Darabont v AMC Network Entertainment LLC
2020 NY Slip Op 34342(U)
December 31, 2020
Supreme Court, New York County
Docket Number: 650251/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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FRANK DARABONT, FERENC, INC., DARKWOODS PRODUCTIONS, INC., CREATIVE ARTISTS AGENCY, LLC,

Plaintiffs,

- v -

AMC NETWORK ENTERTAINMENT LLC, AMC FILM HOLDINGS LLC, AMC NETWORKS INC., STU SEGALL PRODUCTIONS, INC., DOES 1 THROUGH 10,

Defendants.

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INDEX NO.	650251/2018
MOTION DATE	N/A
MOTION SEQ. NO.	007

REVISED DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 309, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 326, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 401, 402, 403, 404, 563, 564, 664, 665, 666, 667, 668, 669. 670, 676, 677. 678, 679, 680

were read on this motion for SUMMARY JUDGMENT.

OVERVIEW

Upon reargument, this Decision and Order supersedes and replaces the Court's decision and order dated April 10, 2020 (NYSCEF 326) denying Defendants' motion for summary

judgment. Although the rationale has changed, the result is the same. Defendants' motion for summary judgment is denied and the case will proceed to trial.[1]

This case concerns Plaintiffs' compensation for the television series *The Walking Dead*. As compared with a larger case that has been pending in this Court since 2013,[2] this one is narrowly focused on the mechanics and calculation of Modified Adjusted Gross Receipts ("MAGR") (as defined in the relevant agreements) as applied to certain specific issues identified during a contractually permitted audit (collectively, the "Audit Claims").

In a nutshell, Plaintiffs allege that Defendants (collectively, "AMC") used "a variety of shady accounting practices" in calculating MAGR to drive down Plaintiffs' profit participation payments, inconsistent with both the contractual language and industry custom and practice. In response, AMC asserts that Plaintiffs' Audit Claims cannot be squared with the unambiguous contractual definition of MAGR and that Plaintiffs cannot appeal to purported industry custom to modify that definition. AMC seeks summary judgment dismissing the Audit Claims. For the following reasons, the motion is denied.

FACTS

The basic facts of the case are set forth in Justice Bransten's thorough summary judgment decision in the 2013 case *Darabont v AMC Network Entertainment LLC*, 2018 WL 6448457, at *1-*11 [NY Sup Ct NY Cty, Dec 10, 2018] ["*2013 SJ Op.*"]). They are summarized here, as

[1] As discussed in the decision granting reargument (NYSCEF Doc. No. 700), the Court's prior decision denying summary judgment was based in part on the lead argument presented in Plaintiffs' brief opposing summary judgment (*i.e.*, that AMC's MAGR definition was subject to mandatory post-contractual negotiation), upon which they no longer rely.

[2] Index No. 654328/2013.

supplemented by the 2018 Action discovery record, only as relevant to resolving the present motion.

The Walking Dead (the "Series") depicts life following a zombie apocalypse. It is broadcast by AMC Network Entertainment LLC ("AMC Network"). On August 7, 2010, Plaintiff Frank Darabont entered into an agreement with AMC Film Holdings LLC ("AMC Studios") regarding Mr. Darabont's services and compensation with respect to the Series (NYSCEF Doc. No. 175, [the "2010 Agreement"]). After a successful first season, the parties executed a second agreement that modified the 2010 Agreement (NYSCEF Doc. No. 202 [the "Season 2 Amendment"]).

Mr. Darabont developed the Series for AMC and was its lead "executive producer/showrunner" from 2010 until 2011. The relevant agreements provide for him to be paid fixed compensation plus contingent compensation (also known as backend or profit participation) based on a percentage of MAGR earned by AMC Studios for the Series. By a separate agreement, Plaintiff Creative Artists Agency, LLC, Darabont's talent agency, is also entitled to MAGR-based participation on the Series.

The parties have two cases pending in this Court: Index No. 654328/2013 (the "2013 Action") and Index No. 650251/2018 (the "2018 Action"). The cases are consolidated for a joint jury trial currently scheduled to begin on April 26, 2021.

The 2013 Action

Plaintiffs filed the 2013 Action on December 17, 2013. Their principal allegation is that AMC Studios "licensed" the Series for broadcast to its corporate affiliate (AMC Network) at an artificially low license fee that, in turn, drove down the profit participation to which Plaintiffs are entitled. According to Plaintiffs, this violates a provision in the 2010

Agreement that requires AMC to set an "imputed license fee" that is "on monetary terms comparable to the terms on which [AMC Network] enters into similar transactions with unrelated third party distributors for comparable programs" (the "Affiliate Transaction Provision"). Plaintiffs contend that because of this alleged breach, AMC has underpaid Plaintiffs by more than $280 million.

AMC vigorously denies these allegations on the basis that, among other things, the Affiliate Transaction Provision does not apply to the imputed license fee because the latter is subject to and controlled by the contractual definition of MAGR. AMC contends that it has complied with the 2010 Agreement, that it paid Plaintiffs what they are owed, and that Plaintiffs are not entitled to damages.

Plaintiffs also allege, among other things, that Mr. Darabont's MAGR share fully vested under the 2010 Agreement, and that AMC breached that agreement by paying him contingent compensation based on a lesser MAGR share. AMC denies these allegations and contends that it has paid Mr. Darabont contingent compensation based on the portion of his MAGR share that vested under the 2010 Agreement.

Summary Judgment Decision in the 2013 Action

After discovery, Plaintiffs moved for partial summary judgment seeking a declaration that the imputed license fee is governed by the Affiliate Transaction Provision. AMC moved for summary judgment dismissing all of Plaintiffs' claims.

In resolving the motions, the Court (Bransten, J.) found, first, that "the [2010 Agreement] is susceptible to the interpretation urged by both parties in regard to whether the Affiliate Transaction Provision applies to the imputed license fee and is therefore ambiguous … Here, the parties offer extrinsic evidence to support their respective positions as to their intent, including,

among other things, evidence of what occurred during negotiations. The extrinsic evidence does not permit this court to rule, as a matter of law, whether the Affiliate Transaction Provision applies to the imputed license fee" (*2013 SJ Op.* at *9 [internal citations omitted]). The Court therefore denied both parties' motions for summary judgment with respect to the core question about whether the imputed license fee had to be (effectively) on arms-length terms (*Id.*). That issue – which involves the most substantial dispute among the parties in monetary terms – is not involved in the present action.

The Court granted the remainder of AMC's motion in part and denied it in part. Justice Bransten dismissed a portion of Plaintiffs' First Cause of Action (breach of contract) relating to certain negotiation rights and screen credits but left intact Plaintiffs' other breach of contract claims. She also left intact Plaintiffs' claim that AMC breached the implied covenant of good faith and fair dealing.[3]

Of relevance here, the Court concluded that AMC's decision to terminate Mr. Darabont's services prior to Season 2 did not necessarily impact the full vesting of Mr. Darabont's rights to profit participation for the Series going forward. Among other things, the Court found that there were disputed questions of fact as to the extent and nature of Mr. Darabont's work on Season 2, which was a trigger for certain vesting provisions (*2013 SJ Op.* at *13-*15). As will be described below, that finding also impacts whether Mr. Darabont was entitled to the benefit of an amended MAGR definition that was included in the Season 2 Amendment.

The parties did not appeal the summary judgment decision.

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[3] Plaintiffs' Third Cause of Action, for an accounting, was withdrawn by Plaintiffs, and has been dismissed. Plaintiffs' Fourth Cause of Action for a declaratory judgment was also dismissed as duplicative of Plaintiffs' breach of contract claim (*Id.* at *16).

The 2018 Action

On January 18, 2018, while the summary judgment motions were pending in the 2013 Action, Plaintiffs filed the 2018 Action.

Based on an audit of AMC's books and records from inception of the Series through September 30, 2014, Plaintiffs allege that AMC miscalculated MAGR and underpaid Plaintiffs' contingent compensation by various and sundry means, including: underreporting revenue from electronic sell through via Apple's iTunes service; applying distribution fees (including sub-distribution fees) in excess of what is permitted under the agreements; failing to account for "product integration fees" from Gerber and Hyundai for permitting their products to appear on screen during episodes of the Series; underreporting license fees from Fox International Channels ("FIC") related to Series' episodes in Season 5; charging Sundance International Channel (an AMC affiliate) a below-market license fee for the Series; overcharging fees with respect to merchandising; overcharging fees with respect to music publishing; overcharging fees for consultants, accountants, and lawyers; inflating the cost of a Comic-Con banner; failing to properly apply Georgia state tax credits as an offset to production expenses; improperly deducting profits received by Plaintiff Ferenc, Inc.; improperly deducting advances paid to other profit participants; applying inflated interest on production costs; and breaching its Most Favored Nations obligations by agreeing to a more favorable distribution fee for another profit participant (NYSCEF Doc. No. 57 [First Amended Complaint "FAC"] at ¶¶ 26, 29).

Based on those allegations, Plaintiffs assert claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendants deny these allegations and contend that they properly calculated MAGR under the agreements.

Discovery is complete and Note of Issue was filed on November 1, 2019. Subject to resolution of this motion for summary judgment, the case is ready for trial.

AMC's Motion for Summary Judgment

AMC seeks summary judgment dismissing Plaintiffs' claims in the 2018 Action. AMC argues that its calculation of MAGR is consistent with "AMC's MAGR definition," which is explicitly incorporated in the 2010 Agreement, subject only to certain specifically negotiated parameters. Therefore, according to AMC, its MAGR definition (which was modified over time) was unequivocally binding on the parties.

In response, Plaintiffs assert that AMC's accounting is inconsistent with the terms of the 2010 Agreement, the Season 2 Amendment, and even with AMC's own purported MAGR definition. Moreover, Plaintiffs assert that AMC is seeking improperly to re-litigate issues already decided in the *2013 SJ Op.* In Plaintiffs' colorful description: "Like the relentless zombies of *The Walking Dead*, arguments previously rejected by Justice Bransten rise again, and form the lynchpin [sic] of AMC's motion" (NYSCEF Doc. No. 290 ["Plaintiffs' Memorandum of Law in Opposition"] at 1).

Relevant Provisions of the 2010 Agreement

Section 13(d) of the Agreement provides different – but arguably parallel – definitions of MAGR depending on whether the Series is produced by a "third party" or by AMC (which turned out to be the case). Both definitions incorporate the producer's (the third party's or AMC's) MAGR terms, using different language to describe them, subject to certain terms specifically negotiated by the parties.

Section 13(d)(i): If the Series is produced by a third party, "MAGR shall be defined, computed, and paid in accordance with the standard definition thereof used by the third party …,

subject to good faith negotiation (including as to distribution fee and overhead) within the usual parameters of such [third party] consistent with Artist's stature …," subject to several Agreement-specific provisos (2010 Agreement at ¶ 13(d)(i)).

Section 13(d)(ii): If, on the other hand, the Series is produced by AMC, "MAGR shall be defined, computed and paid in accordance with *AMC's MAGR definition* (which shall be furnished to Lender #1), which definition shall specify an imputed license fee in connection with AMC's license and rights to exhibit the Series on AMC and its related services to be included in the calculation of 'Gross Receipts' in AMC's MAGR definition, but no television distribution fee shall be charged with respect to the Gross Receipts attributed to such imputed license fee." (*Id*. at ¶ 13(d)(ii) [emphasis added]).

The definition then goes on to spell out several categories of agreed-upon "modif[ications]" to "AMC's MAGR definition" for purposes of the Series: "[F]or purposes of the calculation of Artist's participation hereunder, AMC's MAGR definition shall be modified to provide the following:

(A) AMC's television distribution fee shall be capped at ten percent (10%) and shall be inclusive of all sub-distributor, barter and sales fees (but specifically excluding any advertising agency fees charged on barter), provided there shall be no television distribution fee on the sale to the initial broadcaster, including all extensions and renewals thereof;

(B) AMC's administrative overhead fee shall be capped at twelve and one-half percent (12.5%) on the cost of production (and no studio supervisory fee shall be charged by AMC or any affiliated entity);

(C) no overhead will be charged on interest and no interest will be charged on overhead or interest;

(D) except with respect to agency package commissions, production costs will not include any third party profit participations or advances or deferrals payable out of, or measured by, MAGR or other contingent compensation, or interest on such payments;

(E) the interest charge shall not exceed prime plus one percent (1%) per annum, and interest will be calculated at the midpoint of each production period;

(F) all transactions with affiliated entities will be subject to subparagraph 13(c)(iii) below [*i.e.*, the Affiliate Transaction Provision];

(G) the imputed license fee will be no less favorable than the imputed license fee applicable to any other MAGR participant with respect to the Series;

(H) the upfront portion of any agency package commission (i.e., the portion of the agency package commission that is based on a percentage of license fee) will be deemed a cost of the production, and the back-end portions of any agency package commission (i.e., the portions of the agency package commission that are either deferments payable out of contingent compensation or percentages of contingent compensation) will be deducted in the same manner as a distribution cost; and

(I) Lender will have the right to object to any accounting statement within three (3) years following receipt of the applicable statement, provided that (i) the initial accounting shall be rendered to Lender not later than 90 days after AMC's periodic account closing which occurs closest to December 31 following the end of the first broadcast year during which the Series is

exhibited; (ii) AMC shall subsequently render annual accountings, except that AMC shall render semi-annual accountings for three (3) years following the annual accounting period during which the Series ceases to be produced, and (iii) notwithstanding the foregoing, no accounting shall be required for any accounting period if Lender shall not be entitled to payment pursuant to such accounting" (*Id.*).

Section 13 (d)(iii): In consideration of Mr. Darabont's agreement to waive objections to AMC's use of Affiliated Companies to distribute or exploit the Series, "AMC agrees that AMC's transactions with Affiliated Companies will be on monetary terms comparable to the terms on which the Affiliated Company enters into similar transactions with unrelated third party distributors for comparable programs" (*Id.* at ¶ 13(d)(iii)).

Section 13 (d)(iv): Finally, "[w]ith respect to matters relating to the calculation of [Mr. Darabont's] MAGR participation (i.e., distribution fee, overhead fee, imputed license fee, and other inclusions and deductions which are the subject of negotiation), in no event shall [Mr. Darabont's] participation be defined less favorably that MAGR is defined for any other individual participant on the Series . . . ." (*Id.* at ¶ 13(d)(iv)).

Relevant Provisions of the Season 2 Amendment

The parties amended the 2010 Agreement in February 2011, before the beginning of Season 2, to be effective January 10, 2011 (*see* Season 2 Amendment). At that point, AMC still had not provided Plaintiffs with its MAGR Definition.

Among other things, the parties agreed to a revised definition of MAGR that would only take effect *if* Mr. Darabont "renders executive producer/showrunner services on all

episodes produced for Season 2" and is not in material breach of the 2010 Agreement as amended. If those conditions are satisfied:

"MAGR shall be as set forth in AMC's *customary* MAGR definition, with such changes as have been agreed in the [2010] Agreement, and subject to such further changes as may be agreed following good faith negotiation within customary basic cable television industry parameters consistent with AMC's business practices and Artist's stature in the basic cable television industry as of the date of this Season 2 Amendment. Without limiting the foregoing, [AMC] hereby further agrees as part of this Season 2 Amendment that (i) the MAGR definition applicable to Lender #l's Contingent Participation shall provide that with respect to home video/DVD distribution handled through a third party distributor (i.e., not by AMC or any of its affiliates), 100% of home video/DVD revenues actually received by AMC from such third party distributor shall be included in the computation of Lender #l's Contingent Participation, and (ii) merchandising revenues and expenses that are accountable to Lender #1 as part of the "Merchandising Participation" (as defined below) shall not be included in MAGR or otherwise in computing Lender #l's Contingent Participation." (*Id*. at ¶ 3(b) [emphasis added]).

AMC asserts that the amendments to Mr. Darabont's participation rights did not take effect because he did not render "executive producer/showrunner services" after July 2011, when he was removed by AMC from his role in the midst of AMC's production of Season 2. In support of that assertion, AMC cites Mr. Darabont's testimony that he did not provide "full-time and in-person" services for "all" Season 2 episodes (DSUF at ¶¶22-23). Mr. Darabont vehemently denies that assertion, claiming that he did provide the required services (for which he was credited as executive producer on every episode of Season 2), and that those

services were not required under Section 3 of the Season 2 Amendment to be provided "full-time and in-person."

MAGR Definitions and Negotiations

On February 22, 2011, shortly after the Season 2 Amendment was signed, AMC furnished to Plaintiffs what it asserts to be its "comprehensive" MAGR Definition, identifying the formula by which MAGR would be calculated.

AMC claims that it voluntarily engaged in negotiations in response to Plaintiffs' objections to the MAGR Definition, but that it was not required to do so because the Agreement only mandated MAGR negotiation if AMC selected a *third party* to produce the series, which it did not.

Plaintiffs counter that Mr. Darabont's representatives repeatedly requested that AMC provide a draft AMC MAGR definition both before and after the Agreement was executed but were informed that AMC had no such definition (because AMC had never before produced a television series) and would provide it when it was ready. Plaintiffs assert that they finally received a *draft* of a long-form MAGR definition (which was "cobbled together" from various sources) after Season 1 was complete and shortly after the parties executed the Season 2 Amendment. According to Plaintiffs, the draft did not include provisions that had already been agreed to and thus did not, as AMC asserts, constitute "the full AMC MAGR definition" (NYSCEF Doc. No. 289 [Pls. Counterstatement of Facts, "PSUF"] at ¶16).

In any event, it is undisputed that the parties' representatives continued to discuss the MAGR definition. Ultimately, in January 2015, more than a year after Plaintiffs commenced the 2013 Action, AMC provided by email a redlined MAGR definition (NYSCEF Doc. No. 203 [the "2015 MAGR Definition"]) that purportedly "reflect[ed] the negotiated changes made to date as

a result of good faith negotiations between AMC and other participants as well as global changes AMC has made to its definition, and are being provided to you pursuant to Paragraph 13(d)(iii) of the [2010] Agreement." That revised definition was used in calculating payments to Plaintiffs under the 2010 Agreement.

According to Plaintiffs, this purportedly revised definition contained "some changes the parties agreed to, but still conflicted with both the Agreements and industry custom and practice" (Plaintiff's Memorandum of Law in Opposition at 10).

The Audit

Section 13(b)(ii) of the Agreement (governing definition, computation, and payment of MAGR) requires AMC to provide various periodic accountings and gives Lender the "right to object to any accounting statement within three (3) years following receipt of the applicable statement…." (2010 Agreement at ¶ 13(b)(ii)).

In October 2013, Mr. Darabont notified AMC that he intended to conduct an audit (*see* NYSCEF Doc. No. 228). The audit commenced in 2015, after initiation of the 2013 Action. Plaintiffs' claims in this case arise out of information they assert they discovered during the audit.

ANALYSIS

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [citations omitted]; *see also Ahmad v City of New York*, 129 AD3d 443, 444 [1st Dept 2015] ["[S]ummary judgment

should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact"]; *Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010] ["Issues of credibility in particular are to be resolved at trial, not by summary judgment"]; *Esteve v Abad*, 271 AD 725, 728 [1st Dept 1947] ["Issue-finding, rather than issue-determination, is the key to the [summary judgment] procedure"]).

In a contract case, "[i]f there is ambiguity in the terminology used, … and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury," not on a motion for summary judgment (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY 169, 171-72 [1973]; *see also Aronson v Riley*, 59 NY2d 770 [1983] ["In view of our conclusion that the agreement is ambiguous, defendant's motion for summary judgment should be denied inasmuch as plaintiff has tendered extrinsic evidence in admissible form sufficient to require a trial" as to parties' intent]; *Castillo v Big Apple Hyundai*, 177 AD3d 473, 473 [1st Dept 2019] ["Summary judgment is not available … for either party … because there are ambiguities in the written contracts"]; *Davis Inf. Group, Inc. v Ifft*, 239 AD2d 297, 297 [1st Dept 1997] ["Summary judgment… was properly denied since the written agreement between the parties is ambiguous"]).

"Whether an agreement is ambiguous is a question of law for the courts" (*Kass v Kass*, 91 NY2d 554, 566 [1998]. "To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation. The existence of ambiguity must be determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording considered in the light of the obligation as a

whole and the intention of the parties as manifested thereby" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [citations and internal quotations omitted]).

"Further, in deciding the motion [for summary judgment], '[t]he evidence will be construed in the light most favorable to the one moved against'" (*Id.*).

A. AMC's MAGR Definition is Incorporated in the Parties' Agreements

The 2010 Agreement unequivocally provides that, "MAGR shall be defined, computed, and paid by [AMC] in accordance with AMC's MAGR [D]efinition (which shall be furnished to Lender #1)" (2010 Agreement at ¶ 13(d)(ii)). The definition was modified, conditionally, in the Season 2 Amendment, including by describing it to be AMC's "customary" MAGR definition. Of course, at the time the 2010 Agreement and Season 2 Amendment were signed, AMC did not *have* a MAGR Definition, customary or otherwise. The first version of the definition was provided to Plaintiffs in February 2011 and a purportedly "final" version was provided in January 2015.

While the parties agree that it was AMC's task to come up with a MAGR Definition, and that such a definition would be binding on the parties (subject to the exceptions described in the relevant agreements), that is where the consensus ends. They disagree sharply as to whether the revised MAGR definition in the Season 2 Amendment was triggered by Mr. Darabont's involvement (or lack thereof) in Season 2; whether AMC's evolving MAGR Definition was ever finalized during the course of negotiations among the parties; and whether the MAGR definition (whatever it is) unambiguously precludes some or all of the specific Audit Claims, in light of the language of the 2010 Agreement, the Season 2 Amendment, and (to the extent applicable) industry custom. The Court finds that there are material issues of fact that preclude summary judgment.

B. There are Triable Issues of Fact As to the Definition of MAGR

First, there are questions of fact with respect to whether the revised MAGR definition contained in the Season 2 Amendment became effective. As noted above, the definition of MAGR was amended in Section 3(b) of the Season 2 Amendment. The amended definition focuses on "AMC's customary MAGR definition, with such changes as have been agreed in the [2010] Agreement, and subject to such further changes as may be agreed following good faith negotiation within customary basic cable television industry parameters consistent with AMC's business practices and Artist's stature in the basic cable television industry as of the date of this Season 2 Amendment." The applicability of the amended definition of MAGR in the Season 2 Amendment is subject to the condition that, *inter alia*, Mr. Darabont has rendered "executive producer/showrunner services on all episodes produced for Season 2."

Justice Bransten previously held that whether Mr. Darabont satisfied that condition is a question of fact than cannot be resolved on summary judgment (*2013 SJ Op.* at *15). Accordingly, AMC's arguments here are foreclosed by law of the case and the Court sees no reason to deviate from Justice Bransten's conclusions.[4]

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[4] Defendants' argument that the law of the case doctrine does not apply because the 2013 and 2018 cases are "separate actions" is not persuasive. The difference between consolidation for joint trial and formal consolidation (with a single caption) is largely a matter of form. "Joint trial and consolidation are much the same in accomplishment, but differ in mechanics … Consolidation fuses them organically, while joint trial, available on the same criteria under CPLR 602, offers the same advantages without the additional paperwork that consolidation entails …" (Siegel and Connors, N.Y. Practice §127 [6th ed.]). Defendants cite no authority for the proposition that law of the case is inapplicable when two cases are so closely connected that they are combined for a joint trial, and the Court sees no reason to reach that conclusion here (*cf. Dain & Dill, Inc. v Betterton*, 39 AD2d 939, 939 [2d Dept 1972] [prior orders consolidating cases for joint trial were law of the case that precluded subsequent judge from ordering severance]). In *Manessis v Snoke*, 33 AD2d 877, 878 [4th Dept 1969]), the court found that law of the case did not apply in the context of cases consolidated for joint trial because, among other

Although there has been some additional discovery in the 2018 Action, the "new" evidence cited by Defendants does not undermine Justice Bransten's conclusion that there are disputed fact issues as to Mr. Darabont's involvement in Season 2 of the Series that preclude granting summary judgment in favor of Defendants in this case.[5]

Second, there are triable issues of fact as to the precise contours of AMC's MAGR Definition (or its "customary" definition, assuming the Season 2 Amendment definition applies). The record reflects an iterative process with versions being forwarded by email, with ongoing negotiations in between, and with the "final" work product being a redlined 2015 version purporting to show "changes made to date as a result of good faith negotiations between AMC and other participants as well as global changes AMC has made to its definition." Plaintiffs have pointed to sufficient evidence in the record to show factual disputes as to the precise contours of AMC's MAGR Definition (customary or otherwise).

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things, the parties to be bound "were not parties to the previous motions and orders." That is not the situation here. Justice Bransten adjudicated the *same* contractual language, involving a closely related dispute among the *same* parties. To the extent AMC argues that additional facts have been unearthed during the 2018 Action, that is an argument for diverging from law of the case based on extraordinary circumstances, not an argument for finding the doctrine to be entirely inapplicable simply because the cases have not been fully consolidated.

[5] While testimony as to whether Mr. Darabont was involved full-time and in-person in Season 2 might be relevant generally to a factual determination of whether he rendered "executive producer/showrunner services for all episodes in Season 2," it is not conclusive. Section 3 of the Season 2 Amendment does not contain any reference to "full-time" or "in-person"; those terms are referenced in a different section of the Season 2 Amendment. There remain disputed fact issues as to whether Mr. Darabont's involvement in Season 2 constituted "executive producer/showrunner services" (which is a term of art as to which extrinsic evidence may be helpful) for all Season 2 episodes.

In view of those factual disputes as to the scope and contours of the core definition of MAGR, the motion for summary judgment dismissing Plaintiffs' claims based on AMC's proposed definition must be denied.

C. The Individual Audit Claims

Although the foregoing conclusion precludes a definitive resolution of the Audit Claims on summary judgment, the Court will proceed to discuss those claims based on the 2015 MAGR Definition, which may be relevant in the event of an appeal and will, in any event, provide guidance for evidentiary or jury instruction issues at trial.

i. Home Video Distribution

AMC argues that its 2015 MAGR Definition unambiguously permits it to charge a 20% distribution fee on home video receipts from sub-distributors who retain their own distribution fees. While that may be a reasonable reading of the AMC definition, Plaintiffs have provided their own reasonable reading of the Season 2 Amendment that would override such a definition. Specifically, the agreement provides that "100% of home video/DVD revenues actually received by AMC from such third party distributor shall be included in the computation of [Darabont's] Contingent Participation…" (Season 2 Amendment at ¶3(b)). AMC's response that the contractual provision relates solely to revenues (not to costs), and envisions that the 100% "actually received" could be reduced by costs, is plausible but not conclusive.

In addition, Plaintiffs can also plausibly (though not conclusively) argue that AMC's policy with respect to home video is inconsistent, at least in part, with Section 13(d)(ii)(A) of the 2010 Agreement, which provides that "AMC's television distribution fee shall be capped at ten percent (10%) and shall be inclusive of all sub-distributor, barter and sales fees (but specifically excluding any advertising agency fees charged on barter), provided there shall be no television

distribution fee on the sale to the initial broadcaster, including all extensions and renewals thereof."

At trial, the parties can present admissible extrinsic evidence in support of their respective positions.

ii. Electronic Sell Through ("EST")

AMC claims its 2015 MAGR definition unambiguously permitted it to report 20% (rather than 100%) of the total revenue it received from Apple for Apple's sales of the Series to consumers via iTunes in calculating contingent payments to Plaintiffs. Plaintiffs respond that Apple is a "third party distributor," and thus they are entitled to 100% of such revenues under Section 3(b) of the Season 2 Amendment. The same would be true under the 2015 MAGR Definition. Citing dictionary definitions, AMC responds that *it* is the distributor, while Apple (which deals directly with consumers) is a retailer.

The term "distributor" is not defined in the agreements. Plaintiffs and their expert witness (Laurie Younger) point out that AMC's agreement with Apple provides that Apple will "[s]ell *and distribute* the Series via iTunes" (NYSCEF Doc. No. 341 [emphasis added]). They note also that AMC, which claims to be the distributor in the Apple sales chain, does not undertake the functions normally associated with being a distributor (Younger Report at 13-14).

Ms. Younger, based on substantial experience in the industry, provides evidence that "distributor" is a term of art with a recognized meaning in this particular commercial context, and that it would (in her view) apply to Apple and not to AMC (*Id.*). Such evidence suggests that there is more than one commercially reasonable interpretation of the contract language (*Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]; *Uribe v Merchants Bank of New*

York, 91 NY2d 336, 341-42 [1998]; *Cont. Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 654 [1993]).

In sum, the Court finds there is a question of fact as to whether Apple is a "third party distributor" for purposes of the Season 2 Amendment and the 2015 MAGR Definition.

iii. Product Integration

Plaintiffs' arguments with respect to their purported right to participate financially in product integration revenue fare less well. There is no reasonable reading of the text of the relevant agreements or the 2015 MAGR Definition that would give Plaintiffs a share of such revenues. AMC defines product integration receipts as "advertising revenues," which expressly are not to be included in MAGR (*see* 2015 MAGR Definition at ¶ 1(B)(1)(b)(iv)). Plaintiffs' attempt to shoehorn product integration revenues into "additional licensing" revenues is not persuasive.

Plaintiffs' arguments boil down to a claim that it is customary (and equitable) in the industry for profit participants to share in such revenue, which arguably are attributable at least in part to the efforts of the studio (not solely to the network). They point, for example, to AMC's adoption of that practice with respect to another of its successful series, *Breaking Bad*. But appeal to industry custom or practice is only appropriate when there is ambiguity in the contract (*767 Third Ave. LLC v Orix Capital Markets, LLC*, 26 AD3d 216, 218 [1st Dept 2006]; *AG Capital Funding Partners, L.P. v State St. Bank and Tr. Co.*, 10 AD3d 293, 295 [1st Dept 2004], *affd as mod*, 5 NY3d 582 [2005]). Here, unlike with respect to the contextual definition of "distributor" discussed above, there is no such ambiguity. Accordingly, Plaintiffs' claim for breach of contract with respect to product integration revenue would not be viable if the 2015 MAGR Definition is found to be binding.

iv. Merchandising Distribution and Merchandising Fees

Plaintiffs claim that AMC breached the 2010 Agreement by taking a 50% distribution fee on merchandising receipts while also charging, as distribution expenses, fees paid to Striker Entertainment, LLC, AMC's merchandising agent. But AMC's 2015 MAGR Definition expressly permits AMC to take "fifty percent (50%) of the Gross Receipts derived from the exercise of Ancillary Rights," which the MAGR Definition defines to include "Merchandising . . . Rights in the Program." (2015 MAGR Definition at ¶¶ I(B)(1)(a)(iv), I(B)(2)(h)). Plaintiffs argue that the 2010 Agreement requires merchandising distribution fees to be inclusive of sub-distributor fees. But the section to which Plaintiffs refer applies to "television distribution fees," not to merchandising distribution (2010 Agreement at ¶ 13(d)(ii)(A)). Accordingly, this claim would not be sustainable if the 2015 MAGR Definition is found to be binding. For the reasons described above, appeals to industry custom in this context are unavailing.

However, assuming the 2015 MAGR Definition applies, there is a question of fact whether Plaintiffs are entitled under Section 13(d)(iv of the 2010 Agreement to the benefit of the arguably more favorable distribution fee arrangement to which AMC agreed with another profit participant, Greg Nicotero, in 2017 (*see* NYSCEF Doc. No. 351 (Nicotero Profit Participation Agreement) at ¶ (1)(b)(ii)(8)). In response, AMC argues that Plaintiffs are entitled to the most favorable MAGR definition "taken as a whole," and that Nicotero had another provision in his MAGR definition offsetting this perceived improvement, rendering his definition as less "favorable" than Darabont's. The inquiry of whether Nicotero's MAGR definition is less favorable than Darabont's is a question of fact for the jury.

v. Music Publishing Fees

Plaintiffs claim that AMC breached the 2010 Agreement by charging a 50% distribution fee and 15% administration fee on music publishing receipts. However, AMC's 2015 MAGR Definition expressly allows a charge of "fifty percent (50%) of the Gross Receipts derived from the exercise of Ancillary Rights, provided that AMC may also charge an administrative fee of fifteen percent (15%) on the Gross Receipts derived from Music Publishing Rights" (2015 MAGR Definition at ¶ I(B)(2)(h)). Ancillary Rights include "Music Publication Rights" and "Distribution and Soundtrack Rights" (*Id.* at ¶ I(B)(1)(iv)). Accordingly, this claim would not be viable if the 2015 MAGR Definition is found to be final.

Again, however, there is a question of fact as to whether Plaintiffs are entitled to the arguably more favorable distribution fee arrangement that AMC has with Nicotero (Nicotero Profit Participation Agreement at ¶ (1)(b)(ii)(8) [Nicotero's MAGR definition allows for a 35% distribution fee]).

vi. Service Providers

Plaintiffs claim that AMC breached the 2010 Agreement by improperly deducting costs and expenses that should have been absorbed by AMC as part of its overhead and distribution fees. Per Section 13(d)(ii)(B) of the 2010 Agreement, AMC Studios can charge overhead and distribution fees as compensation for the production and distribution of the Series. Plaintiffs claim that they understood that AMC would not be charging additional categories of expenses to be absorbed within those fees. Further, Plaintiffs claim that AMC did not distinguish between studio and network expenses in accounting to Plaintiffs, and therefore, improperly deducted fees paid to third-party service providers like counsel, a data security firm, and a consultant who were or may have been retained by the network, rather than the studio.

The 2015 MAGR Definition provides that service provider fees incurred by the studio are properly included as "Distribution Charges," including "costs of developing and producing the Program … including … outside legal and accounting fees" (¶¶ I(B)(3), I(B)(5)). Plaintiffs' subjective beliefs that AMC would not be charging certain expenses as "Distribution Charges," are irrelevant absent some argument that the parties' definition of "Distribution Charges," is ambiguous, which it is not.

However, whether AMC improperly deducted *network* expenses for internal legal, business, and accounting affairs, is a question of fact for a jury.

vii. MAGR Advances

Plaintiffs claim that AMC breached the 2010 Agreement by improperly deducting advances paid to other MAGR participants against Plaintiffs' share. They argue that language in the 2015 MAGR Definition permitting such deductions (¶ I(B)(4)) is inconsistent with Section 13(a) of the 2010 Agreement, which entitles Plaintiffs to "10% of 100% of MAGR."

Although Plaintiffs suggest that the "10% of 100% of MAGR" phrasing was intended to mean something other than the more straightforward "10% of MAGR" (which plainly would be subject to any deductions pursuant to the MAGR definition), the Court does not find the language to be ambiguous. In either case, the provision is subject to the definition of MAGR. Accordingly, if the 2015 MAGR Definition is the controlling definition of MAGR, Plaintiffs' claim cannot be sustained.

viii. Comic-Con Expenses

Finally, Plaintiffs assert that 100% of AMC *Network's* Comic-Con expenses improperly were attributed to AMC *Studios* on Plaintiffs' participation statements. This claim is not in

Plaintiffs' First Amended Complaint and cannot be raised for the first time on summary judgment (*Palka v Village of Ossining*, 120 AD3d 641, 617 [1st Dept 2014]).

Although Plaintiffs may be correct that AMC is aware of Plaintiffs' objection to their accounting for these expenses, and that may support a motion for leave to amend the complaint, Plaintiffs' claims cannot be a moving target on summary judgment.

D. Plaintiffs' Implied Covenant Claim is Not Duplicative

"In New York, all contracts imply a covenant of good faith and fair dealing" (*511 West 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 153 [2002]). That covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*ABN Amro Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011] [internal quotations and citations omitted]; *see also Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 888 [1st Dept 2010]). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship,' they do encompass 'any promises which a reasonable person in the position of the promise would be justified in understanding were included'" (*511 West*, 98 NY2d at 153 [internal citations omitted]).

Although the 2010 Agreement (and the Season 2 Amendment) gave AMC the ability to craft a definition of MAGR after the execution of the agreement, AMC was not free to craft that definition arbitrarily, irrationally, or in bad faith so as to undermine Plaintiffs' right to benefit under the 2010 Agreement, which is what Plaintiffs allege[6] (*see Dalton v Educ. Testing Serv.*, 87 NY2d 384, 397 [1995] [implied covenant "ensure[s] that a party with whom discretion is vested

[6] AMC contends that Plaintiffs' implied covenant claim is limited to allegations regarding the audit itself. The Court does not read the claim that narrowly.

does not act arbitrarily or irrationally"]; *Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015] [reversing dismissal of implied covenant claim where "the allegations show that [defendant], in bad faith, engaged in acts that had the effect of destroying or injuring plaintiffs' right to receive 'the fruits of the contract,' i.e., the contingent payments"]; *Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003] ["even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement"] [citations omitted]).

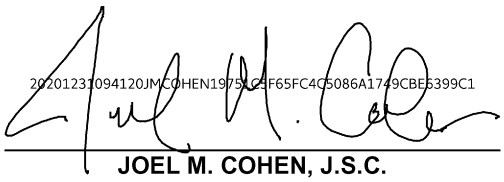
Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is not, as AMC contends, duplicative of their claim for breach of contract. The claims are based on different facts (*see, e.g.*, *Hong Leong Finance Ltd. v Morgan Stanley*, 131 AD3d 418, 419 [1st Dept 2015]; *2013 SJ Op.* at *16). Accordingly, Plaintiffs may assert breach of the implied covenant as an alternative ground for relief (*see Citi Management Group, Ltd. v Highbridge House Ogden, LLC*, 45 AD3d 487, 487 [1st Dept 2007]).

The determination of whether AMC acted arbitrarily, irrationally, or in bad faith in defining and applying MAGR so as to breach the implied covenant of good faith and fair dealing presents disputed questions of fact for trial.

* * * *

For the reasons stated above, AMC's motion for summary judgment is **granted in part** (dismissing any breach of contract claim based on AMC not including product integration revenue in its calculation of MAGR) and is otherwise **denied**.

This constitutes the Decision and Order of the Court.



12/31/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE