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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: Response to Defendants' Pre-Conference Letter re: Production of Documents in *Darabont, et al. v. AMC Network Entertainment LLC, et al.*, Index No. 654328/2013

Dear Justice Bransten:

Plaintiffs submit this letter in response to the letter submitted by Defendants on June 16, 2014, asking the Court to order the production of certain categories of documents from the files of plaintiff Creative Artists Agency, LLC ("CAA"). Plaintiffs respectfully request an in-person conference with the Court to resolve this discovery dispute.

AMC's document requests clearly exceed the bounds of legitimate discovery, as they go far beyond any issues relevant to the instant litigation. Worse, they are manifestly so burdensome and overbroad that compliance would be all but impossible. The requests also seek disclosure of private, personal and confidential information of thousands of CAA's clients, which would severely damage CAA's business and reputation. This abuse of discovery is improper and should be denied.

Defendants seek broad categories of "contingent compensation agreements negotiated by and on behalf of Plaintiff CAA and its clients, and correspondence reflecting how these agreements were negotiated and administered." (Defs' letter at 3.) The only proffered relevance AMC offers for such private, nonparty documents is that they will purportedly "help establish industry custom and practice." (*Id.*) However, what is relevant here is that Darabont's agreement provides that AMC's self-dealing transactions regarding *The Walking Dead* must be on terms "comparable to the terms on which the [AMC] enters into similar transactions with unrelated third party distributors for comparable programs." Thus, the relevant inquiry is *not*

CAA's clients' myriad agreements with studios, but rather the terms on which *networks* enter into "similar transactions" with unaffiliated *studios* for "comparable programs."

CAA simply *does not have this information*. CAA is a talent agency representing actors, writers, directors, and producers in the entertainment industry. CAA has *no involvement*, as agent for its clients, in negotiations between studios and networks for licensing television programming. Thus the requested documents cannot shed light on whether AMC's self-dealing license agreement for *The Walking Dead* was comparable to an agreement AMC would have made with an unaffiliated studio for a comparable program. Not only are the document requests irrelevant, the relevant information—license fees paid between unaffiliated entities for comparable programs—is not in CAA's possession.

CAA has already agreed to provide documents responsive *to nearly all* of Defendants' 139 document requests. However, Defendants also seek categories of documents which require the disclosure of private employment records, financial information, and business records relating to thousands of CAA clients neither involved with *The Walking Dead* nor parties to this litigation. While Defendants argue that the discovery they seek is reciprocal, that is incorrect. The documents Defendants request have no bearing on this case whatsoever. And, their requests implicate the privacy concerns of third parties, seek irrelevant information, and would impose a devastating burden on CAA.

FACTUAL BACKGROUND

CAA is one of the largest talent and sports agencies in the world. Its principal place of business is located in Los Angeles, California, but it maintains offices and employs agents around the world. CAA employs over 1,400 people, 342 of whom are licensed talent or sports agents who represent and procure work for clients in the entertainment, media, and sports industries around the world. CAA represents over 6,000 active clients, including over 2,000 clients working in television.[1] Only one of these clients, Frank Darabont, is a party to this litigation.

Plaintiffs' complaint alleges that Darabont's counsel negotiated for and obtained contractual protections assuring him that, if AMC opted to both produce and broadcast *The Walking Dead* (also, the "Series"), "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." Compl., ¶ 6. "Stated simply, AMC agreed that for purposes of accounting to Darabont, it would 'impute' a

[1] Upon the Court's request, Plaintiffs' counsel will supply to the Court a declaration from Jeffrey Freedman, CAA's General Counsel, attesting to the facts herein.

license fee comparable to what AMC would pay an unaffiliated studio such as Lionsgate or Warner Bros. Television for the right to broadcast comparable programming." *Id.*[2]

The Court recently ordered that AMC produce, among other things, documents related to the license fees AMC pays unaffiliated studios for *Mad Men* and *Breaking Bad* and related programs. Plaintiffs' document requests were narrowly tailored to cover only "comparable programs," as dictated by the relevant contract language between Darabont and AMC. Although these shows are not nearly as successful as the Series, they are the closest AMC has to "comparable programs."

Defendants, on the other hand, seek "all documents concerning" not only other profit participants on *The Walking Dead* (RFP Nos. 8-10), but also *any* CAA client (whether an actor, writer, director, producer, etc.) with a contingent compensation interest in *any* basic cable television project within the last five and a half years (RFP Nos. 28-33). Defendants also seek all documents concerning "the application of production tax credits" to any CAA client's contingent compensation on any basic cable project within the same timeframe (RFP No. 14). These documents have no probative value in resolving the issues in this litigation. Moreover, the crippling burden on CAA to comply, as well as the prejudicial impact disclosure would have on the privacy rights of CAA's nonparty clients, require denial of the Defendants' document demands.

ARGUMENT

1. Requests Relating to the Series (RFP Nos. 8-10)

Regarding RFP Nos. 8-10, AMC claims that CAA refuses to produce any documents with regard to the other participants on the Series who are CAA clients. On the contrary, CAA had already agreed to produce responsive documents exchanged with AMC before AMC even submitted its letter to the Court. Without conceding the relevance of any such documents, CAA intends to produce non-privileged negotiation files and documents for CAA clients who are profit participants on the Series as well, after appropriate notice to the clients and their counsel.[3] These requests are therefore not at issue.

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[2] CAA was harmed by AMC's failure to comply with this provision because CAA's profit participation is directly tied to Darabont's profit definition.

[3] The contingent compensation provisions set forth in the contracts of other participants on the Series, who may have had more or less bargaining strength in their negotiations with Defendants, are clearly irrelevant. Nevertheless, CAA has agreed to provide those documents.

2. Requests Relating to "Custom and Practice" Regarding Other Cable Series and Other CAA Clients Are Not Relevant (RFP Nos. 14, 28-33)

Separate from requests regarding *The Walking Dead*, AMC demands to see the *entire* negotiation files and *all* agreements for *all* CAA's clients in the last five and a half years having anything to do with basic cable. AMC claims these documents are necessary to prove that AMC did not negotiate in bad faith in this case but "actually *exceeded* industry standards" in negotiating Darabont's MAGR definition (Defs' letter at 3). To support this abusive request, AMC turns the allegations of Plaintiff's complaint on their head by claiming that CAA's other clients' negotiating histories with other studios on other series are somehow relevant to show how AMC negotiated with Darabont regarding *The Walking Dead*. In making this argument, Defendants ignore (1) whether the documents they seek indicate the episodic license fees paid by networks to unaffiliated studios; (2) whether CAA or its clients were involved in negotiating the license fees paid for these series; (3) whether such shows are comparable to *The Walking Dead* (the most popular show on television); and (4) the clients' status and tenure in the entertainment industry.

The central issue in this case is not "custom and practice in the industry" but rather whether AMC breached its contract with Darabont (and, by extension, with CAA) by licensing the Series to its own network for monetary terms inferior to the terms on which the AMC network would have licensed "comparable programs" from "unrelated third party distributors"—*i.e.*, whether AMC is attributing fair market value to the Series. *See* Compl., ¶¶ 27-42, 56(A); Ex. A, ¶ 13(d)(iii). Indeed, the Court ordered AMC to produce documents related to this very issue at the parties' previous discovery conference on June 5, 2014.

CAA and its nonparty clients' agreements for other basic cable television series are irrelevant and cannot shed any light on whether AMC's dealings with its own network lived up to its contractual obligations to Darabont. Put another way, the 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. CAA's nonparty client documents are not relevant to this determination, and any effort by AMC to seek the introduction of such evidence at trial would properly be excluded by the Court.

Two types of CAA client documents are at issue here: (1) those relating to television series produced and broadcast by unaffiliated entities, where the studio and network negotiate at arms-length for a fair market value license fee; and (2) those relating to so-called "vertically integrated" series, where the same entity both produces and broadcasts the series and "imputes" a license fee for the purpose of accounting to profit participants. In the first situation where the studio and network are unaffiliated, license fees are negotiated between the studio that produces the television content and the network that airs it, *not* between a talent agency, like CAA, and the studio. Therefore, in a situation where the studio and network are unaffiliated, CAA and its

clients are not involved in license fee negotiations, and CAA's files *will not contain this information*. CAA's documents related to "unaffiliated" series would have no probative value to this case because CAA is not a party to negotiation documents between the studios and networks regarding license fees.

In the second situation regarding vertically integrated series, "imputed license fee" provisions are typically part of the agreements between the talent and the entity producing the series. However, agreements between CAA's clients and studios containing "imputed license fee" provisions would not shed light on the propriety of the imputed license fee *in this case*. Each such imputed license fee is the product of unique negotiations between the talent and the studio. Every "imputed license fee" agreement in CAA's possession would thus require its own complex analysis—akin to the analysis in this very litigation—in order to determine if the imputed license fee approximated fair market value for a given series. Defendants' use of the documents they seek would require the Court to conduct a mini-trial of every imputed license fee situation in which CAA has represented a client over the past five and a half years (and not all talent necessarily obtained the same fair market value protection Darabont's counsel specifically negotiated for).

Finally, CAA's files are categorized by the "buyer" of the project. Some buyers are broadcast networks like ABC or CBS, or basic cable networks, but many others are television studios like Warner Bros. Television or 20th Century Fox Television, and still others are smaller production companies. Defendants' phrase "basic cable television studio" is undefined, unhelpful, and nonsensical: most studios produce content intended for both broadcast networks and basic cable. There are hundreds of cable television networks, each with seven full days of programming to fill. CAA would have to review its thousands of files for all its clients working in television and try to determine whether each agreement contained an imputed license fee provision, related to a program intended for broadcast on a network owned by the same company that owned the production entity producing the series, or related to a program that ultimately aired on basic cable.

In addition to being merely unduly burdensome, these determinations would in many cases simply be impossible. If, for example, CAA's booking reports reflect a client's deal with a studio, and the studio was in turn developing a series for basic cable, CAA's booking report would not reflect the ultimate end user or broadcaster of the series. CAA would have to go through every single television booking and then attempt to track down the ultimate distributor, which may well have changed over the life of the project (*e.g.* a project originally intended for a broadcast network wound up being sold to a basic cable channel). The only way to make a distinction between agreements related to unaffiliated series versus vertically integrated series, or between series intended for basic cable versus other broadcast means, would be to review every television agreement and related file in CAA's possession, since the client files are not readily identifiable as "vertically integrated" or "basic cable."

AMC attempts to cloak its relevance arguments in an allegation in the complaint that references "industry custom and practice"—paragraph 53. But this paragraph relates to one distinct issue: AMC's failure to account to Plaintiffs for millions of dollars in *tax credits* obtained for filming the Series in Georgia. This paragraph has nothing to do with the custom and practice of nonparty participants, studios, or networks negotiating license fees for cable series. The only "custom and practice" cited by AMC in support of its overbroad discovery is the custom and practice regarding such production tax credits, a custom and practice AMC has apparently begun to comply with. Well after the initiation of this lawsuit, Defendants submitted new participation statements to Darabont and CAA that appear to correct AMC's egregious practice of excluding the tax credits. Additionally, the propriety or impropriety of AMC's treatment of production tax credits for the Series is a subject for the expert testimony of entertainment industry accountants. Ultimately, just as CAA's nonparty client documents cannot explain whether AMC's negotiations with Darabont complied with its contractual obligations, CAA's nonparty client documents regarding treatment of production tax credits on other series cannot explain why AMC initially overstated the Series' production costs by millions of dollars.

In summary, AMC is seeking to fish through thousands of files of thousands of CAA clients who have nothing to do with this litigation, even though these files will not answer the questions of what AMC should be imputing as a fair market license fee for the Series or whether AMC properly accounted for production tax credits on the Series. Such an unfettered search through CAA's clients' files should not be permitted.

3. Any Conceivable Relevance of CAA's Nonparty Documents Is Outweighed by the Enormous Prejudice to CAA and Its Clients

While the probative value and relevance of the files of thousands of nonparty CAA clients is almost impossible to fathom, the prejudice to CAA and its nonparty clients is not. The requests are so overbroad, and would impose such a burden on CAA in terms of time and effort, as to be functionally impossible to comply with. Even if they could be complied with, Defendants' document requests would have a devastating impact on CAA's entire business.

Of CAA's over 6,000 active clients, more than 2,000 currently work in the television industry. CAA would have to comb through every file and agreement for every one of these over 2,000 clients in order to determine which of them have contingent compensation interests regarding work on basic cable, and which projects were produced (or intended to be produced) in a state or country that offers tax credits for film production. CAA currently has over 5,000 separate "open bookings" for its clients in television, meaning open deals or contracts for CAA clients to render services and receive compensation on television projects (whether or not those projects ever make it to the screen). Because not every client working in television has a contingent compensation interest as part of his or her agreement, CAA would have to review

over 5,000 active bookings in order to determine which of them contain contingent compensation interests.

CAA's burden does not stop there. Because Defendants seek all of CAA's clients' basic cable agreements, and related documents and communications, for a five and one-half year period (from January 1, 2009 to the present), CAA would have to review all its closed or inactive booking records for that time period for over 2,000 television clients in order to determine (1) if any of those closed bookings were for basic cable projects, (2) whether any such closed booking contained a contingent compensation interest, (3) whether any basic cable project wherein a CAA client had or has a contingent compensation interest was or is eligible for production tax credits by virtue of being filmed in a foreign state or country, and (4) if so, whether and how such production tax credits were or were not "applied" to that client's contingent compensation. Agents at CAA often work on a "team" model where one client may be represented by several agents. Accordingly, CAA would have to gather and review the files of several different agents, spanning a five and one-half year period, for each of over 2,000 clients working in television. The man-hours and expense of such an undertaking would be hugely burdensome.

In order for CAA to differentiate between cable and non-cable television projects, it would have to look up each individual television booking to determine if the project is intended for a cable distributor or a broadcast network. CAA's television bookings are generally not categorized as "cable" or "network" but rather by the "project type" (*e.g.*, television) and the "buyer" of the project. The process of determining which television bookings are for basic cable buyers would entail CAA reviewing thousands of files for over 2,000 clients working in television in order to determine which files and agreements relate to basic cable projects.

The requests directed to CAA's own agreements with "basic cable television studios" are no less burdensome or overbroad. CAA generally earns compensation from its clients' work in the entertainment industry in one of two ways: either by commissioning its clients' earnings or taking a "packaging fee" in lieu of its commission. In a "package" situation, CAA negotiates directly with the buyer for its fee instead of commissioning the earnings of the clients who render services on the project. CAA's fee in package agreements is typically paid, at least partially, in the form of contingent compensation from the profits of the project. In package situations, CAA's fee will be tied directly to the contingent compensation of one or more of the clients CAA "packaged" in the deal with the buyer.

CAA has a package agreement on *The Walking Dead* and is entitled to, among other compensation, 10% of the Series' MAGR, defined and calculated according to plaintiff (and CAA client) Darabont's MAGR definition on the Series. In order to comply with Defendants' requests for all of CAA's agreements with "basic cable television studios"—as well as all documents concerning any contingent compensation interest CAA may be owed on a package agreement with a "basic cable television studio"—within the last five and one-half years, CAA

would once again have to review all of its over 5,000 open television bookings, as well as all its television bookings going back five and one-half years, in order to determine, first, whether each such booking was for basic cable and, if so, how CAA was compensated on each such booking.

Perhaps most significantly, in addition to the enormous burden and expense on CAA to comply with Defendants' requests, the requests seek the private and personal financial and employment records and information for potentially thousands of CAA clients in numerous states and countries who are not parties to this lawsuit. CAA owes fiduciary duties to its clients to, among other things, maintain their privacy and the secrecy of their financial and business records and affairs. CAA's clients expect it to maintain the confidentiality of any and all documents that contain such private and personal financial and employment information, and many CAA clients sign agreements with the agency stipulating that such information will be kept confidential. Before CAA could produce the requested documents and information, it would have to notify and obtain approval from each of its affected clients, their counsel, and all third party studios or networks at issue for each individual agreement. Each of these clients, networks, or studios may in turn object to the production of their private information. Many of the agreements with studios and production companies contain confidentiality provisions and would require CAA to notify the studios and give them an opportunity to contest disclosure.

Finally, such a wholesale disclosure of the confidential information of potentially thousands of clients would be devastating to CAA's reputation and business, would greatly damage CAA's relationship with its clients, and would have a chilling effect on its competitive position in the marketplace. Although prominent, CAA is certainly not the only talent agency in the entertainment industry. CAA's clients would be outraged at the disclosure of their private information in litigation they are not parties to. Moreover, they would not be satisfied that even a "highly confidential" designation of their documents would protect their privacy and their business interests.

The burdens associated with gathering this information from the largest talent agency in the world, notifying all its clients and their counsel, and dealing with the inevitable fallout from unhappy clients and the negative press reports that would accompany such disclosure would be enormous.

The limitations on document discovery that Plaintiffs seek are not out of the ordinary. For example, in *Zohar* v. *Hair Club for Men, Ltd.*, 200 A.D.2d 453 (1st Dept. 1994), the plaintiff sought damages for the unauthorized use of his image in a commercial. The First Department held that plaintiff's requests for disclosure of defendant's contracts with third parties who appeared in its commercials was "irrelevant and overbroad" and had no bearing on plaintiff's claim. The same is true with respect to AMC's request for disclosure of all of CAA's client information beyond Darabont's information.

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' requests for discovery of these private and irrelevant documents.

Respectfully submitted,

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