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 12/16/2019

MOTION SEQ. NO. 007

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

were read on this motion for SUMMARY JUDGMENT.

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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,[1] this one is more narrowly focused on the mechanics and calculation of Modified Adjusted Gross Receipts ("MAGR"), as that term is defined in the relevant agreements between the parties.

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

[1] Index No. 654328/2013.

payments. They argue that AMC did not have carte blanche under the parties' agreements to define and apply a MAGR that was off "market" and slanted in its favor. In response, AMC asserts that the contracts – which were negotiated by sophisticated counsel and advisers on both sides – provided expressly that AMC was free to define MAGR as it saw fit. According to AMC, Plaintiffs are simply trying to re-trade the deal.

AMC seeks summary judgment dismissing all of Plaintiffs' claims on the ground that they conflict with the plain language of the parties' agreements. For the reasons that follow, the motion is denied. There are factual disputes that must be resolved at trial.

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Overview

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 (the "2010 Agreement," NYSCEF Doc. No. 175). After a successful first season, the parties executed a second agreement that modified the 2010 Agreement (the "Season 2 Amendment," NYSCEF Doc. No. 202).

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 November 2, 2020.

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 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. 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.

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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 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." 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. *Darabont v. AMC Network Entertainment LLC*, 2018 WL 6448457, at *9 (N.Y. Sup. Ct. N.Y. Cty. Dec. 10, 2018) ("*2013 SJ Op.*") (citations omitted).

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.[2]

[2] 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.

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Of particular 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.

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 ("EST") 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

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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. First Amended Complaint ("FAC"), NYSCEF Doc. No. 57 ¶¶ 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, with no provision for future negotiation. Therefore, according to AMC, its subsequently and unilaterally developed MAGR definition was unequivocally binding on the parties.

In response, Plaintiffs argue that AMC's purportedly patchwork and non-final MAGR definition is not binding and is subject to good faith negotiation to ensure consistency with industry "parameters" and customs. They 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, ambiguous 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

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relentless zombies of *The Walking Dead*, arguments previously rejected by Justice Branstrn rise again, and form the lynchpin [sic] of AMC's motion." Pl. Mem. Opp., NYSCEF Doc No. 309, at 1.

FACTS

The basic facts of the case are set forth in Justice Bransten's thorough summary judgment decision in the 2013 case. (*2013 SJ Op.* at *1-11.) They are summarized here, as supplemented by the 2018 Action discovery record, only as relevant to resolving the present motion.

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. Plaintiffs argue that both definitions were intended to ensure that MAGR for the Series was consistent with industry norms.

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.

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

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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." The definition then goes on to spell out nine categories of "modif[ications]" to "AMC's MAGR definition" for purposes of the Series. *Id.* at ¶ 13(d)(ii).

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.* ¶ 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.* ¶ 13(d)(iv).

The MAGR provisions contained in section 13(d)(ii) of the 2010 Agreement were negotiated with Mr. Darabont's sophisticated agents and lawyers who understood that they had not seen "AMC's MAGR Definition" at the time the 2010 Agreement was signed. Def. Statement of Undisputed Facts ("DSUF"), NYSCEF Doc. No. 131 ¶¶ 16-17. AMC claims that it furnished its "comprehensive" MAGR Definition to Plaintiffs on February 22, 2011, identifying in detail the formula by which MAGR would be calculated. Finally, 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.

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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 a Season 2 Amendment (see below). 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." Pls. Counterstatement of Facts ("PSUF"), NYSCEF Doc. No. 289, ¶16.

Finally, Plaintiffs contend that the parties agreed that AMC's MAGR Definition would be subject to good faith negotiation based on market parameters and customs. They reject AMC's assertion that the extensive negotiations over AMC's MAGR Definition were "voluntary," and point out that "AMC reluctantly corrected some, but not all, of the deficiencies" that conflicted with AMC's obligations under the Agreement. Then, in 2015, more than a year after Plaintiffs commenced the 2013 Action, AMC provided a redlined MAGR definition containing, according to Plaintiffs, "some changes the parties agreed to, but still conflicted with both the Agreements and industry custom and practice." Pl. Br. Opp., NYSCEF Doc. No. 309, at 10.

<u>Relevant Provisions of the Season 2 Amendment</u>

The parties amended the 2010 Agreement in February 2011, before the beginning of Season 2, to be effective January 10, 2011 (the "Season 2 Amendment," NYSCEF Doc. No. 202). At that point, AMC still had not provided Plaintiffs with its MAGR Definition.

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Of particular relevance here, 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." *Id.* ¶ 3(b) (emphasis added). That revised definition is similar in some (but not all) respects to the "good faith negotiation" provision in Section 13(d)(i) of the 2010 Agreement that applied if a third party was selected to produce the Series, in that they both reference industry "parameters" consistent with Mr. Darabont's "stature" in the business.

AMC asserts that 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 ¶¶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 "full-time and in-person."

<u>The Audit</u>

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

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object to any accounting statement within three (3) years following receipt of the applicable statement…." 2010 Agreement, ¶ 13(b)(ii).

In October 2013, Mr. Darabont notified AMC that he intended to conduct an audit. (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 course of 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 N.Y.3d 499, 503 (2012) (citations omitted); *see also Ahmad v. City of New York*, 129 A.D.3d 443, 444 (1st Dep't 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 A.D.3d 474, 475 (1st Dep't 2010) ("Issues of credibility in particular are to be resolved at trial, not by summary judgment."); *Esteve v. Abad*, 271 A.D. 725, 728 (1st Dep't 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 N.Y. 169, 171-72 (1973); *see also Aronson v. Riley*, 59 N.Y.2d 770, (1983) ("In

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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 A.D.3d 473, 473 (1st Dep't 2019) ("Summary judgment is not available … for either party … because there are ambiguities in the written contracts"); *Davis Inf. Group, Inc. v. Ifft*, 239 A.D.2d 297, 297 (1st Dep't 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 N.Y.2d 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 A.D.3d 443, 446 (1st Dep't 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.*

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The Definition of MAGR is Ambiguous

AMC's principal argument is that the 2010 Agreement unambiguously gave AMC the unfettered right to impose and apply its own MAGR definition. Accordingly, AMC argues, it was not required to negotiate those terms with Plaintiffs or adhere to purported industry customs or norms. In response, Plaintiffs argue that the agreements required AMC to engage in good faith negotiations to arrive at a MAGR definition consistent with industry parameters and norms. They also argue that AMC's MAGR definition is incomplete and ambiguous. The Court finds

that the parties' agreements, taken as a whole, are "susceptible of more than one commercially reasonable interpretation" with respect to MAGR and thus are ambiguous.

Section 13(d)(ii) provides that "MAGR *shall be* defined, computed, and paid by [AMC] in accordance with *AMC's MAGR definition* (which shall be furnished to Lender #1)," subject to various specifically listed provisos (emphasis added). Although Plaintiffs note that its representatives sought a copy of AMC's MAGR definition in advance of signing the 2010 Agreement and thereafter, it is undisputed that Plaintiffs nevertheless signed the agreement without having received that definition in advance. AMC argues persuasively that the parties referenced a right of negotiation with respect to the adoption of *third party* MAGR definitions, *id.* § 13(d)(1), because the parties could not negotiate those in advance. In other words, the parties knew how to provide for post-agreement negotiation of MAGR rights when that was their intention, but they did not do so in section 13(d)(ii). Accordingly, section 13(d)(ii) can be read reasonably as giving AMC the right to craft whatever definition of MAGR it chose, without any input from Plaintiffs or any connection with its (or anyone else's) customary terms, so long as it did not conflict with any of the specific provisos listed in that section.

However, section 13(d)(ii) does not stand alone. 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."

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That amendment of the MAGR definition introduces several uncertainties that undermine AMC's argument. Instead of "AMC's MAGR definition," it is now "AMC's *customary* MAGR definition" (emphasis added). However, there is evidence suggesting that AMC had no "customary" definition, having never before produced its own programming. Moreover, the revised definition, unlike section 13(d)(ii), explicitly references "good faith negotiation," together with a standard for such negotiation based on industry parameters, custom and consistency with AMC's business practices (again, it is unclear whether AMC *had* any "business practices" on this particular issue) and with Mr. Darabont's stature in the industry.[3]

It is true that 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." It is also true, however, that Justice Bransten previously held that whether Mr. Darabont's satisfied that condition is a question of fact than cannot be resolved on summary judgment. *2013 SJ Op.* at *15.

AMC argued in the 2013 case, as it argues here, that the conditions for triggering the amended MAGR definition were not met because Mr. Darabont was terminated prior to Season 2

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[3] Similar references to good faith negotiation are found elsewhere in the agreements. See 2010 Agreement § 13(d)(iv) ("With respect to matters relating to the calculation of Artist's MAGR (i.e., distribution fee, overhead fee, imputed license fee, and other inclusions or deductions that are the subject of negotiation)"); Season 2 Amendment § 1(b)(iii) (referencing the "'Cost of Production' of the Series (as defined in AMC's standard definition of MAGR, 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)"). While the applicability of those provisions to the MAGR definition is less clear than it is for Section 3(b) of the Season 2 Amendment, they contribute to the overall uncertainty as to whether the parties intended that AMC's ad hoc and evolving (and allegedly self-serving) definition was final and binding as a matter of law. In sum, the unclear interplay between section 13(d)(ii) and other provisions in the agreements creates an ambiguity that precludes granting summary judgment.

and thus did not, as a matter of law, render "executive producer/showrunner services on all episodes produced" for that season. Justice Bransten rejected that proposition. She found that "it is possible, as plaintiffs allege, for Darabont to have rendered some executive producing services on all of the episodes produced during that season notwithstanding his removal from the Series in the middle of that season." *Id.* at *15. Justice Bransten also rejected the related argument, raised again by AMC here, that rendering executive producer/showrunner services (for purposes of Section 3 of the Season 2 Amendment) required Mr. Darabont to provide such services on a "full-time and in-person basis" (which is a condition *only for Section 1(c)* of that agreement). *Id.* The fact that Justice Bransten reached that conclusion with respect to the applicability of Section 3(a) rather than 3(b) of the Season 2 Amendment is irrelevant, as both provisions are subject to the same conditions precedent. Accordingly, AMC's arguments here are foreclosed by law of the case. [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 A.D.2d 939, 939 (2d Dep't 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 A.D.2d 877 (4th Dep't 1969), the court found that law of the case did not apply in the context of cases consolidated for joint trial because, among other things, the parties to be bound "were not parties to the previous motions and orders." *Id.* at 878. 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.

The Court may deviate from Justice Bransten's prior decision with respect to the same contract provisions at issue here only in extraordinary circumstances. *See, e.g., Brownrigg v. N.Y. City Housing Auth.*, 29 A.D.3d 721, 722 (2d Dep't 2006) (law of the case "may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence"); *Colebrook Theatrical LLP v. Bibeau*, 2016 WL 4181006, at *5 (Sup. Ct. NY Cty. 2016) (Oing, J.) (law of the case "may be ignored in extraordinary circumstances") (citations omitted). In *Brownrigg*, the Second Department reversed the trial court's grant of summary judgment at the beginning of trial, on grounds of law of the case, because the same court earlier had denied summary judgment based on the same facts. 29 A.D.3d at 722; *cf. Delgado v. City of N.Y.*, 144 A.D.3d 46 (1st Dep't 2016) (trial court precluded from revisiting summary judgment issue resolved by Appellate Division in prior appeal) (citing *Brownrigg*). The same is true here. 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.

But even if the law of the case doctrine is inapplicable, as AMC argues, the Court independently finds that Justice Bransten's analysis is correct and is not changed by the 2018 Action discovery upon which AMC relies. 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

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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.

AMC argues that *even if* the amended definition of MAGR applies, the revisions to the definition are irrelevant because they do not *mandate* that there be negotiation, only that there "may" be. Again, there is some merit to this position and a fact-finder could well conclude that was the intent of the parties. But for the reasons stated above, the Court does not believe that the contracts can *only* reasonably be read that way when taken together as an integrated whole. Among other things, the amended definition references a negotiation that would be subject to specifically described industry parameters and customs. A fact-finder might reasonably conclude that if it had been a non-binding agreement to negotiate, there would have been no reason to cabin such negotiation by reference to specific standards. In sum, it is ambiguous.

Further, the fact that AMC freely engaged in such negotiations regarding MAGR, and made revisions to its definition, could permit (but not require) a finder of fact to conclude that the parties intended that such negotiation would ensue after execution of the 2010 Agreement. *Town of Pelham v. City of Mt. Vernon*, 304 N.Y. 15, 23 (1952) ("There is no surer way to find out what parties meant, than to see what they have done.") (quoting *Brooklyn Life Ins. Co. of N.Y. v. Dutcher*, 95 U.S. 269, 273 (1877)); *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399-400 (1977) (in determining whether parties agreed to contract terms, courts must look to "the intent of the parties as gathered by their expressed words and deeds"). In view of the significance of the MAGR definition, and the inconsistent language used throughout the agreements, AMC's contention that the parties intended Plaintiffs to be bound by AMC's post hoc definition sight unseen, without negotiation, is not the only reasonable conclusion to be drawn from the record. Moreover, contrary to Defendants' protestations (Def.

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Reply. Mem. at 6-8), there are disputed issues of fact as to whether AMC engaged in "good faith negotiations."

Finally, for the reasons set out at length in Plaintiffs' opposition to summary judgment, there are factual disputes as to whether the evolving versions of AMC's proposed MAGR definition – which were subject to ongoing discussion between the parties – were final, complete, and unambiguous as applied to the specific accounting disputes at issue in this case.

Taking all the circumstances into account, the Court concludes that the relevant agreements are ambiguous with respect to the definition of MAGR as applied to the accounting issues in dispute and that material issues of fact remain for trial. Accordingly, it would be inappropriate to dismiss Plaintiffs' breach of contract claims on summary judgment.

The Individual Accounting Disputes Are Deferred to In Limine Motions

Defendants' arguments in support of summary judgment on the individual line items challenged by Plaintiffs rested mainly on the applicability of a purportedly unambiguous definition of MAGR. Given the Court's ruling above, it is not efficient to wade through each item in this opinion without giving AMC the opportunity to take that ruling into account in stating its arguments as to specific line items. Similarly, Plaintiffs have not had the opportunity to address arguments raised in AMC's reply brief asserting that Plaintiffs have abandoned certain specific claims.

The Court believes it would be more efficient to address these specific issues in the context of in limine motions, which the parties no doubt will file anyway, rather than addressing them on summary judgment without the benefit of more targeted briefing.

Deadline

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 N.Y.2d 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 N.Y.3d 208, 228 (2011) (citations omitted); *see also Forman v. Guardian Life Ins. Co. of America*, 76 A.D.3d 886, 888 (1st Dep't 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 N.Y.2d at 153 (citations omitted).

Even if Section 13(d)(ii) is read as giving AMC broad discretion to craft its own definition of MAGR without negotiation, 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.[5] *See Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 397 (1995) (implied covenant "ensure[s] that a party with whom discretion is vested does not act arbitrarily or irrationally"); *Demetre v. HMS Holdings Corp.*, 127 A.D.3d 493, 494 (1st Dep't 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 A.D.2d 288, 302 (1st Dep't 2003) ("even an explicitly discretionary

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

Deadline

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 A.D.3d 418, 419 (1st Dep't 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 A.D.3d 487, 487 (1st Dep't 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 denied. This constitutes the decision and order of the Court.

Deadline

4/10/2020 DATE			JOEL M. COHEN, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE