SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FRANK DARABONT, FERENC, INC., DARKWOODS PRODUCTIONS, INC., and CREATIVE ARTISTS AGENCY, LLC,	Index No.: 654328/2013
Plaintiffs,	Part 3 (Cohen, J.)
-against-	Motion Seq. No. 022
AMC NETWORKS ENTERTAINMENT LLC, AMC FILM HOLDINGS LLC, AMC NETWORKS INC., STU SEGALL PRODUCTIONS, INC., and DOES 1 THROUGH 10,	
Defendants.	

Deadline

DEFENDANTS' OMNIBUS MOTION IN LIMINE
TO EXCLUDE EVIDENCE AT TRIAL

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PRELIMINARY STATEMENT

If this case gets to a jury, Defendants will prove at trial that Plaintiffs were paid what the parties bargained for in their written agreement concerning profit participation for the cable television show *The Walking Dead*. Those contract terms—negotiated on behalf of Plaintiffs by the most powerful talent agency and sophisticated lawyers in Hollywood—are clear. This lawsuit is a classic attempt by a plaintiff to rewrite the terms of a fully negotiated contract years after the fact to capitalize on changed circumstances—in this case, the breakaway commercial success of *The Walking Dead*.

The focus of this trial is narrow: Did Defendants pay Plaintiffs in accordance with the terms of the parties' agreement or, as Plaintiffs allege, should the jury jettison the contract terms in favor of a fair market value approach based on alleged custom and practice in the entertainment industry. Because Plaintiffs know that the language and negotiating history of the parties' profit participation contract terms is fatal to their overreaching claims, they have announced their intention to offer at trial extraneous evidence designed to confuse, inflame, distract, and unfairly prejudice Defendants—evidence they hope will take the jury's eyes off the issues relevant at trial.

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In this motion, Defendants focus on four categories of inadmissible evidence that Plaintiffs wish to put before the jury at trial (Defendants are separately filing a motion *in limine* to preclude certain expert testimony and evidence):

1. The parties' statements made during ***settlement negotiations*** prior to the filing of this lawsuit;
2. The ***total revenue and profitability*** of AMC and the ***compensation*** paid to its executives;
3. Evidence that AMC acted in ***bad faith in negotiating the document*** that determines how Plaintiffs' profit participation would be calculated (the "MAGR definition"); and

4. Evidence in support of claims Plaintiffs ***failed to plead***, Plaintiffs ***abandoned***, or the Court already ***rejected***.

This Court plays a critical gatekeeping role in ensuring that the jury is not inundated with irrelevant and confusing information that will hamper the jury's consideration of the questions it is sworn to decide. The presentation to the jurors should be focused on the contract questions at issue in the case—not the sideshows Plaintiffs seek to introduce for no purpose other than to distract, mislead, inflame, and confuse. The Court should grant this motion in full and preclude Plaintiffs from offering at trial all four categories of evidence described in this motion.

ARGUMENT

I. First Category of Inadmissible Evidence: Settlement Communications

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This Court should exclude evidence of the months-long settlement negotiations between Darabont's counsel and Defendants' litigation counsel prior to the filing of this lawsuit. From April 2012 through December 2013, Darabont's attorney, Robert Getman, communicated with AMC's outside litigation counsel, James Janowitz of Pryor Cashman LLP, in an effort to resolve disputes resulting from Darabont's termination from *The Walking Dead*, including Darabont's claims that he was entitled to certain screen credits and a more lucrative MAGR definition. Plaintiffs concede that Janowitz "was retained by AMC to negotiate a settlement with Darabont" and that Janowitz and Getman's "pre-litigation correspondence" was for the purpose of negotiating a settlement. Ex. B (Pls. Opp. to AMC's Motion for SJ in Case 1 at Dkt. 397) at 17.[1] Getman likewise testified that his "negotiations with James Janowitz" were "settlement negotiations." Ex. C (Getman Dep. Tr. 5/15/2019) at 56:9-57:12. This is classic settlement evidence that courts routinely exclude under CPLR § 4547. This is not even a close call.

[1] Citations to Ex. _ are to the Affirmation of Ilissa Samplin in Support of Defendants' Omnibus Motion *in Limine* to Exclude Evidence at Trial (August 11, 2020).

A. Getman's and Janowitz's April 2012 through December 2013 Communications are Precluded by CPLR § 4547

"CPLR 4547 and well-settled judicial policy preclude the introduction of evidence of settlement negotiations to prove either liability or the value of the claims." *82 Retail LLC v. Eighty Two Condo*., 117 A.D.3d 587, 589 (1st Dep't 2014) (internal quotations omitted); *CIGNA Corp. v. Lincoln Nat'l Corp*., 6 A.D.3d 298, 299 (1st Dep't 2004) (holding that "evidence [which] consists largely of documents prepared and exchanged for purposes of settlement [] are inadmissible to prove either liability or the value of the claims"). This prohibition encompasses "[e]vidence of any conduct or statement made during [the] negotiations." CPLR § 4547 ("[e]vidence of any conduct or statement made during compromise negotiations shall [] be inadmissible"); *see also Mandell v. Mandell*, 36 Misc.3d 797, 807 (Sup. Ct. Westchester Cnty. 2012) ("evidence of the parties' settlement offers or even evidence of conduct or statements made during compromise negotiations are inadmissible"); 5 Robert A. Barker & Vincent C. Alexander, New York Prac., Evidence in New York State and Federal Courts § 4:58 (2011) (under CPLR § 4547, "[n]ow there is protection not only for the fact of the compromise offer itself, but also for statements and admissions of fact made during compromise discussions"). This prohibition plainly covers the communications with Janowitz that Getman agrees he engaged in for the purpose of settlement.

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On July 27, 2011, AMC terminated Darabont from *The Walking Dead*. After Darabont's termination, the parties disagreed about Darabont's compensation and screen credit (how his name would appear in the show's credits). Anticipating potential litigation, AMC engaged Janowitz *specifically* for the purpose of attempting to reach a settlement with Darabont. On April 2, 2012, Janowitz sent a letter to Darabont's representatives regarding the screen credit AMC was willing to give Darabont. *See* Ex. D (Apr. 2, 2012 Letter from J. Janowitz to B.

Vinokour and A. Wertheimer) at AMC-0003303. Shortly thereafter, Getman sent Janowitz two letters expressing Darabont's disagreement with his screen credit and the imputed license fee in AMC's MAGR definition, among other issues. Ex. E (May 11, 2012 Letter from R. Getman to M. Wiseman and J. Janowitz) at AMC-0026278, Ex. F (Aug. 6, 2012 Letter from R. Getman to J. Janowitz) at AMC-0027379. The letters stated that Darabont believed AMC to be in breach of its contractual obligations, and that "Darabont [was] prepared to vigorously pursue all appropriate legal remedies." *Id.* at AMC-0027380. In the months that followed, Janowitz communicated with Getman regarding AMC's offers to compromise or settle the parties' disputes. During that time, Getman copied Dale Kinsella, Plaintiffs' litigation counsel in this lawsuit, on *every* letter he sent to Janowitz. *See* Ex. G (Sept. 13, 2012 Letter from R. Getman to J. Janowitz) at JTW002509, Ex. H (Nov. 29, 2012 Letter from R. Getman to J. Janowitz) at PL010552, Ex. I (Dec. 21, 2012 Letter from R. Getman to J. Janowitz) at JTW000642, Ex. J (Mar. 26, 2013 Letter from R. Getman to J. Janowitz) at JTW005807. By mid-2013, it became clear that the parties would not be able to reach a settlement. Ex. K (June 7, 2013 Email from J. Janowitz to R. Getman) at JTW007328. Plaintiffs filed the first of their lawsuits against Defendants in December 2013, approximately six months after the parties' settlement communications ceased.[2]

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There is no dispute that these communications between Janowitz and Getman commencing in April 2012 were settlement communications. *See* Ex. B (Pls. Opp. to AMC's Motion for SJ in Case 1 at Dkt. 397) at 17. Getman himself has testified to this fact at *multiple* depositions. *See, e.g.*, Ex. L (Getman Dep. Tr. 2/23/2016) at 487:2-25. When asked most

[2] Defendants have attached as exhibits many of the settlement communications between Janowitz and Getman that began in April 2012 and continued through June 2013. These exhibits do not comprise the entirety of Janowitz and Getman's settlement communications, but rather an illustrative subset. AMC can provide the full set of these settlement communications, should the Court find it of assistance in resolving this motion *in limine*.

recently about this correspondence with Janowitz, Getman testified that the "negotiations with James Janowitz" were "settlement negotiations" and that "it was quite clear . . . while [he] was talking to Mr. Janowitz that the possibility of litigation was very real." Ex. C (Getman Dep. Tr. 5/15/2019) at 56:9-57:12; *see also id*. at 58:1-4. Getman's testimony is a party admission—and it is dispositive because it places the communications at issue on this motion squarely within the ambit of CPLR § 4547.

The substance of these communications also confirms that they are inadmissible. Janowitz, on behalf of AMC, offered to work with Getman towards a potential settlement, in an effort to avoid litigation by Darabont. AMC, through Janowitz, repeatedly offered to implement a "more favorable" imputed license fee, as well as to compromise on issues of tax credits and other terms of AMC's MAGR definition. These offers of "valuable consideration in compromising or attempting to compromise a claim which is disputed" are inadmissible under blackletter New York law. CPLR § 4547; *see, e.g.*, *PRG Brokerage Inc. v. Aramarine Brokerage*, *Inc*., 107 A.D.3d 559, 560 (1st Dep't 2013) (trial court properly excluded "numbers and calculations" prepared for the purpose of settlement); *Fontaine v. Matthews*, 25 A.D.3d 477, 478 (1st Dep't 2006) (holding that "[t]he trial court properly precluded defendant from offering any evidence of a prior settlement offer" under CPLR § 4547); *see also 82 Retail LLC*., 117 A.D.3d at 589; *CIGNA Corp.*, 6 A.D.3d at 299; *Mandell,* 36 Misc.3d at 807.

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B. Getman's and Janowitz's April 2012 through December 2013 Communications also are Irrelevant and Unfairly Prejudicial

The communications between Getman and Janowitz also are independently inadmissible, irrespective of CPLR § 4547, because they are irrelevant and unduly prejudicial.

New York courts have held that "allegations related to [offers to compromise] are irrelevant." *Soumayah v. Minnelli*, 41 A.D.3d 390, 393 (1st Dep't 2007). This is because a

statement made in a compromise negotiation "is not an admission of fact," and is therefore unrelated to determining the parties' rights and obligations. *See Charles Hyman, Inc. v. Olsen Indus., Inc.*, 227 A.D.2d 270, 276-77 (1st Dep't 1996) (citations omitted); *Universal Carloading & Distrib. Co., Inc. v. Penn Cent. Transp. Co.*, 101 A.D.2d 61, 62-63 (1st Dep't 1984) (same). Evidence is relevant only if it has some "tendency in reason to prove the existence of any material fact." *Am. Motorists Ins. Co. v. Schindler Elevator Corp.*, 291 A.D.2d 467, 468-69 (2d Dep't 2002) (quoting *People v. Scarola*, 71 N.Y.2d 769, 777 (1988)); *see also People v. Willock*, 125 A.D.3d 901, 902 (2d Dep't 2015). AMC's offers to settle the compensation dispute with Darabont years after the parties agreed on the compensation terms of the agreement have no bearing on the *meaning* of the agreement or whether the parties complied with it.[3]

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In addition, allowing the communications to be considered by the jury would unfairly prejudice AMC and risk juror confusion. Even "relevant evidence" should be excluded "if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury." *Willock*, 125 A.D.3d at 902 (quoting *People v. Primo*, 96 N.Y.2d 351, 355 (2001)). Here, AMC's statements (through its agent Janowitz), are unfairly prejudicial because they were made against the backdrop of a brewing dispute and the very real threat of expensive and protracted litigation. AMC will be unfairly prejudiced if a jury

[3] To the extent Plaintiffs argue this evidence is admissible to prove post-performance understanding of the parties' contractual obligations—namely, AMC's alleged contractual obligation to negotiate its MAGR definition in good faith before the definition could become binding—Plaintiffs are wrong. Plaintiffs have admitted that the "pre-litigation correspondence" between Getman and Janowitz was for the purpose of "negotiate[ing] a *settlement* with Darabont." Ex. B (Pls. Opp. to AMC's Motion for SJ in Case 1 at Dkt. 397) at 17 (emphasis added). Getman likewise testified that his conversations with Janowitz were "*settlement* negotiations," and that "the possibility of litigation was very real." Ex. C (Getman Dep. Tr. 5/15/2019) at 56:9-57:12 (emphasis added). The communications at issue have *no* probative value to the question of whether AMC believed it was required under the parties' contract to negotiate its MAGR definition before the definition became binding, because they were being made for the purpose of settling Darabont's asserted claims. In addition, Janowitz did not play any role in the negotiation or drafting of Darabont's 2010 contract or the Season 2 Amendment, rendering his understanding of the parties' agreement irrelevant to what the parties agreed to at the time they contracted.

assigns improper weight to AMC's statements made during these settlement negotiations, when the parties were working together to determine if there was a path forward other than litigation. *Cover v. Cohen*, 61 N.Y.2d 261, 270 (1984) (holding that the probative value of certain evidence was outweighed by the "substantial risk that such evidence may be over-emphasized by the jury"); *Stevens v. Atwal*, 30 A.D.3d 993, 994 (4th Dep't 2006) (holding that the admission of evidence of plaintiffs' settlements was highly prejudicial); *Andresen v. Kirschner*, 190 Misc. 2d 779, 782 (Sup. Ct., N.Y. Cnty. 2001), *rev'd on other grounds*, 297 A.D.2d 235 (1st Dep't 2002) (discussing the "potential prejudice to a [party] which may result, if the jury gains knowledge of the settlement" and bases its verdict on improper assumptions about the parties' culpability). And any introduction of these statements would require the parties to engage in mini-trials about whether AMC's litigator's statements during this time period were reflective of AMC's genuine views of the merits, or rather compromise positions offered merely for the purpose of exploring the other sides' appetite for settlement. *See Maraziti v. Weber*, 185 Misc. 2d 624, 626 (Sup. Ct. Dutchess Cnty. 2000). These mini-trials would waste the Court's, parties', and jurors' time and resources.

The CPLR and longstanding New York case law are clear that AMC's pre-litigation efforts to settle with Darabont are inadmissible. The policy behind CPLR § 4547, to encourage "frank and uninhibited communications" during talks "without the fear that such discussions could be damaging," applies with full force to the communications between Janowitz and Getman at issue here. Sponsor's Mem., N.Y. Bill Jacket, 1998 S.B. 6415, Ch. 317. Plaintiffs should be barred from offering these communications at trial.

Deadline

II. <u>Second Category of Inadmissible Evidence</u>: Evidence of AMC's Total Revenue and Profits and the Compensation Paid to AMC Executives

In this case, like so many others, Plaintiffs hope to inflame the jury and unfairly prejudice Defendants by portraying AMC as a multibillion-dollar company that pays exorbitant salaries to its senior executives while shortchanging Plaintiffs. New York courts have long recognized that the "wealth" or "prosperity" of a corporate defendant should not be presented to the jury unless it bears relevance to the issues in the case. *See, e.g.*, *Vassura v. Taylor*, 117 A.D.2d 798, 799 (2d Dep't 1986) ("[R]eferences to the financial status of parties have been universally condemned by the courts of this State."). Courts recognize the obvious potential for such evidence to cause a jury to improperly base its verdict on biases against big business rather than the merits of the case, as well as that such evidence needlessly distracts from core case issues. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

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In this case, of course, the total revenue and profitability of AMC, which is attributable to its *numerous* shows and other products and services, is irrelevant. What is relevant, and what is at issue, is whether from the pool of profits attributable to *The Walking Dead*, AMC properly calculated and paid profit participation—or Modified Adjusted Gross Receipts ("MAGR")—to Plaintiffs under the controlling agreement. Plaintiffs are free to offer relevant evidence of the specific sources of revenue that are part of this MAGR pool. But the overall revenue and profitability of AMC and the compensation the company pays its senior executives has nothing to do with the issues to be tried, and AMC will be unduly prejudiced—and jurors confused and time wasted—if the evidence is admitted at trial.

A. Evidence of AMC's Total Revenue and Profits and the Compensation Paid to AMC Executives is Irrelevant

Evidence of AMC's total revenue and profits and its executives' compensation—including, for example, in the form of stock price, market capitalization, and executive

bonuses—is irrelevant to the claims in this case and should be precluded. *See, e.g.*, *Weingarten v. Braun*, 158 A.D.3d 519, 520 (1st Dep't 2018) (affirming denial of motion seeking discovery of personal tax returns where it was not relevant to plaintiffs' causes of action).

In breach of contract cases, like this one, where the question is "whether [the defendant] adequately performed the scope of the work" required by the parties' agreements, the overall wealth of the defendant is not relevant. *Dienst v. Paik Constr., Inc.*, 161 A.D.3d 638, 639 (1st Dep't 2018) (affirming trial court's decision that the defendant's financial records were "not relevant" to damages sought from an alleged breach of its performance). This is why New York courts routinely exclude evidence of a defendant's "personal wealth and income" where, like here, the plaintiffs seek monetary damages for an alleged breach of contract. *Beach v. Touradji Capital Mgmt., LP*, 2019 WL 295226, at *2 (Sup. Ct. N.Y. Cnty. Jan. 23, 2019); *see also Schreier v. Mascola*, 81 A.D.2d 909, 909 (2d Dep't 1981) (holding that the "discover[y] and inspect[ion] of defendant's financial records" was "not required in plaintiff's [breach of] contract action").

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AMC's overall revenue and profits—attributable to its *many* shows, services, and products—and the amount of money it pays its executives that preside over the entire AMC business, are irrelevant to whether Plaintiffs were properly paid under their *The Walking Dead* contract. That contract, and the MAGR definition it incorporates, do not identify AMC's total revenue, total profits, or its executives' compensation as "inputs" to the MAGR pool in which Plaintiffs participate—and therefore these numbers have nothing to do with the calculation of MAGR and, in turn, Plaintiffs' purported damages in this case.

The only sources of revenue that have any relevance to Plaintiffs' right to profit participation in connection with *The Walking Dead* are those categories of revenue actually

identified in the MAGR definition as inputs to the MAGR pool in which Plaintiffs' participate (such as merchandising revenue, home video/DVD revenue, foreign television revenue, or electronic-sell-through receipts). AMC does *not* seek to exclude evidence of those sources of revenue. Plaintiffs have access to, and may admit at trial, evidence of receipts from each of those revenue categories that are part of MAGR. Instead, AMC seeks to exclude revenue that is not part of MAGR and, therefore, is irrelevant to whether Defendants breached the parties' contract by not paying Plaintiffs what they were owed in profit participation for *The Walking Dead*.[4]

The evidence at issue on this motion is likewise irrelevant to Plaintiffs' implied covenant of good faith and fair dealing claims because the overall revenue and profits of AMC, and the amount of money the company pays its executives, has nothing to do with the question of whether Defendants "sought to prevent performance of the [parties'] contract or to withhold . . . benefits from the plaintiff[s]." *Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dep't 1999). There is nothing in the parties' contract or its negotiating history suggesting that AMC's total revenue, total profits, or its executives' compensation has any bearing at all on AMC's profit participation obligations. They do not. Thus, even if, as Plaintiffs and their experts assert, *The Walking Dead* has played a role in AMC's overall financial success, that fact is irrelevant to whether AMC complied with the express or implied profit participation terms of the parties' agreement.

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[4] Even if Plaintiffs are correct that the imputed license fee is governed by the affiliate transaction provision (they are not), AMC's total revenue and profits and its executives' compensation has no relevance to the affiliate transaction provision's standard—the "monetary terms comparable to the terms on which the Affiliated Company enters into similar transactions with unrelated third party distributors for comparable programs." Ex. M (2010 Agreement) at ¶ 13(d)(iii). And Plaintiffs will have at their disposal ample *admissible* evidence of *The Walking Dead*'s success—including, for example, ratings specific to the show—which is the evidence they have time and again cited as necessary for purposes of the affiliate transaction provision's "comparable programs" analysis. *See e.g.*, Ex. A (Pls. Mem. of Law in Supp. of Partial SJ in Case 1 at Dkt. 322) at 3; Ex. B (Pls. Opp. to AMC's Motion for SJ in Case 1 at Dkt. 397) at 29, n. 13 (citing exhibits with ratings data).

B. Evidence of AMC's Total Revenue and Profits and the Compensation Paid to AMC Executives is also Unfairly Prejudicial, Confusing, and Will Waste Time

The total revenue and profits and compensation information that Plaintiffs seek to offer at trial also should be precluded for its unfair prejudicial effect. Here, where the defendant is a large media enterprise, there exists the concern that if "evidence of [its] net worth" is presented, the jury "will use [its] verdicts to express biases against big businesses." *State Farm Mut. Auto. Ins. Co*, 538 U.S. at 417. Admitting evidence of AMC's total revenue and profits, and the compensation paid to its executives, runs the risk of a damages award tethered not to the parties' contract in this contract case, but rather to jury reactions to, and biases based on, the size and profitability of AMC generally. Juries must "render [] verdict[s] on the *merits*"—not based on any perceived ability on the part of the defendant to pay. *Chilvers v. New York Mag. Co., Inc.*, 114 Misc.2d 996, 998 (Sup. Ct. New York Cnty. 1982); *see also Vassura*, 117 A.D.2d at 799 (granting a new trial on damages after finding that it was "extremely prejudicial to suggest that the measure of damages . . . should be determined by whatever was 'in the other fellow's pocket'").

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Evidence of AMC's total revenue and profits, and the compensation paid to its executives, is also likely to confuse and mislead the jury—who may not be able to distinguish AMC's *overall* revenue and profits from the much more limited revenue relevant to the calculation of MAGR. In particular, the jury may not appreciate the distinction between revenue streams that are contractually allocated to the MAGR pool (e.g., revenue associated with *The Walking Dead* merchandise) and those that are not (e.g., advertising revenue). The jury likewise may not appreciate the distinction between *The Walking Dead*-specific revenue and the company's overall revenue. The unavoidable result would be a "needless[] distract[ion] from the core issue[s]" of the case, as the parties are forced to litigate these distinctions. *Abe v. New York*

Univ., 180 A.D.3d 420, 421-22 (1st Dep't 2020) (affirming trial court's decision to deny plaintiffs' motion *in limine* to introduce defendant's financial information). Courts routinely exclude evidence, including financial evidence of the type at issue on this motion, that "ha[s] little if any probative value" and would result in the examination of collateral issues. *Id.* at 421.

III. Third Category of Inadmissible Evidence: Evidence or Argument That AMC Breached a Duty to Negotiate its MAGR Definition in Good Faith

Defendants seek to exclude evidence that AMC negotiated its MAGR definition in bad faith, in violation of the Season 2 Amendment. As the Court is aware, the parties dispute whether the Season 2 Amendment applies, given that Darabont was terminated prior to the conclusion of Season 2. But even *if* that Amendment applies, Plaintiffs have no cognizable claim that it was breached because they have no evidence of damages (an essential element of any breach of contract claim). Plaintiffs should be precluded from offering any evidence relating to a claim they cannot pursue at trial.

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The Season 2 Amendment states that, "[t]he definition of MAGR shall be as set forth in AMC's customary MAGR definition, with such changes as have been agreed in the Agreement, and subject to such further changes as may be agreed following good faith negotiation . . . ." Ex. N (Season 2 Amendment) § 3(b). Plaintiffs argue that this language indicates that AMC was required to engage in "good faith negotiation" with Darabont before AMC's MAGR definition could become binding and that AMC failed to engage in this negotiation. Plaintiffs are wrong. This language of the Season 2 Amendment merely indicates that the parties agreed to negotiate in good faith *if* Darabont requested "further changes"—but *unless and until* negotiation resulted in "further changes," AMC's MAGR definition is binding and "shall" control. *Id.*[5]

[5] Judge Buckley agreed with AMC when analyzing practically identical contractual language in the *Kirkman v. AMC Film Holdings* case, and held that "the parties agreed that AMC's MAGR definition 'shall' be binding on the

In New York, a claim that a defendant breached a duty to negotiate in good faith does not entitle a plaintiff to the same damages as a claim for a typical breach of contract. In a contract action, a plaintiff may recover "expectation" damages representing what the plaintiff would have received if the contract was performed. *Goodstein Const. Corp. v. City of New York*, 80 N.Y.2d 366, 374 (1992). But an agreement to negotiate in good faith only obligates the parties to negotiate—it does not create an "expectation" that the parties will actually reach a *final agreement* on a contract. *Id.* Therefore, a breach of an agreement to negotiate does *not* entitle the plaintiff to contract expectation damages; the only damages the plaintiff can recover are "reliance damages" that it incurred by relying on the promise to negotiate (also known as "out of pocket" damages). *Id.* at 371; *see also Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 210 (2d Cir. 2002) (explaining that "in *Goodstein*, the Court of Appeals held that a plaintiff was entitled only to reliance damages for the breach of a contractual duty to negotiate in good faith").

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Here, Plaintiffs have not even *alleged* that they suffered damages from relying on AMC's purported promise to negotiate, much less proffered evidence of reliance damages. The only damages Plaintiffs contend they suffered are *expectation* damages—i.e., the profit participation payments they allegedly would have received if AMC had calculated MAGR using Plaintiffs' preferred formula. *See* Ex. O (Case 2 First Amend. Compl.) at ¶ 26 (reciting Plaintiffs' various theories regarding how they believe AMC has miscalculated MAGR). Therefore, Plaintiffs do not have a legally viable claim for breach of a duty to negotiate, because they have no evidence

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parties, and that the parties would negotiate in 'good faith' if Kirkman later wanted to seek improvements to that binding MAGR definition." *Kirkman v. AMC Film Holdings LLC*, 2020 WL 4364279, at *7 (Cal. Super. July 22, 2020) (*see* Ex. S). As Judge Buckley explained, "Plaintiffs argue that the language of Kirkman's MAGR provision"—or here, Darabont's Season 2 Amendment—"should be read as if it stated that 'MAGR shall be defined ***by further agreement after*** good faith negotiation,' but this is a re-writing of the contract, not an interpretation of it." *Id.* at *8 (emphasis in original). "Plaintiffs' reading would render meaningless the parties' contractual agreement that 'MAGR *shall be defined*' by AMC's 'standard definition,'" *id.*—or here, the analogous language mandating that "MAGR shall be as set forth in AMC's customary MAGR definition." Ex. N (Season 2 Amendment) at § 3(b).

that they suffered reliance damages from any such breach. *See Goodstein*, 80 N.Y.2d at 368 (reliance damages are the only recoverable damages for breach of duty to negotiate).

Plaintiffs should not be permitted to offer evidence about a claim they cannot prove. *Cf. Siemucha v. Garrison*, 111 A.D.3d 1398, 1400–01 (4th Dep't 2013) (evidence relating to a particular knee injury was irrelevant, given that plaintiff was not claiming damages for that injury). Allowing Plaintiffs to introduce evidence and argument about their non-viable duty-to-negotiate claim would serve no purpose other than to confuse the jury and prolong the trial.

Therefore, the Court should preclude Plaintiffs from offering evidence solely intended to prove that AMC breached a duty imposed by the Season 2 Amendment to negotiate in good faith. Prior to introducing evidence about post-contract negotiations, Plaintiffs should be required to explain to the Court, outside the presence of the jury, how the negotiation evidence is relevant to a legally viable claim.

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IV. <u>Fourth Category of Inadmissible Evidence</u>: Evidence Pertaining to Claims Plaintiffs Failed to Plead, Plaintiffs Abandoned, or the Court Already Rejected

Plaintiffs' 2018 lawsuit (No. 650251/2018, "Case 2") arises from an audit Plaintiffs conducted of AMC's profit participation accounting. In their Case 2 Complaint, Plaintiffs asserted more than a dozen claims based on their audit, and the parties conducted fact discovery on those exhaustive claims. But for the first time in their Case 2 expert reports—*i.e.*, *after* fact discovery closed—Plaintiffs asserted two entirely new audit-related "claims." Defendants move to exclude evidence of these "claims," on which Defendants were deprived of any opportunity to conduct fact discovery.

In addition, Plaintiffs intend to offer at trial evidence that AMC obstructed or hindered the underlying audit. Defendants move to exclude evidence of their alleged audit obstruction because it has no relevance to the relevant question in Case 2: did Defendants comply with the

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parties' agreement in paying profit participation to the Plaintiffs. Plaintiffs have abandoned any claims related to alleged audit obstruction and therefore no evidence of such an abandoned claim should be admitted at trial. Plaintiffs likewise should be precluded from arguing that Defendants breached the implied covenant of good faith and fair dealing based on any such alleged obstruction. Plaintiffs' implied covenant claim should be limited to the *only* theory this Court deemed viable on summary judgment—whether Defendants acted arbitrarily, irrationally, or in bad faith in defining MAGR.[6]

A. Plaintiffs Should be Precluded from Asserting Claims They Did Not Plead

Plaintiffs intend to offer at trial evidence of two claims that appear nowhere in the Case 2 Complaint and which were raised for the very first time in Plaintiffs' expert reports: (1) that AMC improperly included in the MAGR pool certain expenses associated with Comic-Con, the comic book, film, and television fan convention, Ex. Q (Younger Report) at 24-25; Ex. R (Douglas Case 2 Report) at 4, and (2) that AMC improperly deducted from the MAGR pool profit participation payments made to other profit participants on *The Walking Dead*, Ex. R (Douglas Case 2 Report) at 4. This Court should preclude evidence or argument pertaining to either of these late-breaking claims for which AMC was deprived of the opportunity to take fact discovery. *See Gurewitz v. City of New York*, 175 A.D.3d 655, 657-58 (2d Dep't 2019) (denying motion to amend where opposing party "had not conducted discovery" relating to new claim and

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[6] Defendants advanced several of these arguments during summary judgment proceedings Case 2. This Court, however, did not rule on those issues, and advised that "it would be more efficient to address these specific issues in the context of in limine motions." *Darabont v. AMC Network Entertainment LLC*, 2020 WL 1852644, at *10 (Sup. Ct. April 10, 2020) (Cohen, J.).

had "relied upon" the "original" pleading "to its prejudice by forgoing independent questioning of the witness during deposition, and had been hindered in the preparation of its defense").[7]

Comic-Con. Plaintiffs' expert reports challenge all of AMC's deductions of expenses related to Comic-Con, arguing that including such expenses in the MAGR calculation is "inconsistent with industry custom and practice." Ex. Q (Younger Report) at 24-25; *see* Ex. R (Douglas Case 2 Report) at 4. But no such allegation or claim was pleaded in the Case 2 Complaint. The only Comic-Con related claim in the Case 2 Complaint relates to a specific, discrete, and now-corrected accounting error regarding a single expenditure: that AMC double-counted the cost of a single banner used at Comic-Con. Ex. O (Case 2 First Amend. Compl.) ¶ 26(i). AMC corrected that error and informed Plaintiffs that the inadvertent charge would be reversed. No other Comic-Con claims are in the case.

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Consequently, evidence relating to Comic-Con accounting is irrelevant and highly prejudicial, particularly since AMC had no indication during fact discovery that *all* Comic-Con expenses were at issue in this case. No contract negotiators, for instance, were asked about whether the parties intended for Comic-Con expenses generally to be deducted from MAGR, because the propriety of such deductions was not at issue in this case until expert discovery. As a result of Plaintiffs' conduct, AMC is without the discovery it needs to defend against the

[7] Plaintiffs should not be permitted to amend their pleading through expert reports. To the extent they seek to amend their pleading, they should be required to file a motion. *See* CPLR § 3025(c). The New York appellate courts have cautioned, however, that when "a motion for leave to amend . . . alleging new theories of liability not raised in the complaint . . . is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious." *Navarette v. Alexiades*, 50 A.D.3d 869, 870-71 (2d Dep't 2008); *Morris v. Queens Long Island Medical Grp., P.C.*, 49 A.D.3d 827, 828 (2d Dep't 2008) ("[W]here the application for leave to amend is made long after the action has been certified for trial, 'judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious.'"). Where, as here, allowing an eleventh hour amendment would "substantially prejudice[]" a defendant and where an amendment "was based upon facts that the plaintiff had known since the inception of th[e] action" and nonetheless "sought to add new theories of liability that were not readily discernible from the allegations in the complaint," amendment should not be permitted. *Morris*, 49 A.D.3d at 828-29.

contention that deducting Comic-Con expenses—essential marketing expenditures for *The Walking Dead*—was improper and contrary to the parties' intent when they entered into their agreement. Plaintiffs should not be permitted to try this unalleged claim.

Deductions For Other Participants. Plaintiffs argued, for the first time through their damages expert, that AMC's deductions of MAGR payments to other profit participants breached the parties' agreement. Ex. R (Douglas Case 2 Report) at 4. That claim is nowhere in the Case 2 Complaint—which challenges only the deduction of MAGR participation payments to *Plaintiff* Ferenc, Inc., but not the deduction of MAGR participation payments to any other profit participant on the series. Ex. O (Case 2 First Amend. Compl.) ¶ 26(k). As a result, Defendants had no opportunity to probe in fact discovery Plaintiffs' newfound claim that deductions of MAGR payments to *other* participants besides Ferenc, Inc. breached the parties' agreement. No fact witnesses testified about the parties' intent with respect to this issue and their understanding of the propriety of such deductions—core issues in a trial about a contract this Court has deemed ambiguous. Plaintiffs should not be allowed to bring this new claim into the case at trial, having deprived AMC of the opportunity to take discovery on it.

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B. Evidence of AMC's Alleged Audit Obstruction Is Irrelevant And Highly Prejudicial

Plaintiffs' Case 2 Complaint asserts claims for breach of contract and the implied covenant of good faith and fair dealing arising from (1) AMC's alleged delays during Plaintiffs' audit of AMC's profit participation accounting, and (2) AMC's alleged refusal to disclose to Plaintiffs' auditors the agreements of other profit participants. Ex. O (Case 2 First Amend. Compl.) ¶¶ 32(b), 36(a)-(b). AMC moved for summary judgment on these claims, arguing that Plaintiffs failed to adduce *any* evidence of damages caused by this alleged conduct. *See Lexington 360 Assocs. v. First Union Nat'l Bank of N. Carolina*, 234 A.D.2d 187, 190 (1st Dep't

1996) ("Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order."). In response, Plaintiffs pointed to no evidence of damages whatsoever. Ex. P (Pls. Opp. to AMC's Motion for SJ in Case 2 at Dkt. 309) at 19. In fact, Plaintiffs stated affirmatively that they "are not seeking damages for AMC's obstruction of the audit." *Id.* Plaintiffs therefore conceded that their audit-obstruction claims—whether based on alleged breach of contract or implied covenant—are withdrawn. *FranPearl Equities Corp. v. 123 W. 23rd St., LLC*, 164 A.D.3d 1190 (1st Dep't 2018), *appeal denied*, 33 N.Y.3d 908 (2019) (affirming summary judgment grant where "plaintiff failed to show that it was harmed by defendant's delay" in performing); *Train v. Gen. Elec. Capital Corp.*, 8 A.D.3d 192,193 (1st Dep't 2004) (same for implied covenant claim).

Plaintiffs nonetheless have suggested that AMC's alleged audit obstruction is "relevant" to Plaintiffs' overall "narrative." Ex. P (Pls. Opp. to AMC's Motion for SJ in Case 2 at Dkt. 309) at 19. Not so. To the extent there was any audit obstruction by AMC, and none occurred, it has nothing to do with contract interpretation or any other legal issue in this case. The audit occurred *years* after the operative contract was negotiated and signed. Moreover, it is undisputed that despite any alleged obstruction Plaintiffs *did* complete their audit—that is how Case 2 arose in the first place. The alleged audit obstruction has no legitimate part to play in Plaintiffs' "narrative" in this case.

Plaintiffs' only possible reason to introduce this evidence is to attempt to smear AMC. A party cannot raise its adversary's miscellaneous alleged misdeeds merely to cast aspersions. *Mazella v. Beals*, 27 N.Y.3d 694, 712 (2016) (holding that admitting "unrelated misdeeds" into evidence "was sufficiently prejudicial to defendant so as to require a new trial); *Badr v. Hogan,*

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75 N.Y.2d 629, 636-37 (1990) (holding that cross-examination of a witness with prior bad acts was "sufficiently prejudicial" to require a new trial). Such evidence is plainly irrelevant and at the very least its minimal probative value is substantially outweighed by a serious risk of prejudice based on its potential to inflame the jury and result in a verdict divorced from any legitimate basis for liability.

This Court should preclude Plaintiffs from offering any allegations or evidence of AMC's alleged audit misconduct. Plaintiffs concede they suffered no harm from these alleged misdeeds and thus have no viable claim based on the conduct. These allegations have no bearing on any issue remaining in the case and should be excluded from trial.

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C. Plaintiffs' Implied Covenant Claim Should Be Limited To The Sole Theory This Court Found Viable

Plaintiffs have asserted a panoply of theories about how AMC allegedly breached the implied covenant of good faith and fair dealing. In their Case 2 Complaint, Plaintiffs alleged that AMC breached the implied covenant by obstructing the audit, Ex. O (Case 2 First Amend. Compl.) ¶ 36—a claim they have since abandoned, *see supra* Pt. IV.B—and suggested the same about AMC's alleged failure to disclose other profit participants' agreements to Plaintiffs during the audit, Ex. O (Case 2 First Amend. Compl.) ¶ 36. AMC moved for summary judgment on Plaintiffs' implied covenant claim based on Plaintiffs' inability to show damages, *see supra* Pt. IV.B, and the fact that Plaintiffs' implied covenant theory is duplicative of their breach of contract claims.

On summary judgment, this Court identified that only one implied covenant theory is viable. The Court ruled that *if* the jury concluded that AMC had "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." *Darabont*, 2020 WL 1852644, at *10. The Court then concluded that "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." *Id*.

The implied covenant of good faith and fair dealing is not a malleable, open-ended claim into which Plaintiffs can throw any evidence designed to make Defendants look bad or suggest they are bad actors in a broad sense. As the Court held, the implied covenant claim must be tailored to whether Defendants acted arbitrarily, irrationally, or in bad faith in defining MAGR. This is the sole implied covenant theory remaining in this case, and the only one about which Plaintiffs should be permitted to argue or introduce evidence at trial. Plaintiffs should be precluded from arguing that AMC breached the implied covenant in any other manner, including by purportedly obstructing the audit or by failing to disclose the agreements of other *The Walking Dead* profit participants.

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CONCLUSION

Defendants respectfully request that the Court exclude the four categories of irrelevant evidence described above.

Dated: August 11, 2020
New York, New York

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Orin Snyder, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Support of Defendants' Omnibus Motion *in Limine* to Exclude Evidence At Trial complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,772 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: August 11, 2020
New York, New York

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GIBSON, DUNN & CRUTCHER LLP

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