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 (Bransten, J.)
Plaintiffs,	:	Motion Seq. No. 006
v.	:	
AMC NETWORK ENTERTAINMENT LLC, AMC FILM HOLDINGS LLC, AMC NETWORKS INC., STU SEGALL PRODUCTIONS, INC. and DOES 1 THROUGH 10,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR ORDER TO SHOW CAUSE TO COMPEL DISCOVERY OF PLAINTIFF CREATIVE ARTISTS AGENCY, LLC; OR ALTERNATIVELY TO PRECLUDE CLAIMS AND ALLEGATIONS

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September 26, 2014

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Pursuant to CPLR 3124, defendants AMC Network Entertainment LLC ("AMC Channel"), AMC Film Holdings LLC ("AMC Studios"), AMC Networks Inc. (collectively, "AMC"), and Stu Segall Productions, Inc. ("Segall" and with AMC, "Defendants") respectfully submit this memorandum of law in support of their order to show cause to compel plaintiff Creative Artists Agency ("CAA") to produce documents responsive to Requests for Production Nos. 14 and 28-33 in Defendants' First Set of Requests for the Production of Documents to CAA ("Motion").[1]

PRELIMINARY STATEMENT

Television producer Frank Darabont and talent agency CAA filed this lawsuit claiming that Defendants treated them unfairly during and after the parties' contract negotiations concerning the television series, *The Walking Dead*. Among other things, Plaintiffs allege that Defendants breached their duty to negotiate the contingent compensation portion of the parties' agreements "in good faith" and "within customary basic cable television industry parameters." (Berlinski Aff. Ex. B (the "Complaint") ¶ 56(G).) Plaintiffs also assert that Defendants acted in bad faith by refusing to negotiate certain terms of the parties' agreements "consistent with fair market value for a Series of this stature." (*Id.* ¶ 60.) Moreover, Plaintiffs claim that the manner in which Defendants calculated their contingent compensation interests in *The Walking Dead* was in "blatant disregard for . . . industry custom and practice" (*Id.* ¶ 53.)

Defendants have denied each of these allegations and countered that they treated Plaintiffs more favorably than what is typical in the basic cable television industry. As the

[1] Submitted herewith in support of Defendants' Memorandum is the Affidavit of John V. Berlinski, dated September 24, 2014 ("Berlinki Aff."), with exhibits annexed thereto, and the Affidavit of Marci Wiseman, dated September 26, 2014 ("Wiseman Aff."), with exhibits annexed thereto.

largest agency in this industry, plaintiff CAA negotiates contingent compensation agreements with studios on a daily basis—both for itself and on behalf of its clients—and therefore possesses the agreements, related negotiating history, and accounting statements that will support Defendants' industry-related defenses and reveal Plaintiffs' claims to be meritless. Defendants, on the other hand, do not negotiate contingent compensation agreements on behalf of talent and therefore do not possess the same access as CAA to documents reflecting how these agreements are negotiated in the basic cable television industry, so they are relying in large part on CAA's documents to defend themselves in this lawsuit.

Yet, CAA refuses to produce the documents, insisting that they are irrelevant, confidential, and the burdens associated with producing them are too high. In support of their relevance argument, CAA claims that the documents do not concern a particular "self-dealing" claim found in paragraph 56(A) of the Complaint. But self-dealing is only one of many allegations in the Complaint and, as stated above, Defendants seek the requested discovery in connection with other allegations. Moreover, the requested discovery is central to one of AMC Studios' primary defenses in this lawsuit: that its obligations with respect to defining Plaintiffs' contingent compensation were limited to providing Plaintiffs with AMC's standard "Modified Adjusted Gross Receipts" ("MAGR") definition and then negotiating that definition within customary industry parameters consistent with its business practices. To establish that AMC Studios met these requirements and fully complied with the parties' agreements, Defendants need the CAA documents that define the industry parameters within which the parties were required to negotiate, and thus CAA's argument of irrelevance is without merit.

CAA's arguments concerning the burdens of production here are equally meritless and disingenuous. CAA initially told both Defendants and this Court that it would be "impossible"

to identify, collect, and produce the requested documents because doing so would involve manually searching through more than 5,000 different files. Subsequently, however, CAA admitted that it can identify these documents by performing a simple keyword search, so the stated burdens of production no longer exist.

Finally, with respect to CAA's claims that the requested documents are too private and confidential to produce, the parties have stipulated to a protective order that governs both parties' highly confidential documents and will restrict dissemination to only those few individuals involved in this lawsuit. Defendants have already produced proprietary financial information and their own highly confidential agreements—the public disclosure of which would cause irreparable harm—pursuant to this protective order, and Plaintiffs must now do the same.

Put simply, plaintiff CAA cannot have it both ways—to allege that Defendants breached various duties to act in accordance with the practices of third party studios in the basic cable television industry at-large, but then refuse to produce the documents in its possession that speak directly to and disprove these allegations. Alternatively, if as alluded to during the August 12, 2014 court conference in this matter, the Court is inclined to preclude Plaintiffs from asserting certain claims in this lawsuit in lieu of ordering the requested document production, Defendants respectfully ask that all claims and allegations relating to the documents sought herein be formally precluded and stricken from this case with prejudice.

STATEMENT OF FACTS

A. The Darabont Agreements

The Walking Dead television series (the "Series") originates from a comic book created and written by author Robert Kirkman. (Compl. Ex. A (the "2010 Agreement"), at 1.) In 2009, Kirkman licensed the television rights to the comic book to AMC Channel's predecessor-in-

interest, American Movie Classics Company LLC. Plaintiff Frank Darabont ("Darabont"), through his loan-out companies,[2] Ferenc, Inc. ("Ferenc") and Darkwoods Productions, Inc. ("Darkwoods", and with Darabont, Ferenc, and CAA, "Plaintiffs"), was then hired by defendant Segall to adapt and help produce the Series for basic cable television. (*See* 2010 Agreement.)

The 2010 Agreement entitled Darabont to approximately $300,000 in fixed compensation for his work on Season One of the Series. Darabont also contracted for future contingent compensation—the right to potentially receive a percentage of AMC Studios' defined "gross receipts" from the Series, after deduction of certain agreed-upon fees, expenses, and other items. (2010 Agreement ¶ 13.) The formula, or "definition," that the parties agreed to apply in calculating his contingent compensation interest was called "Modified Adjusted Gross Receipts" ("MAGR").[3] The 2010 Agreement provided that AMC Studios was to calculate Darabont's contingent compensation using its customary MAGR definition, subject to certain pre-negotiated improvements. (*Id*. ¶ 13(d)(ii).)

On the heels of a successful first season of the Series, the parties renegotiated their agreement and entered into "'The Walking Dead'/Frank Darabont – Season 2 Amendment." (*See* Compl. Ex. B (the "2011 Amendment").) The 2011 Amendment increased Darabont's fixed compensation to $2.3 million for his work on Season Two of the Series. Moreover, while it did not change the existing MAGR definition, the amendment provided that this definition would be "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 [Darabont's] stature in the basic cable television industry . . .." (*Id.* ¶ 3(b)

[2] A "loan-out" company is an entity that typically employs a single individual and furnishes his or her creative services to one or more studios.

[3] Though the parties' agreements and negotiating history consistently use the term "MAGR," Plaintiffs' Complaint misleadingly refers to MAGR as "Profits." (*See, e.g.*, Compl. ¶ 5.)

(emphasis added).) In short, the parties promised to revisit their negotiations of the MAGR definition after executing the 2011 Amendment, and then established objective, good faith standards to ensure a meaningful future dialogue.

The parties' commitment to continue negotiating the MAGR definition was itself the product of lengthy negotiation. (Wiseman Aff. ¶ 6.) In January 2011, Plaintiffs' counsel first asked that the MAGR definition be "subject to good faith negotiations." (*Id.* ¶ 7.) AMC declined, explaining that an abstract "good faith" standard was too subjective, and the term should be defined objectively with reference to "AMC's customary parameters." (*Id.* ¶ 8.) But Plaintiffs countered that "AMC does not have a custom definition yet & once prepared it must be subject to good faith negotiations." (*Id.* ¶ 9.) Eventually, the parties compromised, agreeing to an objective test that the fairness of their MAGR definition negotiations would be judged by "***customary basic cable television industry parameters*** consistent with AMC's business practices and Artist's stature in the basic cable television industry as of [January 10, 2011]." (*See id.* ¶ 10; 2011 Amendment ¶ 3(b).) In short, Plaintiffs conceded to an objective standard of good faith, and AMC Studios recognized that its limited history negotiating MAGR definitions justified an examination of the basic cable television industry as a whole—not just its own experiences—to judge good faith compliance. (Wiseman Aff. ¶ 10.)

B. The CAA Package Agreement

CAA is Darabont's agent and was involved in negotiating the 2010 Agreement and 2011 Amendment on his behalf. (Compl. ¶ 22.) In lieu of commissions that CAA would have otherwise received from Darabont, CAA obtained its own independent contingent compensation interest in the Series from AMC Studios, known as a "package" commission. (*Id.*) CAA's package commission included both fixed compensation and an independent 10% share of MAGR

to be defined "in accordance with Frank Darabont's MAGR definition . . .." (*See id.*) CAA therefore acted on behalf of both Darabont and itself when it participated in negotiating the 2010 Agreement, the 2011 Amendment, and the MAGR definition.

C. The Parties' Good Faith MAGR Definition Negotiations

Plaintiffs' original MAGR definition, as documented in the 2010 Agreement, was modeled on contingent compensation definitions that Darabont's transactional law firm had previously negotiated with another major television studio. (Wiseman Aff. ¶ 11.) It included a number of valuable concessions, such as reduced television distribution fees, reduced administrative overhead charges, and "most favored nations" provisions that ensured Darabont would receive the benefit of future concessions that other contingent participants on *The Walking Dead* negotiated for their MAGR definitions. (*Id*.) AMC Studios then continued to make concessions after execution of the 2010 Agreement, including by waiving its right to charge standard distribution fees on home video revenue, and by making an offer – which Plaintiffs ultimately rejected—to significantly improve the imputed license fee.[4] (*Id*.)

After the parties signed the 2011 Amendment, AMC Studios spent more than two years continuing to negotiate Darabont's MAGR definition and make further concessions. (Wiseman Aff. ¶ 12.) In November 2013, AMCFH made a particularly significant concession by agreeing to offset production costs in the calculation of Plaintiffs' MAGR with the production tax credits it had and would receive from the state of Georgia. (*Id*.) This concession resulted in a credit of

[4] "Imputed license fees" are sometimes negotiated between studios and profit participants when television series are licensed by one affiliate to another. For purposes of calculating "MAGR," they replace the product of any actual studio/network license fee negotiations with the amount that the studio and profit participant have agreed upon. A primary goal of imputed license fees is to avoid disputes about the fairness of affiliated party transactions.

more than $24 million in calculating Plaintiffs' MAGR for the period ending September 30, 2013, and should benefit Plaintiffs by millions of additional dollars in years to come. (*Id.*)

Notwithstanding AMC Studios' multiple negotiating concessions, once it informed Plaintiffs that it no longer required Darabont's services, Plaintiffs began complaining about the "good faith" nature of these negotiations. (*See* Wiseman Aff. ¶ 13.) These complaints focused on AMC Studios' alleged failure to negotiate the MAGR definition "consistent with industry standards." (*See id.*) For example, Plaintiffs argued that "[t]he foundation for [Plaintiffs'] assertion that AMC is required to include any tax credit . . . as an offset against production costs is the requirement that AMC negotiate the profit definition in good faith and is consistent with industry standards. AMC's position . . . is inconsistent with how other production companies treat those revenues." (*Id.* Ex. D.) Plaintiffs also stated that they were "disappointed . . . that [AMC Studios] is refusing to negotiate in good faith consistent with industry standards." (*Id.*)

D. The Complaint

On December 17, 2013, Plaintiffs filed their Complaint, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, accounting, and declaratory relief. Though Plaintiffs pled breach of contract as a single cause of action, this claim contains seven distinct subparts, each relating to different contractual provisions and theories of breach. (*See* Compl. ¶¶ 56(A)-(G).) Of particular relevance to this motion, paragraph 56(G) alleges that AMC breached its contractual duty to negotiate the MAGR definition with Plaintiffs in good faith. (*Id.* ¶ 56(G).)[5] This allegation arises from Plaintiffs' claim that AMC Studios is refusing to negotiate in good faith "consistent with industry standards." (*See* Wiseman

[5] This allegation differs from Plaintiffs' paragraph 56(A) claim that AMC should have credited Plaintiffs' MAGR "gross receipts" with a license fee comparable to what AMC Channel paid to third party studios. (Compl. ¶ 56(A).)

Aff. ¶ 13, Ex. D.) The contractual provision relevant to this allegation is contained in the 2011 Amendment, and provides that AMC Studios must calculate Plaintiffs' contingent compensation using the parties' then-current MAGR definition, "subject to such further changes as may be agreed following good faith negotiation within customary basic cable television industry parameters. . . ." (*See* 2011 Amendment ¶ 3(b).)[6]

With respect to their Second Cause of Action, Plaintiffs allege that AMC Studios breached the implied covenant of good faith and fair dealing by "refusing to provide Plaintiffs with a Profits definition [*i.e.*, the MAGR definition] in a timely manner, refusing to negotiate the Profits definition in good faith, and refusing to negotiate for an imputed license fee consistent with fair market value for a Series of this stature." (Compl. ¶ 60.)

The Complaint separately takes issue with AMC's methodology in accounting to Plaintiffs under the MAGR definition. (*See id.* ¶ 53.) In a paragraph entitled "AMC Fails to Properly Account for Profits," Plaintiffs allege that AMC behaved in "***blatant disregard for . . . industry custom and practice*** . . . in calculating Plaintiffs' Profits/deficits." (*Id.* ¶ 53 (emphasis added).) This paragraph is incorporated by reference throughout every cause of action in the Complaint and essentially avers that AMC Studios administered Plaintiffs' contingent compensation interests—as reflected in the accounting statements it issued—in a manner less favorable than how studios typically account to profit participants in the basic cable television industry.

E. Defendants' Answer to the Complaint

Defendants' filed their Answer on February 20, 2014. (Berlinski Aff. ¶ 6, Ex. C

[6] While Defendants dispute that the parties' agreements required AMC Studios to meet any "fair market value" standard, Defendants are still entitled to the discovery that will disprove this baseless allegation.

("Answer").) In it, they denied each material allegation of the Complaint, including Plaintiffs' claims that AMC Studios failed to make negotiating concessions with them that reflected the "fair market value" of the Series and that AMC's MAGR definition and accounting practices "blatant[ly] disregard[ed] . . . industry custom and practice." (*See* Answer ¶¶ 42, 53, 56, 60.) At trial, Defendants intend to demonstrate their full compliance with the terms of the parties' agreements by, among other things, establishing that they negotiated and administered a MAGR definition that actually exceeds how other studios in the basic cable television industry typically negotiate and administer these definitions.

F. AMC's Document Requests and CAA's Objections

On March 4, 2014, Defendants served Plaintiffs with document requests targeted to uncover industry custom and practice concerning the negotiation and administration of contingent compensation agreements. (*See* Berlinski Aff. ¶ 7, Ex. D.) They included:

- Any and all agreements between [CAA] and any basic cable television studio between January 1, 2009 and the present that include contingent compensation interests. (*Id.*, Request No. 28.)
- Any and all agreements between any of [CAA's] clients and any basic cable television studio between January 1, 2009 and the present that include contingent compensation interests. (*Id.*, Request No. 29.)
- All Documents concerning any and all definitions for the calculation of contingent compensation owed to [CAA] by any basic cable television studio pursuant to an agreement between January 1, 2009 and the present. (*Id.*, Request No. 30.)
- All Documents concerning any and all definitions for the calculation of contingent compensation owed to any of [CAA's] clients by any basic cable television studio

pursuant to an agreement between January 1, 2009 and the present. (*Id.*, Request No. 31.)

- Any and all agreements between [CAA] and any basic cable television studio between January 1, 2009 and the present that include an "imputed license fee." (*Id.*, Request No. 32.)
- Any and all agreements between any of [CAA's] clients and any basic cable television studio between January 1, 2009 and the present that include an "imputed license fee." (*Id.*, Request No. 33.)

Together, these requests cover three categories of documents: (1) contingent compensation agreements for basic cable television shows; (2) accounting statements related to these agreements; and (3) correspondence related to these agreements. The documents include both those relating to the contingent compensation interests of CAA's clients, and those concerning CAA's own, independent "package commission" interests. The requests were limited to the time period beginning 2009, to align with the date on which Plaintiffs allege that they began negotiating the 2010 Agreement with Defendants. (*See* Compl. ¶ 25.)

On May 2, 2014, CAA served its Responses and Objections, objecting to each of Defendants' requests on the grounds that they are vague, ambiguous, overbroad, burdensome, and harassing. (*See* Berlinski Aff. ¶ 8, Ex. E, Responses and Objections to Request Nos. 28-33.) CAA further objected to Request Nos. 28-33 on the ground that they are irrelevant. (*Id.*)

G. Meet and Confer/Initial Court Conference

The parties spoke often in an effort to resolve their differences. (*See* Berlinski Aff. ¶ 9.) During these conversations, Defendants explained the relevance of the above-referenced categories of CAA documents and asked Plaintiffs how they intended to prove their case without

these industry custom and practice documents. (*Id.* ¶ 10.) Among other things, Plaintiffs responded that they intended to produce the documents that they would use at trial and did not believe they were required to produce additional responsive documents. (*Id.*) Defendants countered that this would be impermissible "cherry-picking." (*Id.*) Plaintiffs also asserted that it would be sufficient for the parties to retain expert witnesses in lieu of document discovery on these claims. (*Id.* Ex. J, at 6.) Defendants disagreed and reiterated that if CAA possessed documents that contradicted allegations in its Complaint and/or supported AMC's defenses, New York law required production of these documents. (*Id.* ¶ 10, Ex. I, at 3.)

CAA also raised concerns about the burdens of producing this discovery and the confidential nature of the information contained therein. (*Id.* ¶ 11.) With respect to burden, CAA initially represented to Defendants and the Court that it would "simply be impossible" to produce the documents because "CAA would have to comb through every file and agreement for every one of [its] 2,000 clients" and manually "review over 5,000 active bookings" to even distinguish between cable and network television agreements. (*Id.* ¶ 15, Ex. J, at 5-7.) However, CAA later admitted that it could conduct key-word searches in its electronic "open bookings database" and generate a list of relevant documents with minimal effort. (*Id.* ¶ 17.) Concerning CAA's privacy concerns, Defendants reminded counsel that the parties would be stipulating to a protective order and that Defendants would not object to these documents being classified as "highly confidential." (*Id.* ¶ 11; *see also id.* Ex. K, at 4.)

On August 12, 2014, the Court conducted a discovery conference in connection with this dispute. (Berlinski Aff. ¶ 18.) Based in part on Plaintiffs' counsel's representations that this lawsuit is nothing more than "a license fee case" and "we are not seeking damages based upon some custom-wide practice in the industry," the Court limited the discovery that it ordered CAA

to produce to documents relating to the television series' *Mad Men* and *Breaking Bad*. (*Id.* Ex. L, at 6:11-16; 23:12-13, 22.) The Court also "preclude[d] the Plaintiffs from asserting a breach of industry practice and custom as to good faith negotiations." (*Id.* at 27:21-23.)

ARGUMENT

I. CAA SHOULD BE ORDERED TO PRODUCE DOCUMENTS EVIDENCING HOW MAGR DEFINITIONS ARE CUSTOMARILY NEGOTIATED AND ADMINISTERED IN THE BASIC CABLE INDUSTRY

A. New York Law Favors Broad Discovery

A party must produce documents that are "material and necessary" to the claims and defenses in the action. CPLR 3101(a). The phrase "material and necessary" is "to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968).

Where, as here, Plaintiffs seek substantial damages, the requirement to produce relevant materials is heightened. *See JRDM Corp. v. U.W. Marx Inc.*, 237 A.D.2d 798, 800 (3d Dep't 1997) (reversing denial of defendant's motion to compel by concluding that "[d]efendants should be provided with the requested documents sufficiently in advance of trial to properly prepare their defense, particularly in light of the magnitude of the claim at issue in this case."); *Montalvo v. CVS Pharm., Inc.*, 81 A.D.3d 611, 612 (2nd Dep't 2011) (reversing denial of motion to compel); *see also Hutchison v. Brown*, 277 A.D. 130, 137 (1st Dep't 1950) (granting new trial because trial court would not compel production of documentary evidence).

B. Plaintiffs Allege That Defendants Breached Their Duties to Negotiate and Administer the MAGR Definition Consistently with Basic Cable Television Industry Custom and Practice

A core allegation of Plaintiffs' lawsuit is that Defendants acted in bad faith when negotiating and administering the parties' MAGR definition. Specifically, Plaintiffs claim that AMC Studios unnecessarily delayed in providing them with the MAGR definition, eventually presented them with a definition that did not "reflect[] fair market terms," refused to negotiate certain terms of that definition "consistent with ***fair market value*** for a Series of this stature," and then acted in "***blatant disregard for . . . industry custom and practice*** . . . in calculating Plaintiffs' Profits/deficits" under the MAGR definition. (Compl. ¶¶ 60, 42, 56(G), 53.)

Plaintiffs have stitched together many of these allegations and purported contractual duties out of whole cloth. Those that are at least ostensibly tethered to a provision of the parties' agreements, however, are based in paragraph 3(b) of the 2011 Amendment, which obligated AMC Studios to calculate Plaintiffs' MAGR pursuant to "AMC's customary MAGR definition . . . 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 . . .." (2011 Amendment ¶ 3(b).)

The negotiating history of paragraph 3(b) confirms the parties' intent to measure their negotiations with reference to how other studios in the basic cable industry negotiate MAGR definitions with talent. Plaintiffs began the paragraph 3(b) discussions by requesting that future MAGR definition negotiations be measured by a subjective "good faith" standard. (Wiseman Aff. ¶ 7, Ex. A.) AMC refused, and responded that the standard should be objective and measured with respect to "AMC's customary parameters." (*Id.* ¶ 8, Ex. B.) Plaintiffs disagreed, countering that "AMC does not have a custom definition yet & once prepared it must be subject

to good faith negotiations." (*Id.* ¶ 9, Ex. C.) Eventually, the parties compromised, agreeing that they would look to external "customary basic cable television industry parameters consistent with AMC's business practices" to judge whether their future renegotiations of the MAGR definition had been done in good faith. (*See id.* ¶ 10; 2011 Amendment ¶ 3(b).)

In the past, Plaintiffs have freely admitted that industry custom and practice concerning MAGR definitions is not only relevant, but part of the very contractual standard the parties' good faith negotiations were required to meet. In a September 13, 2012 letter to Defendants, for example, Plaintiffs complained that AMC Studios had failed to live up to the contractual requirement that it "negotiate the profit definition in good faith and [] consistent with industry standards. AMC's position . . . is inconsistent with how other production companies treat those revenues." (Wiseman Aff. ¶ 13, Ex. D.) Plaintiffs concluded that letter by expressing their disappointment with their "unfavorable profit definition" and reiterating their accusations that AMC Studios was "refusing to negotiate in good faith consistent with industry standards." (*Id*.) Put simply, there was never any question as to the relevance of industry custom and practice in this dispute until CAA's own documents came under scrutiny.

C. The Requested Discovery Is Highly Relevant to Plaintiffs' Claims and Defendant AMC Studios' Defenses.

Notwithstanding the aforementioned allegations and the objective, industry-wide standards agreed to by the parties, plaintiff CAA refuses to produce a single document from the following categories: (1) contingent compensation agreements for basic cable television shows; (2) correspondence related to these agreements; and (3) accounting statements related to these agreements. These documents are narrowly tailored, highly relevant, and certain to contradict key allegations in Plaintiffs' Complaint.

Discovery of CAA's contingent compensation agreements for basic cable television shows will reveal the terms of MAGR definitions that CAA and/or its clients have negotiated with other studios. If, as Defendants expect, CAA and its clients routinely enter into less valuable agreements than what Defendants offered them here—such as agreements with lower imputed license fees—that will be powerful evidence that Defendants conducted their MAGR definition negotiations in "good faith." *See Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 459-60 (2004) (finding industry custom and practice relevant to resolving contract dispute).

Likewise, the negotiating history tied to these agreements will permit a detailed examination of these types of negotiations, including which terms are initially offered, what constitutes "timely" provision of these terms, and which "asks" and "gives" are customarily made during these negotiations. Using this information, AMC Studios will be able to demonstrate, contrary to the allegations of the Complaint, that it provided Plaintiffs with the MAGR definition in a "timely" manner and made more valuable concessions when negotiating that definition than are customary in the basic cable industry. In other words, Defendants acted in "good faith" in accordance with customary basic cable television industry parameters consistent with AMC's business practices when negotiating the MAGR definition and thus fully complied with their contractual obligations.

Finally, the accounting statements that Defendants have requested will, in conjunction with the agreements, show how other basic cable television studios in the industry typically administer MAGR definitions. Among other things, these statements will show the frequency with which studios typically account to talent, the level of detail typically included within them, and how studios interpret similar MAGR definitions. For example, they will reveal whether and the manner in which studios give their MAGR participants the benefit of production tax

credits—a key contention in this lawsuit. In short, AMC expects these documents to reveal that its administration of Plaintiffs' agreements was not—contrary to the allegations of the Complaint—in "blatant disregard . . . for industry custom and practice."[7] (*See* Compl. ¶ 53.)

Absent this crucial discovery, AMC Studios will be severely prejudiced because its defenses hinge on the contents of these documents. One of these defenses is that Plaintiffs have grossly misrepresented the parties' agreements, which nowhere provide that AMC Studios must comply with any nebulous "fair market value" test or credit Plaintiffs with an imputed license fee comparable to the actual license fees AMC Channel pays to third party studios. (*See* Answer, First-Third Affirmative Defenses.) Rather, the express terms of the parties' agreements provide that with respect to determining Plaintiffs' MAGR, "[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 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 [January 10, 2011]." (2011 Amendment ¶ 3(b) (emphasis added).)

Put simply, AMC Studios intends to defend itself by pointing out that the parties' agreements obligated them solely to provide Plaintiffs with AMC's customary MAGR definition

[7] Plaintiffs argue that these documents are irrelevant because "[t]he central issue in this case is whether the license fees AMC 'imputed' for the Series equaled what AMC would have paid an unaffiliated studio for the Series." (Berlinski Aff. Ex. J, at 4.) This self-serving characterization of their claims cannot change the allegations of paragraphs 42, 48, 53, 56(G), and 60 of the Complaint, where Plaintiffs allege that Defendants breached the parties' agreements and the implied covenant by treating Plaintiffs differently from how other studios in the basic cable television industry typically treat talent. Plaintiffs have not offered a single argument even hinting at why the documents at issue in this motion are irrelevant to these independent allegations.

and then negotiate that definition "within customary basic cable television industry parameters."[8] To prove that it did just that, AMC Studios needs to obtain the contingent compensation agreements, negotiating history, and accounting statements that will prove they fully complied with, and indeed exceeded, these obligations.

D. Plaintiff CAA Is In Unique Possession of the Documents That Will Reveal How Other Studios in the Basic Cable Industry Negotiate and Administer Their Contingent Compensation Definitions

CAA negotiates contingent compensation agreements in the basic cable television industry on behalf of itself and its clients on a near daily basis. As the largest talent agency in the television industry, CAA possesses hundreds of these agreements and related accounting statements, and thousands of pages of related negotiating history, from basic cable television studios. In fact, in the informal letter to the Court that Plaintiffs submitted on July 1, 2014, CAA complained that it has ***too many*** of these documents.[9] (*See* Berlinski Aff. Ex. J, at 6-8.) Defendants do not negotiate contingent compensation agreements on behalf of talent and therefore do not possess the same access as CAA to documents reflecting how these agreements are negotiated in the basic cable television industry. (Wiseman Aff. ¶ 14.) Consequently, it is critical to AMC Studios' defense of this litigation that CAA be ordered to produce the requested documents.

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[8] The parties' agreements also obligated Defendants to credit Plaintiffs with the benefits of any MAGR definition improvements negotiated by other profit participants on the Series, including any increases in the imputed license fee resulting from negotiations with those third-parties to this dispute. (2010 Agreement ¶ 13(d)(iv).)

[9] As is discussed more fully in Section G, *supra*, pp. 10-12, CAA has since retracted the burden arguments set forth in its July 1, 2014 letter to the Court, so those burdens are no longer at issue with respect to these documents.

E. The Prejudice to Defendants That Would Result from Denial of This Motion Outweighs Any Purported Burden to CAA of Producing These Documents

Courts weigh the need for discovery against the burden to the protesting party. *See Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 955 (1998) (affirming grant of defendant's motion to compel an examination of plaintiff's vocational abilities by an expert). Without a showing of undue burden by the protesting party, courts will grant a motion to compel discovery of relevant evidence. *See Montalvo,* 81 A.D.3d at 612 (reversing denial of motion to compel). The goal is to "'ensur[e] that both plaintiff[s] and defendants receive a fair trial.'" *Kavanagh*, 92 N.Y.2d at 955 (citations omitted).

Defendants have requested documents related to CAA and its clients' agreements with third party studios in the basic cable television industry from 2009 through the present, including the agreements themselves. In the parties' meet and confer and informal letters submitted to the Court, CAA argued that the burdens associated with identifying, gathering, and producing these documents outweighed the benefits to Defendants. In particular, CAA claimed it had over 5,000 "open deals" or contracts for CAA clients to render services, and that CAA would have to manually review each of those documents to determine which of them relate to basic cable deals that include contingent compensation. (Berlinski Aff. Ex. J, at 6-8.)

Despite CAA's original representations to the Court regarding these burdens, CAA has now confirmed that it has a database within which it may easily query the documents at issue in this motion. (Berlinski Aff. ¶ 17.) For example, CAA has the capability of querying the database for only basic cable agreements, during a specific time period, and can set parameters for minimum compensation. (*Id.*) At the push of a few buttons, the database delivers a report with all of the relevant documents. (*See id.*) The entirety of CAA's argument—that it would be

too time consuming to search through thousands of its clients' television bookings and agreements in order to identify responsive documents—is therefore now moot.

Even if it were the case that CAA's attorneys would have to review numerous documents to determine responsiveness—which they do not—that is no different from the burden any large corporate party faces in any litigation, Defendants included. CAA elected to file a lawsuit that alleges "tens of millions of dollars of damages" and implicates a duty to negotiate certain agreements "within customary basic cable television industry parameters," and in which they have asserted that Defendants "blatant[ly] disregard[ed] . . . industry custom and practice" and "fair market value." (*See* Compl. ¶¶ 1, 53.) Given the centrality of the documents at issue in this motion to Defendants' defenses, and the fact that CAA is in near exclusive possession of these documents, CAA's burden arguments do not outweigh the probative value of the documents.

To the contrary, denying Defendants' motion here would undoubtedly deprive AMC Studios of a full defense and a fair trial. *See Kavanagh*, 92 N.Y.2d at 955; *see also Hutchison*, 277 A.D. at 137 (granting new trial because trial court would not compel production of key documentary evidence). At the very least, the denial of this highly relevant and minimally burdensome discovery would be subject to reversal. *See JRDM Corp.*, 237 A.D.2d at 800 (reversing the denial of defendant's motion to compel production of documents).

F. CAA's Privacy Concerns Are Overstated.

CAA's privacy argument is based on concerns about how disclosure of its clients' agreements would "greatly damage CAA's relationship with its clients, and would have a chilling effect on its competitive position in the marketplace." (Berlinski Aff. Ex. J, at 8.) As an initial matter, this argument applies only to the agreements CAA negotiated for its clients. The

many tens of package commission agreements that CAA negotiated for itself, and to which none of its clients are parties, do not implicate any such third party privacy interests.

With respect to the remaining documents, the parties have now stipulated to the entry of a Protective Order providing that "confidential" and "highly confidential" documents can only be used in connection with the instant litigation. (*See* Berlinski Aff. Ex. F.) Moreover, those documents designated "highly confidential" may only be viewed by outside litigation counsel and select in-house counsel assisting in the litigation. (*Id.* Ex. F ¶ 19.) No third parties may view these documents or use them to gain any advantage in unrelated matters. (*Id.*) Defendants have no objection to CAA applying this "highly confidential" designation—the same one that protects Defendants' proprietary information and trade secrets from being disclosed by Plaintiffs—to the documents Defendants seek by way of this motion, thereby fully addressing CAA's stated concerns.

II. IF THE COURT DENIES THIS MOTION TO COMPEL, DEFENDANTS REQUEST THAT THE COURT PRECLUDE THE RELATED CLAIMS AND ARGUMENTS PLAINTIFFS MAY MAKE IN THIS LITIGATION.

At the August 12, 2014 initial court conference concerning these issues, in order to avoid producing the discovery at issue here, Plaintiffs asserted that their claims in this lawsuit were significantly more limited than what they had pleaded in the Complaint. (Berlinski Aff. Ex. L, at 23:12-13) ("We are not seeking damages based upon some custom-wide practice in the industry.") The Court then precluded Plaintiffs from making such claims in the lawsuit going forward. (*Id*. at 27:21-25 ("I will preclude the Plaintiffs from asserting a breach of industry practice and custom as to good faith negotiations. In other words, you can't come back to me and try to do it for yourself. You can't do it."))

While Defendants believe that their instant motion to compel should be granted, and CAA should be ordered to produce all non-privileged documents responsive to Request Nos. 14 and 28-33, if the Court disagrees, Defendants respectfully request that Plaintiffs be formally precluded from making the following arguments and pursuing the following claims:

- That Defendants failed to negotiate Plaintiffs' MAGR definition, including the imputed license fee, in good faith;
- That the imputed license fee negotiated between AMC Studios and Plaintiffs was undervalued and failed to meet the Series' fair market value;
- That AMC's MAGR definition was not provided to Plaintiffs in a timely manner; and
- That Defendants failed to properly account for Plaintiffs' contingent compensation consistent with industry custom and practice.

As stated above, plaintiff CAA is in near exclusive possession of the industry custom and practice documents that Defendants require to defend themselves from these allegations. In the absence of an order compelling production of these documents, the Court should formally preclude Plaintiffs from making any of the above assertions, or bringing claims that rely on such assertions. Further, the Court should require Plaintiffs to amend their Complaint by striking paragraphs 7, 26, 28, 29, 30, 35, 36, 37, 38, 39, 40, 41, 42, 53, 55, 56(F), 56(G), and 58-61, all of which contain allegations that are contradicted by the CAA documents at issue in this motion.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this order to show cause to compel discovery of plaintiff CAA and order production of all non-privileged documents responsive to Defendants' Requests for Production Nos. 14 and 28-33 or, in the

alternative, to preclude Plaintiffs from asserting any of the claims set forth in the paragraph immediately above and to amend their Complaint accordingly.

Dated: September 26, 2014
New York, New York

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