

**Darabont v AMC Network Entertainment LLC**

2021 NY Slip Op 30652(U)

March 3, 2021

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.

INDEX NO. 650251/2018

MOTION DATE N/A

MOTION SEQ. NO. 008

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 179, 180, 181, 182, 183, 184, 185, 186, 187, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 310, 311, 312, 313, 371, 372, 373, 374, 375, 389, 390, 391, 392, 393, 405, 406, 562, 657, 658, 659, 660, 661, 662, 663, 671, 672, 673, 674, 675

were read on this motion to PRECLUDE EXPERT TESTIMONY.

In this motion, Defendants seek to preclude the testimony of Plaintiffs’ proposed industry expert Laurie Younger (“Younger”). For the reasons described below, the motion is granted in part and denied in part.

“The admission of an expert opinion is a matter within the sound discretion of the court” (*Oboler v City of New York*, 31 AD3d 308, 308 [1st Dept 2006] [citation omitted]). An expert opinion is properly admitted when the opinion “would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror” (*De Long v Erie County*, 60 NY2d 296, 307 [1983]). “An expert may be qualified without specific academic training through ‘[l]ong observation and actual experience’” (*Price ex rel. Price v New York City Hous. Auth.*, 92 NY2d

553, 559 [1998]). Expert opinions are inadmissible when based on speculation or unsupported by evidence (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

At the outset, the Court rejects Defendants' broad challenge to Younger's qualifications to provide expert testimony. She was a high-level executive with more than 30 years of relevant experience in the television industry, including with respect to the types of profit participation arrangements at issue in this litigation. Defendants' challenges to Younger's qualifications (*e.g.*, a purported lack of ground-level experience in preparing profit participation statements) go to the weight of her testimony not to its admissibility, and may be explored on cross-examination (*see e.g., Sadek v Wesley*, 27 NY3d 982, 984 [2016]; *Adamy v Ziriakus*, 92 NY2d 396, 402 [1998]; *Nemeth v Brenntag N. Am.*, 183 AD3d 211, 228 [1st Dept 2020]; *Bd. of Managers of 195 Hudson St. Condominium v 195 Hudson St. Assoc., LLC*, 63 AD3d 523, 524 [1st Dept 2009]). Similarly, the fact that Younger has not previously testified as an expert in a court proceeding (she has testified as an expert in an arbitration) does not preclude her from being qualified to testify in this matter.

The real question is whether the *substance* of Younger's proposed testimony is admissible. In her expert affidavit and report, Younger states that she will testify about "(1) television studio practices for accounting to profit participants with respect to scripted television series; (2) the customary and practical application of certain terms in Plaintiffs' contingent compensation agreements for *The Walking Dead*; (3) the ways in which the negotiation of Plaintiffs' contingent compensation deviated from industry custom and practice; and (4) the additional amounts that should have been included in MAGR had AMC complied with its obligations to Plaintiffs" (*see* NYSCEF Doc. No. 372 ["Younger Affidavit and Expert Report"] at Expert Report, pg. 2).

Her specific proffered opinions are that: (i) AMC should have included 100% of the revenue it received from Apple/iTunes distribution in Plaintiffs' MAGR (*id.* at 12); (ii) AMC Studios should not charge distribution fees on Consumer Video Devices/Home Entertainment where the distribution of the Series was handled by unaffiliated third party distributors who charge their own distribution fees (*id.* at 15); (iii) AMC Studios improperly deducted merchandising distributor fees from the participation statements (*id.* at 18); (iv) AMC Studios should have included, at a minimum, 50% of the revenue from product integration on the participation statements (*id.* at 19); (v) AMC Studios is improperly charging fees that should be covered by its overhead charge and distribution fees (*id.* at 21); and (vi) AMC Studios improperly charged AMC Network's Comic-Con promotional expenses on the participation statements (*id.* at 24).

Defendants correctly assert that expert witnesses generally are barred from offering opinions as to the legal obligations of parties under contract (*Colon v Rent-a-Center, Inc.*, 276 AD2d 58, 61 [1st Dept 2000] [internal citation omitted]; *see also Good Hill Master Fund L.P. v Deutsche Bank AG*, 146 AD3d 632, 637 [1st Dept 2017]). Although Plaintiffs disclaim any intention to have Younger offer legal opinions (instead limiting such testimony to industry custom and practice), the form of the conclusions in her affidavit and report (quoted above) could suggest otherwise. To be clear, the Court will not permit Younger to opine on the parties' legal obligations under the relevant agreements. Instead, her testimony shall be limited to providing background to assist the jury's understanding of certain industry terms of art for which the meaning would not be clear to a non-expert finder of fact.

The issues in this case are complex and, in many instances, the documents and testimony will be freighted with industry-specific jargon. The Court believes it will be helpful for expert

witnesses to be able to explain the background and, where appropriate, provide their opinions as to what particular contractual language means in this particular commercial context. A contract made in a “highly technical industry, which employs distinct terminology used by those in the business ... must be construed with reference to both the intention of the parties and the known practices within the industry” (*Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]).

However, as the Court observed in its recent summary judgment opinion in this case, a general “appeal to industry custom or practice is only appropriate when there is ambiguity in the contract” (*Darabont v AMC Network Entertainment LLC*, 2020 N.Y. Slip Op. 34342[U], 20 [NY Sup Ct, NY Cnty 2020] [“S.J. Op.”] [citing *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], *aff’d as mod*, 5 NY3d 582 [2005]). Therefore, Plaintiffs can present testimony from Younger concerning the meaning of industry terms of art that are outside the ken of a lay jury and that could be subject to more than one reasonable interpretation.

For example, in addressing Defendants’ summary judgment motion, the Court observed that “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... Such evidence suggests that there is more than one commercially reasonable interpretation of the contract language” (S.J. Op. at 19). Accordingly, Younger will be permitted to state her opinion as to whether Apple is a “distributor” in this commercial context. The Court will consider the admissibility of testimony with respect to other purported terms of art on a case by case basis, if such opinions have been timely disclosed during discovery.

However, Younger will not be permitted to testify broadly as to what she believes the scope of the MAGR definition *should* be based on industry custom and practice. Under the relevant agreements, the task of defining MAGR was delegated to AMC, subject to certain protections set forth in the agreements themselves (S.J. Op. at 15). “[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). Younger’s testimony, therefore, must be tethered to the language of the agreements and the language of the MAGR definition(s) tendered by AMC, not to generalized concepts of industry custom and practice divorced from that language.

The fact that Plaintiffs have a separate claim for breach of the implied covenant of good faith and fair dealing does not open the door for Younger to testify broadly as to what the MAGR definition would have been under industry customs or standards. To prevail on their implied covenant claim, Plaintiffs will have to establish that AMC crafted its definition of MAGR arbitrarily, irrationally, or in bad faith to deprive Plaintiffs of the fruits of the agreement, not simply that the definition deviated from industry customs or standards. The Court will consider specific proffers that support an opinion that certain MAGR terms are arbitrary, irrational or in bad faith, but not simply on the ground that they conflict with industry custom, assuming such opinions have been timely disclosed during discovery.

Accordingly, it is

**ORDERED** that Defendants’ motion to preclude the expert testimony of Laurie Younger is granted in part and denied in part, as set forth above.

