

Darabont v AMC Network Entertainment LLC

2021 NY Slip Op 30654(U)

March 4, 2021

Supreme Court, New York County

Docket Number: 650251/2018

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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	09/02/2020
MOTION SEQ. NO.	015
DECISION + ORDER ON MOTION	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 015) 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 638, 639, 640, 641, 642

were read on this motion to PRECLUDE.

The Affiliate Transaction Provision (“ATP”) in the parties’ 2010 Agreement states 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 distributors for comparable programs” (NYSCEF Doc. No. 491 [“2010 Agreement”] § 13[d] [iii]). From a financial perspective, the central issues in this case are whether the ATP applies to the calculation of Modified Adjusted Gross Receipts (“MAGR”) and, if so, whether the “imputed license fee” used by AMC in calculating Plaintiffs’ “contingent participation” complies with the

ATP. For present purposes, the Court assumes that the ATP applies to the calculation of MAGR (including the implied license fee), though that will be a contested issue at trial.¹

Plaintiffs argue that the ATP requires AMC to set an imputed license fee for AMC Network's distribution of *The Walking Dead* ("TWD") that is in line not only with prior AMC transactions as to comparable programs but also with "fair market value" informed by transactions involving non-AMC programs. Defendants, on the other hand, argue that the ATP standard is tethered to transactions that AMC itself has entered into with unrelated third parties for comparable programs, and that therefore expert testimony regarding "fair market value," based on transactions involving non-AMC television shows, is irrelevant and should be excluded. (Defendants do not, in this motion, contest the relevance of such testimony to the extent it is based on comparisons to other AMC programs, such as *Breaking Bad* and *Mad Men*.)

The Court agrees with Defendants. In *Darabont v AMC Network Entertainment LLC*, 128 AD3d 472 [1st Dept 2015], the First Department addressed the question of whether Defendants were entitled to obtain documents from Plaintiff Creative Artists Agency, LLC ("CAA") concerning contingent compensation owed to CAA or its clients under their agreements with nonparty cable television studios (i.e., not AMC). The court upheld Justice Bransten's decision to deny Defendants' motion to compel production of such documents, noting that: "Those documents, and CAA's and its clients' dealings with nonparty studios, have no bearing on the issues in this action and will not sharpen those issues, as *the only relevant inquiry is the monetary terms of [AMC's] transactions with nonparty distributors of comparable programs*" (*id.* at 473 [emphasis added]). The court further noted that "[t]o the extent defendants allege that

¹ This decision and order is in substance the same as the Court's decision and order resolving Motion Sequence Number 25 in the corresponding 2013 Action (Index No. 654328/2013).

the requested documents are necessary to defend against any claims that they breached industry-wide standards, the motion court has stated that it *will preclude plaintiffs from raising such claims*” (*id.* [emphasis added]).

Although the evidence at issue in this motion is of a different type, the First Department’s analysis controls. The 2010 Agreement provides a specific reference point for assessing compliance with the ATP – that is, the monetary terms of *AMC*’s transactions with respect to comparable programs. It does not provide a general “fair market value” standard and it does not, as Justice Bransten and the First Department recognized, envision comparison with transactions in which *AMC* played no part. Accordingly, the evidence and testimony adduced by the parties on this point must be tethered to *AMC*’s transactions with respect to comparable programming.

The proposed testimony of Plaintiffs’ experts Lee Bartlett, James Dertouzos, Elaine Douglas, and Richard Marks is based in part on transactions in which *AMC* played no part, in aid of an assessment of the fair market value of *TWD* licensing rights. Such testimony is irrelevant and inadmissible based on the plain language of the contract and it is precluded by the law of the case.²

Accordingly, it is

ORDERED that Defendants’ motion to exclude in part the proposed expert testimony of Plaintiffs’ witnesses Lee Bartlett, James Dertouzos, Elaine Douglas, and Richard Marks is **GRANTED**.

² In view of this conclusion, the Court need not reach Defendants’ alternative arguments for exclusion based on, *inter alia*, *Frye v United States*, 293 F 1013 [DC Cir 1923].

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

3/4/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE