



March 15, 2011

James J. Tierney, Esq.
Chief, Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, D.C. 20530

Re: Proposed Final Judgment in *U.S. v. Lucasfilm*

Dear Mr. Tierney:

The Association of Executive Search Consultants (“AESC”) recently filed public comments concerning DOJ’s proposed consent decree in the *Lucasfilm* matter. In its public comments, the AESC outlined practical scenarios in which a broad no direct solicitation provision in an executive search contract might *not* be “reasonably necessary.” The AESC urged DOJ to consider adding language to the proposed Final Judgment identifying guideposts for tailoring overly broad non-solicitation provisions to more appropriately track the scope of a recruiting or executive search engagement. As the AESC noted, absent further clarification it may be difficult for executive search firms to ensure compliance with the standards of conduct outlined by the proposed *Lucasfilm* consent decree. In addition, the AESC believes there are policy issues that should be of some concern to DOJ, issues that could effectively be addressed through relatively minor revisions to the language of the proposed Final Judgment.

When a corporation engages an outside consultant to perform an executive search, the consultant may learn a great deal about the office or business in question, including its internal structure, personnel, reporting relationships, and compensation practices. Such knowledge can be very useful to the outside consultant and can aid the process of identifying and recruiting talented, well-placed executives, leading to better and more rapid results for the client. Where an executive search firm, in the course of its work, gains exposure to proprietary details about an aspect of a client’s business, it is understandable that the client would desire to ensure that such knowledge is not used for the benefit of the search firm’s other clients. Thus, to facilitate executive search engagements, it may be “reasonably necessary” for the client and search firm to agree upon a narrowly tailored non-solicitation covenant. An example would be a covenant of limited duration restricting the search firm from contacting, for recruiting purposes, individuals who work within the relevant office or division of the client corporation.

James J. Tierney, Esq.

March 15, 2011

Page 2

But as noted in the examples highlighted by our public comments, executive search clients can demand much broader non-solicitation terms. For instance, a large multinational corporate client could demand a multi-year contractual ban on solicitations extending across the client's entire global enterprise, even where the search that is the subject of the retention agreement is limited to a single position or a discrete business unit.

Where a client negotiates for and receives an overly broad non-solicitation covenant in a contract with an executive search firm, this alone likely would not raise antitrust concerns. Indeed, absent collusion, even pervasive use of overly broad non-solicitation terms in retention agreements with leading executive search firms likely would not rise to the level of an antitrust violation. Yet agreements containing such terms, if widespread within a given industry, do pose an arguable threat to competition, inasmuch as they tend to place significant numbers of talented individuals off limits from employment opportunities. If a corporation can broadly place its personnel off limits to top executive search firms, this serves to insulate the corporation from normal marketplace pressures, which in the words of the *Lucasfilm* Competitive Impact Statement could interfere with "the proper functioning of the price-setting mechanism."

Although inclusion of overbroad non-solicitation provisions in vertical retention agreements between executive search consultants and their corporate clients is not a matter of acute antitrust sensitivity, given the potential competition-reducing effect of such provisions presumably DOJ would not wish to encourage the use of such provisions. Yet as currently worded the proposed Final Judgment may do just that. The proposed Final Judgment addresses this subject under the heading of "Conduct Not Prohibited." This, combined with the fact that the term "reasonably related" is nowhere defined or clarified, could be interpreted to suggest that no direct solicitation provisions, no matter how broadly defined, are unlikely to pose legal concerns as long as they bear *some* relation to the recruiting or consulting engagement.

With relatively minor language revisions, DOJ could send a more constructive message, counseling in favor of some restraint in this area. What is missing from the proposed Final Judgment is simply some indication of the factors that would be relevant to consider in assessing the "reasonable necessity" of a non-solicitation restraint – factors such as:

- the nature and scope of the recruiting engagement;
- the extent to which the search consultant is given access to proprietary details about the client's business;
- the breadth of the proposed non-solicitation restraint in relation to the scope of the recruiting engagement and any proprietary information conveyed by the client in the course of facilitating the engagement; and
- the duration and geographic scope of the proposed non-solicitation restraint in relation to the scope of the recruiting engagement.

James J. Tierney, Esq.

March 15, 2011

Page 3

The AESC would therefore propose that DOJ consider adding this language as a new Section V.B. to the proposed Final Judgment, with the current Section V.B. being re-designated as Section V.C., etc.:

B. All no direct solicitation provisions that relate to agreements with recruiting agencies described in Section 5.A.3 shall be narrowly tailored such that the scope of the no direct solicitation provision bears a reasonable relationship to the scope of the recruiting engagement, including with respect to geographic reach, duration, and the number of personnel and business units affected.

Inclusion of additional language as simple and straightforward as this would establish a useful reference for executive search consultants and their clients when entering into non-solicitation terms. This would help to ensure against overly broad contractual restrictions that have the effect of placing significant numbers of individuals off limits to recruiters, thus expanding the pool of accessible talent from which to draw when conducting executive searches. The chief beneficiary of such a trend would be individual corporate executives and employees whose range of opportunities would be enhanced. This outcome is entirely in keeping with the policies that motivated the DOJ's action in the *Lucasfilm* matter, and we hope that you will give serious consideration to revising the proposed Final Judgment accordingly.

Sincerely,

A handwritten signature in cursive script that reads "Peter Felix".

Peter M. Felix

President, Association of Executive

Search Consultants