017) in *Darabont v. AMC Network Entertainment LLC*, 128 A.D.3d 472 (N.Y. 1st Dep't 2015).

[31] Ted Johnson, '*Walking Dead' Lawsuit: Frank Darabont Can Move Forward on Added Claim*, Variety (Feb. 9, 2016), https://variety.com/2016/tv/news/walking-dead-lawsuit-frank-darabont-1201701086/.

[32] Grover Deposition at 61-63, 80-87.

[33] Transcript of June 3, 2010 Trial Proceedings, Celador CEO Paul Smith in *Celador Int'l v. Walt Disney Co.*, 347 F.Supp.2d 846 (C.D. Cal. 2004).

[34] Transcript of June 8, 2010 Trial Proceedings, Former WMA Agent Greg Lipstone in *Celador Int'l v. Walt Disney Co.*, 347 F.Supp.2d 846 (C.D. Cal. 2004).

[35] Ted Johnson, *Court Won't Consider Disney's Request for 'Millionaire' Verdict Review*, Variety (Feb. 26, 2013), https://variety.com/2013/biz/news/court-won-t-consider-disney-s-request-for-millionaire-verdictreview-1118066585/. Verdict affirmed in *Celador Int'l v. Am. Broad. Cos.*, 499 Fed. Appx. 721 (9th Cir. 2012).

[36] Transcript of June 29, 2010 Trial Proceedings, Attorney Marty Katz on behalf of Walt Disney Co. in *Celador Int'l v. Walt Disney Co.*(C.D. Cal. 2004).

[37] All emphasis added.

[38] Sometimes, when different agencies represent the key elements of a package (eg. writers, directors or actors), they share the packaging fee among themselves.

[39] *Our Story*, Endeavor, http://www.endeavorco.com/story/ (last visited Feb. 6, 2019).

[40] David Ng, *Talent agencies are reshaping their roles in Hollywood. Not everyone is happy about that*, Los Angeles Times (Apr. 6, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-talentagencies-20180406-story.html.

[41] Mike Fleming Jr., *Endeavor Content Bolsters TV & Film Ranks, Fully Integrates Global Sales Company Bloom; Alex Walton is EVP, Dan Guando Sr Veep*, Deadline (Oct. 10, 2018), https://deadline.com/2018/10/endeavor-content-bloom-alex-bloom-dan-guando-david-greathouse-patrick-mcdonald-lorenzode-maio-1202479929/.

[42] Ryan Faughnder, *CAA and China's Bona Film Group Create $150-Million Film Fund,* The Los Angeles Times (May 25, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-caa-bona-film-fund-20170525-story.html.

[43] Abbreviation of "word.idea.imagination.production." Rebecca Sun & Jonathan Handel, *As Talent Agencies Push to Own Content, Some Creators Cry Foul*, The Hollywood Reporter (Sept. 12, 2018), https://www.hollywoodreporter.com/features/talent-agencies-push-production-rankles-wga-someclients-1142009; Delaware Department of State, Division of Corporations Website, Entity Details for "Wiip Development, LLC" (last visitedw Feb. 6, 2019).

[44] Joe Otterson, *Apple Orders Emily Dickinson Series With Hailee Steinfeld Set to Star*, Variety (May 30, 2018), https://variety.com/2018/tv/news/emily-dickinson-series-apple-hailee-steinfeld-1202825290/.

[45] Press Release, TPG, *TPG Growth and Liberty Global Launch Independent Television Studio*, *Platform One Media*, (July 17, 2017), http://press.tpg.com/phoenix.zht l?c=254315&p=irolnewsArticle& ID=2286787.

[46] Press Release, TPG, *TPG Growth to Acquire TRACE, Africa's Leading Music and Entertainment Company* (Jan. 19, 2018), http://press.tpg.com/phoenix.zhtml?c=254315&p=irolnewsArticle & ID=2327496; Michael J. de la Merced, *Vice Shows the Perils of the* '*Greater Fool' Theory*, The New York Times (June 11, 2018), https://www.nytimes.com/2018/06/11/business/dealbook/*viceshows-the-perils-of-the-greater-fool-theory*.html.

[47] *Investors*, STX Entertainment, https://stxentertainment.com/investors (last visited Jan. 8, 2019).

[48] David Hayes, *UTA and Valence Media's MRC Form TV Production and Finance Venture Civic Center Media*, Deadline (Oct. 10, 2018), https://deadline.com/2018/10/uta-valence-media-media-rights-capital-tvproduction-financing-venture-civic-center-1202480359/.

[49] Rebecca Sun, Jonathan Handel, *As Talent Agencies Push to Own Content, Some Creators Cry Foul*, Hollywood Reporter (Sept. 12, 2018), https://www.hollywoodreporter.com/features/talent-agencies-pushproduction-rankles-wga-some-clients-1142009.

[50] Complaint, *United States v. MCA Inc.*, No. 62-942-WM at 12 (July 13, 1962).