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

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FRANK DARABONT, FERENC, INC., DARKWOODS PRODUCTIONS, INC., and CREATIVE ARTISTS AGENCY, LLC,

Plaintiffs,

-against-

AMC NETWORK ENTERTAINMENT LLC, AMC FILM HOLDINGS LLC, AMC NETWORKS INC., STU SEGALL PRODUCTIONS, INC., AND DOES 1 THROUGH 10,

Defendants.

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Index No.: 654328/2013

Part 3 (Bransten, J.)

Motion Seq. No. 12

Oral Argument Requested

DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM OF LAW REGARDING SUMMARY JUDGMENT

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Defendants AMC Network Entertainment LLC, AMC Film Holdings LLC, AMC Networks Inc., and Stu Segall Productions, Inc. (collectively, AMC) respectfully submit this supplemental reply brief regarding summary judgment to respond to the new theory set out in the recent filing by Plaintiffs Frank Darabont, Ferenc Inc., Darkwoods Productions, Inc., and Creative Artists Agency, LLC (CAA). We will keep it brief.

PLAINTIFFS' LATEST FILING DEFINITIVELY SHOWS THAT THEIR SUMMARY JUDGMENT MOTION SHOULD BE DENIED

Just when it seemed like their arguments could not become any more convoluted and confusing, Plaintiffs have filed a brief taking yet a different position and creating yet more disputed fact issues. *See* Supp'l Resp., Dkt. 669. Plaintiffs' case has become a moving target. Now, for the very first time after years of litigation, Plaintiffs concede that the MAGR (modified adjusted gross receipts) Document is and always has been part of the parties' contract.[1] This is directly contrary to their previous argument that the MAGR Document is a "sham" and should be disregarded. Plaintiffs' striking about-face makes one thing perfectly clear—Plaintiffs are not entitled to summary judgment here. Quite simply, Plaintiffs cannot obtain summary judgment on their interpretation of the contract when their interpretation keeps changing. Only a jury can untangle the mess Plaintiffs have created.[2]

A. Plaintiffs' Prior Case #1 Position – MAGR Document Is A Sham

Plaintiffs built this lawsuit—Case #1—on the foundational argument that the MAGR

[1] This brief uses the same capitalized terms and abbreviations as in Defendants' Supplemental Memorandum of Law Regarding Summary Judgment, Dkt. 652 (Defs.' Supp'l Br.).

[2] Plaintiffs moved for partial summary judgment on their claim that the affiliate transaction provision governs the imputed license fee provision. Defendants moved for summary judgment on all claims. Defendants' motion should be granted—but at a minimum, Plaintiffs' motion must be denied. The statements in this brief about the need for a jury assume *arguendo* that Defendants' motion is denied.

Document is a "sham" and should not be enforced. The parties' 2010 contract contains an imputed license fee provision, which provides that AMC shall designate an imputed license fee formula to calculate contingent compensation. AMC designated that formula in the MAGR Document. Plaintiffs did not like the result, so they attacked it—saying that the imputed license fee formula in the MAGR Document yields an amount that is "unconscionably low" and "millions of dollars lower than what AMC would have to pay an independent studio . . . for a comparable show." Ex. 2[3] (SAC) ¶¶ 7, 36; *see also id.*, ¶¶ 63(A), 67, 73; Ex. 8 (Opp. to Defs.' MSJ) 24-25 n.10. This is the basis for Plaintiffs' breach-of-contract claim. Rather than accept the MAGR Document as written, Plaintiffs made a convoluted argument that the imputed license fee provision should be merged with the affiliate transaction provision to give them a higher imputed license fee and, thus, more money.

For Plaintiffs' breach-of-contract claim to work, the Court must reject AMC's imputed license fee. So in their summary judgment motion, Plaintiffs vigorously argued that the MAGR Document's imputed license fee was a "sham," that Plaintiffs did not agree to it, and that it did not become part of the parties' contract. *See* Ex. 1, Dkt. 654 (Nov. 29, 2012, letter from Plaintiffs' counsel stating: "[W]e will not be able to reach agreement on the Modified Adjusted Gross Receipts definition."). This is the position that drove Plaintiffs' motion for partial summary judgment in Case #1, which they filed on July 13, 2017.

B. Plaintiffs' Case #2 Position – Accepting MAGR Document For Audit (But Denying They Are Doing So)

Six months later, Plaintiffs filed Case #2. *Frank Darabont, et al. v. AMC Network Entertainment LLC, et al.,* Index No. 650251/2018 (Sup. Ct., N.Y. Cty. 2018). In the complaint

[3] Cites to "Ex. __" refer to exhibits to the Affirmation of Orin Snyder, dated May 9, 2018 (Dkt. 653).

in Case #2, Plaintiffs invoke audit rights to try to get more money. *See* Ex. 4 (Compl. Case #2) ¶¶ 4, 39. These audit rights are contained in only one place—the MAGR Document. So in Case #2, Plaintiffs rely on and invoke the MAGR Document—even though they rejected it and said it was a "sham" in Case #1.

Defendants notified the Court of Case #2 and requested leave to file a supplemental brief to explain that the complaint in Case #2 fatally undercuts Plaintiffs' arguments in Case #1 because (among other things) Plaintiffs now appeared to accept the MAGR Document. *See generally* Defs.' Mot. For Leave to Supplement SJ Briefing, Dkt. 604 (Mot. For Leave). Plaintiffs vigorously disputed that in opposing AMC's request for supplemental briefing. They said that they had *not* adopted the MAGR Document by invoking their audit rights and that the audit rights are contained in *another* part of the contract, not the MAGR Document. *See* Ex. 15 (Suppl. Br. Opp.) 11 ("Darabont has contractual audit rights in other provisions of his contract."). That is just wrong—the portions of the contract Plaintiffs cite do not contain any audit rights. The audit rights reside in one place and one place only—the MAGR Document. *See* Defs.' Supp'l Br. 7 n.4. Defendants therefore explained that, by embracing the MAGR Document in Case #2, Plaintiffs created a material fact issue in Case #1 as to whether the MAGR Document is operative, and that their summary judgment motion therefore must be denied. *See id*. 5-9.

C. Plaintiffs' New Case #1 Position – MAGR Document Has Always Been Part of the Contract

Now, in their supplemental summary judgment brief in Case #1, Plaintiffs abruptly change course. They finally admit that the MAGR Document *is and has always been* part of the parties' 2010 contract. *See* Supp'l Resp. 9 ("the MAGR Exhibit is, obviously and by definition, an ***Exhibit*** to the Agreement, and is incorporated by reference ***into*** the Agreement") (emphasis in original); *id.* at 10 ("the MAGR Exhibit is intrinsic to the Agreement"). In fact, Plaintiffs say that they never

rejected the MAGR Document or said that it was not part of the 2010 contract.

This about-face shows that there is a disputed issue of contract interpretation: Is the MAGR Document part of the parties' contract or not? Plaintiffs have argued both no *and* yes. That is, in late 2012, Plaintiffs' counsel who negotiated the contract—experienced Hollywood lawyer Robert Getman—definitively said *no*. Ex. 1, Dkt. 654 ("[W]e will not be able to reach agreement on the Modified Adjusted Gross Receipts definition."). In the brief they just filed, Plaintiffs unequivocally say *yes*. Supp'l Resp. 9, 10.

D. Effect On The Pending Summary Judgment Motion

At this point, Plaintiffs cannot possibly prevail on their motion for summary judgment. To obtain summary judgment, Plaintiffs must show that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *See, e.g.*, *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Plaintiffs have now set out two opposing views of the contract—that the MAGR Document *is not* operative or enforceable (Case #1 summary judgment briefs) and that the MAGR document *is* operative and enforceable (Case #1 supplemental brief). Only one of those can be true. Plaintiffs advanced an interpretation of the contract in their summary judgment motion, and they have not shown that that interpretation is correct. Indeed, they themselves have contradicted it. Plaintiffs cannot obtain summary judgment on their interpretation of the contract when they cannot even, at this late date, settle on a coherent interpretation of the contract.

What is more, Plaintiffs' new filing shows that their case is based on an invented reading of the contract—and is falling apart. Their summary judgment theory was that Defendants breached the contract by subsequently using the "sham" imputed license fee designated in the MAGR Document. They now say that the MAGR Document is fine and is actually part of the

2010 contract. So how can there be a breach of the contract? Plaintiffs' theory now seems to be that the imputed license fee that they say *breaches* the 2010 contract is actually *part of* the 2010 contract. This is nonsensical. A contract cannot breach itself.

This is not the place to address what, if anything, remains of Plaintiffs' case; Defendants fully intend to take that up at the appropriate time. But what is evident now is that summary judgment cannot be granted in Plaintiffs' favor. Defendants are entitled to present Plaintiffs' shifting facts and theories to a jury as evidence that their inconsistent (and incoherent) theories of liability prove that this entire case is simply an attempt to extract a bigger payday—and is not based on a genuine interpretation of the operative contract. Plaintiffs cannot create this factual mess and then prevent Defendants from presenting it to the jury as evidence that Plaintiffs are making things up as they go along. Defendants are entitled to a trial on the factual chaos created by Plaintiffs under the CPLR and governing case law, and as a matter of basic fairness and due process.

* * *

Plaintiffs' ever-changing factual and legal positions have hopelessly confused this litigation and have made summary judgment in their favor plainly inappropriate. The genuine issues of fact and law created by Plaintiffs' various filings require resolution by a jury.

Dated: New York, New York
June 4, 2018

By: */s/ Orin Snyder*_____

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