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VIA ELECTRONIC FILING and BY HAND

The Honorable Eileen Bransten
Supreme Court of New York
60 Centre Street, Room 521
New York, NY 10007

Re: ***Darabont v. AMC Network Entertainment LLC*, Index No. 654328/2013**

Dear Justice Bransten:

Although "replies" to discovery letters are usually neither required nor necessary, Plaintiffs are compelled to respond to Defendants' May 16, 2014 letter to the Court (the "Letter Response") in order to set the record straight. Plaintiffs respectfully submit that the Letter Response is either an intentional effort to obfuscate Plaintiffs' claims or, more likely, designed for purposes unrelated to discovery.[1] In any event, Defendants are attempting to argue their bizarre contract interpretations during what should be a routine discovery dispute. The instant reply is intended to clarify exactly what Plaintiffs' claims are and why the disputed document requests are unquestionably relevant to those claims.

As a preliminary matter, it must be noted that Defendants did not file a motion to dismiss Plaintiffs' complaint but chose instead to answer it. This is significant because much of Defendants' Letter Response is devoted to arguing their plainly erroneous interpretations of the underlying contracts and postulating why Plaintiffs' document requests are therefore "irrelevant." If Defendants truly believed their current position had any merit, a motion to

[1] Not coincidentally, within hours of Defendants' filing the Letter Response, widely-read entertainment blog "Deadline Hollywood" published an article about it, including a link to the Letter Response itself. The story was subsequently picked up by other Hollywood news outlets.

dismiss would and should have been filed. The parties are now engaged in discovery, however, and arguing contract interpretation is wholly inappropriate at this stage. *See Fawcett v. Altieri*, 38 Misc. 3d 1022, 1024 (Sup. Ct. Richmond Co. 2013)("It is equally accepted that discovery is permitted with respect to not only materials having to do with liability, but to damages as well."); *see also* Siegel, *New York Practice*, § 344, p. 569 ("The burden of proof is immaterial on disclosure....The plaintiff, for example, who has the burden of proof of every substantive element of the claim, is entitled to full disclosure from the defendant of everything relevant to it....Each party is entitled to know the other's position on every element.") (West, 5th ed. 2011).

A. Plaintiffs' Allegations

Plaintiffs allege that, in contracting with AMC, they sought and obtained contractual protections from improper manipulation of license fees that may occur when a vertically integrated company both produces and broadcasts a television series. Complaint at ¶ 6. Specifically, Plaintiffs obtained a "promise requiring that any deal between AMC affiliated entities would be for fair market value." *Id.* In the underlying agreement, AMC expressly agreed 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" (the "Affiliated Company Provision"). *Id.*, Ex. A, pp. 13-14, ¶ 13(d)(iii).

In their complaint, Plaintiffs explain that when a vertically integrated company such as AMC engages in self-dealing, there is often no actual money or fee that changes hands between the parties. Therefore, in order to protect profit participants such as Plaintiffs who depend on a fair market license to earn backend compensation, the vertically integrated entity often "imputes" a license fee for the purpose of calculating profit participations. According to the contract, this "imputed license fee" must be comparable to the license fee that would be achieved in negotiations between AMC and an unaffiliated studio for the right to broadcast a series "**comparable to**" *The Walking Dead*. *See id.*, ¶¶ 29-30.

The "imputed license fee" is merely a mechanism by which AMC Network transacted with AMC Studios when licensing the Series for initial domestic broadcast. Such a transaction between AMC Studios to AMC Network is, by definition, an "affiliated transaction" and therefore governed by the Affiliated Company Provision. The "imputed license fee" does ***not*** supersede the Affiliated Company Provision or operate separate and

apart from it, as Defendants now claim in their Letter Response. However, Plaintiffs specifically allege that "AMC is required to make the imputed license fees equal to the fair market value of what AMC would pay for the right to broadcast comparable programming produced by an unaffiliated studio in arms' length negotiations." *Id.*, ¶ 30. Nowhere in the parties' agreement is the Affiliated Company Provision qualified or superseded by the "imputed license fee" provision. *See id.*, Ex. A, pp. 12-14, ¶¶ 13(d)(ii) and (d)(iii).

B. The Value of the Series to AMC Is Relevant

Plaintiffs allege that AMC's imputed license fee is well below market value because the Series is the most popular show in the history of cable television and competes regularly for the highest ratings in key demographics. An unaffiliated studio would consider the value of the Series to AMC in negotiating for the license fee AMC would pay for the right to broadcast the Series, either at the outset of the license negotiation or in renegotiation for subsequent seasons. Because AMC's license of the Series to itself was perpetual (which is itself unusual), there would never be any such renegotiation, which only emphasizes the point of Plaintiffs' allegations. *See* Complaint, ¶¶ 36-39. AMC's sham "negotiations" with itself never complied with its contractual duties to Plaintiffs. The value of a series is of course highly relevant in any arms-length negotiations. Documents showing the value of the Series to AMC are therefore relevant to show how AMC should have handled its negotiations with itself in order to comply with its contractual obligations to Plaintiffs. The Series' ratings and all of the revenue streams that the Series created for Defendants are relevant to determining whether the "imputed license fee" unilaterally selected by AMC breached the Affiliated Company Provision of the parties' agreement.

C. AMC's Third Party License Agreements Are Relevant

AMC claims its imputed license fee was established without reference to third party agreements, but that issue goes to AMC's liability, not relevance for discovery purposes. As noted above, Plaintiffs negotiated for protections ensuring that any "imputed license fee" would be on comparable terms to what AMC would pay for the right to broadcast comparable programs produced by unaffiliated studios. Therefore, Plaintiffs have requested documents related to the license fees for *Mad Men* and *Breaking Bad*, two of AMC's most popular shows after *The Walking Dead*, both of which were produced by unaffiliated studios. What AMC Network gave and obtained "in similar transactions with unrelated third party distributors for

comparable programs" is not only relevant to Plaintiffs' claims, it is foundational. AMC's arguments to the contrary do not survive the barest of scrutiny.

1. Defendants' Willingness to Produce Documents Related to the Series' Imputed License Fee Is Insufficient

AMC claims that the only contractual restraint on the imputed license fee is that it be no worse than what AMC imputes for other participants. This illogical position is unsupported by the language of the agreement. While the agreement allows "AMC to specify an imputed license fee in connection with AMC's license and rights to exhibit the Series on AMC," the very same paragraph of the agreement provides that, "for purposes of the calculation of [Plaintiffs'] participation hereunder," AMC's profit definition containing the imputed license fee "shall be modified to provide the following:...(F) all transactions with affiliated entities will be subject to subparagraph 13[d](iii) below[.]" Complaint, Ex. A., pp. 12-13, ¶ 13(d)(ii). Subparagraph 13(d)(iii) contains the Affiliated Company Provision. *Id.*, Ex. A., pp. 13-14, ¶ 13(d)(iii). AMC's argument that the imputed license fee need not comply with the Affiliated Company Provision is flatly wrong.

If AMC was correct that the imputed license fee was separate from and unconstrained by the Affiliated Company Provision, AMC could simply have imputed a license fee to the Series of $1 per episode, as long as it equally ripped off every other participant on the Series. However, the imputed license fee is expressly governed by the Affiliated Company Provision.

D. Plaintiffs' Requests Regarding *Talking Dead* Are Relevant

Defendants object to allowing discovery regarding the spin-off series *Talking Dead*, based on a hypothetical summary judgment motion that they have not yet filed. This is not how discovery works, and Defendants know it. Defendants are not entitled to suspend disclosure, particularly since they never filed a motion to dismiss any of Plaintiff's claims.

Talking Dead is a talk show that follows each episode of the Series where a host and guests recap and discuss the previous episode. Under paragraph 14 of the parties' agreement, Darabont is entitled to "first negotiation rights" on all "derivative productions" based on *The Walking Dead*. Specifically, if certain conditions are met (and it is undisputed that they were), AMC and Darabont "agree[d] to negotiate in good faith (within [AMC's] customary parameters consistent with [Darabont's] stature)...with respect to [Darabont] writing, pilot directing and executive producing the first derivative production based on the Series, on terms

no less favorable than the terms [of the agreement] with respect to a comparatively budgeted television pilot or series." Complaint, Ex. A, p. 14, ¶ 14.

It cannot be disputed that *Talking Dead* is a "derivative production based on the Series." AMC never made any attempt to negotiate with Darabont regarding *Talking Dead.* Even if the parties could not reach an agreement regarding Darabont's right to produce, write, or direct *Talking Dead*, Plaintiffs are at a minimum entitled to "passive payments" for all derivative productions based on the Series. *Id.*, ¶ 15. AMC has not made any payments and has not negotiated with Plaintiffs for their passive payments on *Talking Dead.* The documents requested by Plaintiffs related to *Talking Dead* are clearly relevant in determining Defendants' breach of this provision of the agreement and resultant damages to Plaintiffs.

E. The Parties' Protective Order Must Treat All Parties Fairly

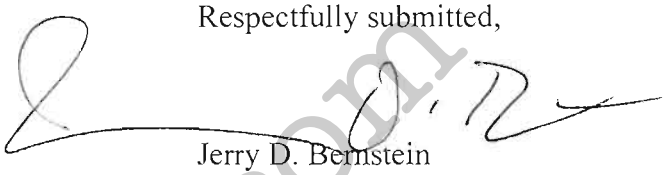
Defendants seek special treatment regarding the Protective Order, in which their in-house counsel can review "highly confidential" documents, but Darabont's representatives (the equivalent of his "in-house counsel," since he is an individual) cannot. Plaintiffs' position is that either (a) "highly confidential" documents should be viewed by outside counsel only, or (b) Darabont's representatives must have the same rights as AMC and CAA.

Defendants' position that Darabont's representatives must be treated differently because they may see third party documents (which AMC has refused to produce) and gain an unfair competitive edge is ridiculous. AMC wants its inside counsel to be able to see third party documents that could give AMC a competitive edge, and AMC has served a subpoena on Darabont's representatives seeking such third party documents. Again, this could be resolved easily if Defendants agreed that "highly confidential" documents were for outside litigation counsel's eyes only, or that all parties be treated equally and fairly regarding who may see "highly confidential" documents.

It is unfortunate that Defendants are using this protective order issue as an excuse to delay producing documents indefinitely—even documents they have agreed to produce. Plaintiffs' counsel offered to treat all documents as outside counsel's eyes only until a formal agreement on a protective order is reached. However, over five months after receiving the document requests, Defendants have not produced a single document and now want to enter a formal interim agreement pending the Court's entry of a formal protective order. It is unfortunate that this simple disagreement between counsel over a protective order requires the Court's intervention, but Plaintiffs wish to expedite resolution of all current discovery issues.

Pursuant to the Court's rules, counsel are available for a telephone conference to address these issues at the Court's earliest convenience.

Respectfully submitted,



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