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| **Darabont v AMC Network Entertainment LLC** |
| 2018 NY Slip Op 33180(U) |
| December 7, 2018 |
| Supreme Court, New York County |
| Docket Number: 654328/2013 |
| Judge: Eileen Bransten |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART: 3

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

Index No. 654328/2013
Motion Seq. Nos. 012 & 013

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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**EILEEN BRANSTEN, J.**

In this action to recover damages for, among other things, breach of contract, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on their cause of action for declaratory relief (Motion Sequence No. 012). Defendants oppose the motion and move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (Motion Sequence No. 013). For the reasons set forth below, plaintiffs' motion is denied. Defendants' motion is granted in part and denied in part.

## I. BACKGROUND

Plaintiff Frank Darabont is the creator and a former executive producer of the highly successful cable television series *The Walking Dead* (the Series), which is based upon a graphic novel series of the same title written by Robert Kirkman. *See Defendants' Rule 19-A Statement at* ¶¶*1-2; see also Second Amen. Comp.* ¶*2.* Plaintiffs Darkwoods Productions, Inc. and Ferenc, Inc. are "loan-out" companies through which Darabont provided services in connection with the Series. *See Defendants' Rule 19-A Statement at ¶7; see also Second Amen. Comp. ¶¶11-12.* Plaintiff Creative Artists Agency, LLC (CAA) is Darabont's agent and helped to negotiate his contract in connection with the Series. *Defendants' 19-A Statement at ¶5; see also Second Amen. Comp. ¶13.*

Defendants produced and broadcasted the Series, which premiered on their network in October 2010. *See Plaintiffs' 19-A Statement at ¶2; see also Second Amen. Comp. ¶¶25-26.* Darabont was let go during the production of the second season. The crux of this dispute concerns whether defendants breached their contractual obligations in connection with Darabont's and CAA's entitlement to profits from the Series.

### *A. Basis for the Lawsuit*

By way of background, directors, actors, and other talent in the television industry, may as part of their contract with the studio, receive a percentage of the net or gross profits. *See Plaintiffs' 19-A Statement at ¶7; Defendants' 19-A Statement at ¶11; Second. Amen. Comp. ¶5.* This is referred to as "profit participation" or "contingent compensation." Some agreements refer to the series' profits or earnings as "receipts." In this case, Darabont's contingent compensation consists of a percentage of the Modified Adjusted Gross Receipts (hereinafter MAGR). *Defendants' 19-A Statement at ¶¶11-16.* CAA, as part of its compensation as the packaging agency for the Series, is also entitled to a percentage of MAGR. *See Plaintif's 19-A Statement at ¶13; see also Defendants' 19-A Statement at ¶6.* MAGR is calculated by deducting certain defined fees and expenses from gross receipts from various sources. *See Plaintiff's 19-A Statement at ¶9; see also Defendants' 19-A Statement at ¶13.* Thus, when gross receipts exceed production costs and other deductions, fees and costs, Darabont and CAA are entitled to a certain percentage of the net positive number. *Plaintiff's 19-A Statement at ¶10.*

When a studio licenses a television series to a network/broadcaster, this generates a "license fee" for the studio and increases gross receipts. *See Plaintiff's Rule 19-A Statement at ¶15.* However, many entertainment companies own both studios and television networks, and are, therefore, able to make and own a television series, as well as air it on their network. *See Second Amen. Comp. ¶5.* The absence of a license fee reduces the gross receipts for the series, thereby reducing the pool of profits available to talent entitled to contingent compensation in their contracts. *See id at ¶5.* In order to address this, a contract may include an agreement to add an "imputed license fee" (in lieu of an actual license fee) to the gross receipts for the purpose of calculating the talent's contingent compensation. *See Plaintiff's Rule 19-A Statement at ¶16; see also Defendants' Rule 19-A Statement at ¶¶15-25.*

Here, no actual license fee was included in the gross receipts for the Series because defendants produced the Series and aired it on their own network. In other words, AMC Network did not actually pay license fees to AMC Studios in connection with the Series. Darabont's contract provides that under such circumstances, an imputed license fee would be included in the definition of "gross receipts" used to compute MAGR. *See Defendants' 19-A Statement at ¶14; Plaintiffs' 19-A Statement at ¶16; Second Amen. Comp. ¶29.* However, the parties dispute whether his contract requires the imputed license fee to approximate the actual license fee an unaffiliated studio would have paid to air a comparable program. The dispute also concerns, among other things, whether defendants failed to pay Darabont and CAA the percentage of MAGR they are entitled to under the contract and breached their obligation with respect to Darabont's rights regarding derivative productions based on the Series.

***B. The 2010 Agreement, Season 2 Amendment, and Definition of MAGR***

The parties' rights and obligations are governed by an agreement executed by Darabont[1] on August 7, 2010 (referred and cited to herein as the "2010 Agreement"), which was amended by an agreement, referred to as the "Season 2 Amendment," effective January 10, 2011 (referred and cited to herein as the "Season 2 Amendment"). *See Bernstein Affirm Exs. 3-4 (Mot. Seq. 12).* Darabont entered into the 2010 Agreement with defendant Stu Segall Production Inc. (SSP). Defendant AMC Film Holdings LLC (AMC Studios) is the successor-in-interest to SSP, and the owner, financier, and distributor of the Series. Defendant AMC Network Entertainment LLC (AMC Network), previously known as American Movie Classics Company LLC, is the exhibitor of the Series on domestic basic cable television.

As relevant here, the 2010 Agreement includes the following provisions granting Darabont a percentage of MAGR as contingent compensation. Paragraph 6 (c)(vi) states: "If Artist is entitled to sole 'Directed By' credit on the Pilot upon which the Series is based, [he]

[1] Darabont's "loan out" companies, Darkwoods Productions, Inc. and Ferenc, Inc., also executed the agreement for the services of (f/s/o) Darabont. In the agreement, Darabont is referred to as "Artist." Ferenc Inc. is referred to as "Lender #1" and Darkwoods Productions, Inc. is referred to as "Lender #2."

shall be entitled to directing contingent compensation in the amount of 2.5% of 100% of MAGR (as defined herein)". *See 2010 Agreement 6(c)(vi).* It is undisputed that Darabont is entitled to this percentage of MAGR.

Paragraph 13 of the 2010 Agreement, entitled "Contingent Compensation," provides:

"(a) Participation:

If Artist receives sole 'created by' credit on the Series (subject to Paragraph 17 below), Lender #1 shall be entitled to 10% of 100% of the Modified Adjusted Gross Receipts ('MAGR'), reducible dollar-for-dollar by participations payable to other writers sharing 'created by' credit to a floor of 5% of 100% of the MAGR if Artist is entitled to shared 'created by' credit; provided, however, that Artist's sole 'created by' credit participation shall be increased to 12.5% of 100% of the MAGR for all episodes on which Artist renders executive producer/showrunner services. If Artist does not receive any 'created by' credit, Artist shall not be entitled to any contingent participation.

. . .

(c) Vesting:

Contingent Participation shall vest ¼ at each of the following events: (i) delivery to Company of Pilot rewrite; (ii) delivery of Pilot, provided that Artist renders executive producing services on the Pilot; (iii) conclusion of first season of the Series, provided that Artist renders executive producing services on all episodes produced during the production of the first season; and (iv) ***conclusion of second season of the Series, provided that Artist renders executive producing services on all episodes produced during the production of the second season***.

(d) Definition:

MAGR shall be defined, computed, and paid to Lender #1 as follows:

i. If the Series is produced with a third-party supplying producer/deficit financier, MAGR shall be defined, computed, and paid in accordance with the standard definition thereof used by the third party supplying producer/deficit financier, subject to good faith negotiation (including as to distribution fee and overhead) within the usual parameters of such supplying producer/deficit financier consistent with Artist's stature . . . .

ii. ***If the Series is produced without any third-party supplying producer/deficit financier, MAGR shall be defined, computed and paid by American Movie Classics Company LLC ('AMC') in accordance with AMC's MAGR definition . . . , which definition shall specify an imputed license fee in connection with AMC's license and rights to exhibit the Series on AMC and its related services to be included in the calculation of 'Gross Receipts' in AMC's MAGR definition***, but no television distribution fee shall be charged with respect to the Gross Receipts attributed to such imputed license fee. ***In addition, for purposes of the calculation of Artist's participation hereunder, AMC's MAGR definition shall be modified to provide the following***: (A) AMC's television distribution fee shall be capped at ten percent (10%) and shall be inclusive of all sub-distributor, barter and sales fees (but specifically excluding any advertising agency fees charged on barter), provided there shall be no television distribution fee on the sale to the initial broadcaster, including all extensions and renewals thereof; . . . ***(F) all transactions with affiliated entities will be subject to subparagraph 13[d](iii) below;*** (G) the imputed license fee will be no less favorable than the imputed license fee applicable to any other MAGR participant with respect to the Series; . . . .

iii. Each of Lender and Artist acknowledges that AMC is part of diversified, multi-faceted, international company(ies), whose affiliates include, or may in the future include, among others, exhibitors, television 'platforms', networks, stations and programming services, video device distributors, record companies, internet companies, so called 'E. Commerce companies', publishers (literary and electronic) and wholesale and retail outlets (individually or collectively, 'Affiliated Company or Companies'). Each of Lender and Artist further acknowledges that *AMC **informed Lender and Artist that AMC intends to make use of Affiliated Companies in connection with its distribution and exploitation of the Series episodes*** (including the Pilot), as, when and where AMC deems it appropriate to do so. ***Each of Lender and Artist expressly waives any right to object to such distribution and exploitation of any Series episode*** (including the Pilot) (or aspects thereof) or assert any claim that AMC should have offered the applicable distribution/exploitation rights to unaffiliated third parties (in lieu of, or in addition to, offering the same to Affiliated Companies). ***In consideration thereof, AMC agrees 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.*** Each of Lender and Artist agrees that Lender's and Artist's sole remedy against AMC for any alleged failure by AMC to comply with the terms of this paragraph shall be actual damages, and

> each of Lender and Artist hereby waives any right to seek or obtain preliminary or permanent equitable relief or punitive relief in connection with any such alleged failure.
>
> iv. With respect to matters relating to the calculation of Artist's MAGR participation (i.e., distribution fee, overhead fee, imputed license fee, and other inclusions or deductions which are the subject of negotiation), ***in no event shall Artist's MAGR participation be defined less favorably than MAGR is defined for any other individual participant on the Series***; it being agreed that favorability of the MAGR definition shall be determined based on Artist's MAGR definition taken as a whole as compared to another participant's MAGR definition taken as a whole, and not based on individual terms from several MAGR definitions".
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> 2010 Agreement at 11-14 (emphasis added).

Paragraphs 14 and 15 of the 2010 Agreement also grant Darabont certain rights with respect to the profits from derivative productions based on the Series.

The Season 2 Amendment, effective January 10, 2011, grants Darabont, under paragraph 1(d), certain negotiation rights with respect to rendering services in connection with the third season of the series. *See Season 2 Amendment, ¶1(d).* Paragraph 3 of the Season 2 Amendment, entitled "Contingent Compensation," sets forth certain amendments to paragraph 13 of the 2010 Agreement as follows:

> "Provided that Artist renders executive producer/showrunner services on all episodes produced during Season 2 pursuant to this Season 2 Amendment . . ., Paragraph 13 of the Agreement shall be amended as follows:
>
> (a) Contingent Participation Percentage: In the event Artist renders full-time executive producer/showrunner services for Season 2 as st forth herein, the increase in Lender #1's Contingent Participation percentage under Paragraph 13(a) of the Agreement to 12.5% of 100% MAGR shall apply to all episodes of the Series (i.e., including with respect to episodes for which Artist does not render executive producer/showrunner services), subject to the other provisions of Paragraph 13 and the terms of the Agreement (As hereby amended);

> (b) <u>Definition</u>: The 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 my be agreed following good faith negotiations with customary basic cable television industry parameters consistent with AMC's business practices and Artists's stature in the basic cable television industry as of the date of this Season 2 Amendment" Season 2 Amendment, at 5.

On February 22, 2011, AMC Studios provided plaintiffs with a draft MAGR definition specifying an imputed license fee. It sets forth the imputed license fee as follows:

> "*As the license fee payable for the right to broadcast the Program* by means of Non-Standard Television in the Territory in perpetuity over any programming services of AMC or an AMC Affiliate, *AMC shall be deemed to have received an amount (the 'Imputed License Fee') equal to sixty-five percent (65%) of the Cost of Production of the Series up to a cap of [Six Hundred Twelve Thousand Five Hundred Dollars ($612,500) for each episode of the Program of a half-hour series] [One Million Four Hundred Fifty Thousand Dollars ($1,450,000) for each episode of the Program of a one-hour series, except for a broadcast full length Pilot whose cap shall be three Million Dollars ($3,000,000)], subject to five percent (5%) annual, cumulative increases for each Series Year following the first Series Year*, provided, however, that for the distribution and or exhibition of any pilot, presentation or other prototype episode, or in the event that the Program is for a non-prime-time exhibition series, an animated series, or a series that is produced by AMC as part of a co-production arrangement with one or more other entities, the Imputed License Fee shall be an amount negotiated in good faith between AMC and Participant within AMC's customary parameters".
>
> MAGR Definition ¶1(B)(1)(a)(i).

In this action, plaintiffs allege, among other things, that the foregoing imputed license fee does not comply with the requirement in paragraph 13(d)(iii) of the 2010 Agreement 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" (hereinafter referred to as the "Affiliate Transaction Provision"), inasmuch as it is not comparable to what defendants would pay an unaffiliated studio such as Lionsgate or Warner Bros. Television for the right to broadcast comparable programing.

### *C. Darabont's Termination*

On July 27, 2011, defendants removed Darabont from the Series pursuant to the "PAY OR PLAY" provision in the Standard Terms and Conditions of the 2010 Agreement, which states:

> "11. '*PAY OR PLAY*':
> Company shall not be obligated to utilize Artist's services or the Work, but shall be obligated only to pay Lender the guaranteed consideration and vested contingent compensation, subject to possible diminution pursuant to Paragraph 8 and 10 above, and to perform any further obligations which may become due with respect to Artist's services and the Work, if any, actually utilized by Company (e.g., insurance and indemnity obligations)". *See 2010 Agreement, Exhibit B, Standard Terms and Conditions, ¶11.*

Darabont's termination occurred during the production of the program's second season. In this action, plaintiffs allege that defendants removed Darabont from the Series as part of a "plan to deprive Darabont of (a) his compensation under the Agreement and Amendment and (b) his right of first negotiation to serve as showrunner in Season 3 and other rights". *See id.* at ¶46.

### *D. History of the Instant Action*

Plaintiffs initiated this action in December 2013. They plead a first cause of action for breach of contract, which consists of six parts. *See Second Amen. Comp. ¶63.* Plaintiffs allege in this regard that defendants breached the agreement as follows:

"A. By breaching Section B(13)(d)(iii) of the Agreement, which provides, among other things, 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[,]' by establishing imputed license fees for the Series below what AMC would pay unrelated third party distributors for programming comparable to the Series;

B. By breaching Section 1(d) of the Amendment, which requires that if Season 2 of the Series was produced within budget and on schedule, and Darabont was not in breach of the agreement, AMC must then negotiate with Darabont to be the Season 3 showrunner of the Series;

C. By depriving Darabont of his contractual right of first negotiation to render services and receive payment and credit on all derivative works of the Series, including but not limited to *Talking Dead* and the upcoming spinoff of the Series titled *Fear the Walking Dead*;

D. By depriving Darabont of his screen credit in violation of Section B(3)(c) of the Agreement;

E. By improperly reducing Darabont's share of Developed By Profits and EP/Showrunner Profits under Paragraph 13 of the Agreement and by failing to apply Darabont's EP/Showrunner Profits to all episodes produced during Season 2 and beyond; and

F. By failing to properly account to Darabont for Profits from the Series pursuant to a Profits definition negotiated in good faith".

*See Second Amen. Comp.* ¶63.

In the second cause of action, plaintiffs seek to recover damages for breach of the covenant of good faith and fair dealing. This cause of action is based upon the allegation that defendants engaged in "bad faith conduct such as, among other things, refusing to provide [p]laintiffs with a [MAGR] definition in a timely manner, refusing to negotiate the [MAGR] definition in good faith, and refusing to negotiate for an imputed fee consistent with fair market value for a Series of this stature" *See Second Amen. Comp. at* ¶67.

Plaintiffs plead a third cause of action for an accounting. They agreed to withdraw this cause of action in their opposition papers and, on the record, during oral argument on September 15, 2017. *See Plaintiffs' Memorandum of Law in Opposition to AMC's Motion for Summary Judgment, at 35*; *see also Tr. 87:13-87:21 (September 15, 2017) (Anne Marie Scribano, SCR)* (stating "and then there's the other issue that there really isn't any problem with, the accounting issue which I think has been withdrawn." The parties then conclusively affirmed to the Court that the claim was withdrawn).

Finally, plaintiffs plead a fourth cause of action seeking the following declaratory relief:

"77. . . . a judicial declaration that (a) the license fees for the Series imputed by AMC and included in Plaintiffs' Profits are artificially low and in violation of the terms of the Agreement alleged herein; and (b) the Affiliate Transaction Provision applies to the imputed license fee applicable to the Series.

78. . . . a judicial declaration that (a) *Talking Dead* and *Fear the Walking Dead* qualify as derivative productions under the Agreement; (b) Defendants failed to comply with their obligations under the 'First Negotiation' provision regarding these series; and (c) Plaintiffs are entitled to payments and/or contingent compensation under the terms of the Agreement for Talking Dead and any subsequent derivative productions, including forthcoming scripted spinoff to *The Walking Dead* titled *Fear the Walking Dead*.

79. . . . a judicial declaration that (a) Darabont's shares of Developed By Profits and EP/Showrunner Profits, under Paragraph 13(a) of the Agreement, are fully vested under Paragraph 13(c) of the Agreement; (b) Darabont's EP/Showrunner Profits under the Agreement apply to all episodes produced during Season 2; and (c) Darabont's EP/Showrunner Profits apply to all episodes for the life of the Series pursuant to Paragraph 3(a) of the Amendment".

*See Second Amen. Comp. ¶¶77-79.*

Plaintiffs now move pursuant to CPLR 3212, for partial summary judgment on their fourth cause of action for declaratory relief (Motion Sequence No. 012). Defendants oppose the motion and move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (Motion Sequence No. 013).

## II. <u>DISCUSSION</u>

### A. Legal Standard on Summary Judgment

"It is well settled that summary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues". *Aguilar v. City of New York*, 162 AD3d 601, 601 (1st Dept 2018). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'". *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011). The proponent of the "motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact". *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action". *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324; *see Zuckerman v. City of New York*, 49 N.Y.2d at 562.

"It is not the court's function on a motion for summary judgment to assess credibility" *Ferrante v. American Lung Assn*, 90 N.Y.2d 623, 631 (1997). "[T]he court's function is issue finding rather than issue determination". *See Genesis Merchant Partners, L.P. v. Gilbride, Tusa,* *Last & Spellane, LLC*, 157 A.D.3d 479, 481 (1st Dept 2018). The motion "must be denied where there is any doubt as to the existence of a triable issue or where the issue is arguable" *Id.*

**B. Plaintiffs' Motion**

Plaintiffs move for partial summary judgment on their cause of action for declaratory relief under paragraph 77(b) of the second amended complaint, which seeks a declaration that "the Affiliate Transaction Provision applies to the imputed license fee applicable to the Series". *See Second Amen. Comp.* ¶77 (b). In this regard, the parties' agreement states that the MAGR "definition shall specify an imputed license fee in connection with AMC's license and rights to exhibit the Series on AMC". *See 2010 Agreement, ¶13(d)(ii).* Plaintiffs assert that according to the plain language of the agreement, such imputed license fee for the Series must satisfy the Affiliate Transaction Provision which states: "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". *See 2010 Agreement, ¶13(d)(iii).* In opposition, defendants argue that the language of the parties' agreements does not, as plaintiffs claim, tie the Affiliate Transaction Provision to the imputed license fee.

"[P]rovisions in a contract are not ambiguous merely because the parties interpret them differently". *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 N.Y.2d 347, 352 (1996). Whether a contract contains an ambiguity is "a legal matter for the court to decide. Whether there is an ambiguity is determined by looking within the four corners of the document, not to outside sources". *MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 17 (1st Dep't 2018). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide". *See Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002).

An agreement "is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself and concerning which there is no reasonable basis for a difference of opinion". *See id.*

> "Conversely, [a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. The existence of ambiguity is determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording to be considered in the light of the obligation as a whole and the intention of the parties as manifested thereby". *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d at 66-67.

The Affiliate Transaction Provision is part of paragraph 13(d) of the 2010 Agreement. The purpose of that paragraph is to specify how MAGR will be defined, computed, and paid. *See 2010 Agreement ¶13(d).* Paragraph 13(d)(ii) states that where the Series is produced without a third-party, then MAGR "shall be defined, computed and paid by American Movie Classics Company LLC ('AMC') in accordance with AMC's MAGR definition . . . which definition shall specify an imputed license fee in connection with AMC's license and rights to exhibit the Series on AMC and its related services". *See 2010 Agreement ¶13(d)(ii).* Paragraph 13(d)(ii) then goes on to state that such definition "shall be modified to provide the following . . . (F) all transactions with affiliated entities will be subject to subparagraph 13[d](iii)," which is the Affiliate Transaction Provision. *See id.* Plaintiffs assert that given the phrase "*all* transactions with affiliated entities," it is clear that the Affiliate Transaction Provision applies when defendants use an affiliated entity to produce and broadcast the Series. Plaintiffs assert that reading the Affiliate Transaction Provision as being inapplicable to the imputed license fee renders the provision meaningless and would lead to an "absurd result" because it would allow defendants to impute a license fee as low as $100 per episode.

In opposition, defendants contend that the phrase "all *transactions* with affiliate entities" is clearly not applicable given that no "transaction" actually occurred here. Defendants assert in this regard that the parties agreed, that in lieu of an actual transaction, an imputed license fee would be used as a "stand in." An imputed license fee is the product of negotiations between the studio and the talent. It is not a *transaction* between affiliate entities. Therefore, under the plain language of the agreement, paragraph 13(d)(ii)(F) does not apply.

Defendants also assert that the language of the Affiliate Transaction Provision supports their position. Defendants highlight that the provision states: "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". *See 2010 Agreement, ¶13(d)(iii) (emphasis added).* Here, even overlooking the fact that an imputed license fee is not an actual transaction between affiliated entities, no money changes hands for the right to broadcast the Series. The program is exhibited on AMC Network pursuant to a license from the owner of the rights, AMC Studios, without there being any "monetary terms."

In addition, defendants point out that the agreement explicitly places two conditions on the imputed license fee. First, that "the imputed license fee will be no less favorable than the imputed license fee applicable to any other MAGR participant with respect to the Series" and second that "no television distribution fee shall be charged with respect to the Gross Receipts attributed to such imputed license fee". *See 2010 Agreement, ¶¶13(d)(ii)(G);13(d)(ii).* In contrast, the Affiliate Transaction Provision makes no reference to the imputed license fee. *See 2010 Agreement, ¶13(d)(iii).* Defendants contend that this indicates that the Affiliate Transaction Provision was not intended to apply as a condition on such fee.

Defendants further assert that reading the Affiliate Transaction Provision as being inapplicable to the imputed license fee would not, as plaintiffs suggest, permit AMC Studios to specify an imputed license fee of $100 because defendants are still required to act in good faith in specifying an imputed license fee. In this regard, they argue that "[i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance", *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), and that "[e]ven when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith". *Travellers Intl., A.G. v. Trans World Airlines*, 41 F.3d 1570, 1575 (2d Cir. 1994). In addition, such a reading would not render the Affiliate Transaction Provision meaningless inasmuch as it would still apply to transactions between certain AMC affiliates for the exploitation of the Series internationally, on home video, on online streaming services and other media.

Defendants also assert that AMC Network, not AMC Studios, is the entity referred to in the Affiliate Transaction Provision as doing the distributing and exploitation of the Series, further evincing that it was not intended to apply to the imputed license fee. In this regard, they highlight the following language in Affiliate Transaction Provision:

> "Each of Lender and Artist acknowledges that AMC is part of diversified, multi-faceted, international company(ies), whose affiliates include, or may in the future include, among others, exhibitors, television 'platforms', networks, stations and programming services, video device distributors, record companies, internet companies, so called 'E. Commerce companies', publishers (literary and electronic) and wholesale and retail outlets (individually or collectively, 'Affiliated Company or Companies'). Each of Lender and Artist further acknowledges that AMC informed Lender and Artist that AMC intends to make use of Affiliated Companies in connection with its distribution and exploitation of the Series episodes (including the Pilot), as, when and where AMC deems it appropriate to do so" *See 2010 Agreement, ¶13(d)(iii).*

Defendants point out that AMC is defined in the preceding sub-paragraph 13(d)(ii), as American Movie Classics Company, LLC, an entity which became AMC Network. Therefore, defendants assert, the foregoing language indicates that the Affiliate Transaction Provision applies when AMC Network distributes or otherwise exploits the series and the licensee is an affiliated company, such as an exhibitor or network, not a licensor like AMC Studios. Even assuming that a "transaction" occurred with respect to the imputed license fee, it would involve AMC Studios acting as the distributor, not AMC Network. Defendants further highlight that the affiliates listed in the provision do not include television studios or other distributors of television broadcast rights such as AMC Studios.

Plaintiffs dispute this proposition, contending that "AMC" in the Affiliate Transaction Provision means AMC Studios, not AMC Network. They assert that while AMC is defined in sub-paragraph 13(d)(ii) as American Movie Classics Company, LLC, which ended up becoming AMC Network, that was not what the parties had in mind. Plaintiffs highlight that the provision states: "Each of Lender and Artist further acknowledges that AMC informed Lender and Artist that AMC intends to make use of Affiliated Companies in connection with its *distribution and exploitation* of the Series episodes." *See 2010 Agreement, ¶13(d)(iii).* They assert that studios distribute programs, not networks and the reason why studios are not included on list of affiliates is because the studio is the entity doing the distribution to such affiliates. Plaintiffs assert that in August 2010, the parties did not know exactly which AMC entity was going to hold the license rights and become the studio. That entity turned out to be AMC Studios. When that information became available, it was included in the draft definition of MAGR, thereby evincing that the intent all along was for "AMC" to mean AMC Studios.

The court concludes that the agreement is susceptible to the interpretation urged by both parties in regard to whether the Affiliate Transaction Provision applies to the imputed license fee and is therefore ambiguous. "While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact". *See Amusement Bus. Underwriters v. American Intl. Group*, 66 N.Y.2d 878, 880 (1985); *see also 37 E. 50th St. Corp. v. Restaurant Group Mgt. Servs., L.L.C.*, 156 A.D.3d 569, 570 (1st Dept 2017) ("If extrinsic evidence is required to glean the intent of the parties to a contract, summary judgment is inappropriate"). Here, the parties offer extrinsic evidence to support their respective positions as to their intent, including, among other things, evidence of what occurred during negotiations. The extrinsic evidence does not permit this court to rule, as a matter of law, whether the Affiliate Transaction Provision applies to the imputed license fee. Therefore, plaintiffs' motion is denied.

**C. Defendants' Motion**

***(i) Breach of Contract***

**Affiliate Transaction Provision/Imputed License Fee**

Turning to defendants' motion, the first cause of action in the second amended complaint seeks damages for breach of contract on six separate grounds, the first being that defendants breached the Affiliate Transaction Provision "by establishing imputed license fees for the Series below what AMC would pay unrelated third-party distributors for programming comparable to the Series". *See Second Amen. Comp. ¶63(A).* Since a fact question exists whether the Affiliate Transaction Provision applies to the imputed license fee, the dismissal of this claim is denied.

**Right to Negotiate Services for Season 3**

Next, the second amended complaint alleges that defendants breached paragraph 1 (d) of the Season 2 Amendment which states:

"Season 3: Provided that Season 2 is completed and delivered to Company with the Company Approved Season 2 Budget taken as a whole (i.e., on a cumulative

> basis including all Season 2 episodes) and the Company-approved production/deliver schedule and Artist is not otherwise in material breach or default under the Agreement (as hereby amended), Lender shall have a 30-day right of first negotiation to provide the services of Artist to render the same executive producer/showrunner services as set forth in this Season 2 Amendment in connection with the third Series Year ('Season'), on terms no less favorable than the terms hereof applicable to Season 2 (including, without limitation, AMC's first look under Paragraph 1[c] above). For the avoidance of doubt, in the event the parties do not reach agreement for Lender to provide the services of Artist as executive producer/showrunner in connection with Season 3, Artist shall then be engaged to render services as an executive producer for Season 3 and for the continuing life of the Series, as and to the extent provided in Paragraph 3 of the Agreement (including the compensation specified therein and the cumulative annual increases thereto), and ***subject to the other terms of the Agreement".*** *Season 2 Amendment, at 4* (emphasis added).

Plaintiffs assert that since the second season of the Series was produced within budget and on schedule, and Darabont was not in material breach or default of the agreement, defendants were required to negotiate with Darabont to be the Season 3 showrunner of the Series. Plaintiffs allege that since defendants failed to do so, they breached this provision.

Defendants seek to dismiss this claim, arguing that the negotiation rights set forth in this provision are expressly "subject to the other terms of the Agreement," which include the "pay or play" provision pursuant to which Darabont was terminated. That provision states:

> "Company ***shall not be obligated to utilize Artist's services or the Work***, but shall be obligated only to pay Lender the guaranteed consideration and vested contingent compensation, subject to possible diminution pursuant to Paragraph 8 and 10 above, and to perform any further obligations which may become due with respect to Artist's services and the Work, if any, actually utilized by Company (e.g., insurance and indemnity obligations)" *See 2010 Agreement, Exhibit B, Standard Terms and Conditions, ¶11 (emphasis added).*

Defendants assert that Darabont's negotiations rights under paragraph 1 (d) of the Season 2 Amendment did not survive his termination because those rights do not constitute a payment obligation or an obligation "which may become due with respect to [Darabont's] services." In this regard, they point out that the "pay or play" provision expressly states that AMC "shall not be obligated to utilize Artist's services." Therefore, defendants cannot be required, under that same provision, to perform an obligation requiring them to utilize Darabont's services. Defendants argue that such a requirement would run counter to very purpose of the "pay or play" provision, which is invoked when an employer wishes to stop working with an employee. Here, defendants allege that they wished to stop working with Darabont because, among other reasons, he mismanaged the Series and verbally abused his subordinates. Under such circumstances, it is nonsensical that defendants would have an obligation to negotiate for Darabont's return on the next season of the Series.

In addition, defendants contend that Darabont's negotiations rights under paragraph 1 (d) of the Season 2 Amendment did not survive his termination under the "pay or play" provision because such rights are not an "obligation" that survives termination. Defendants assert in this regard that the only rights that the parties agreed would survive concerned services and work performed by Darabont that was "actually utilized" by AMC. The potential for future services that Darabont says he was entitled to negotiate for could not have been "actually utilized" by AMC because Darabont never performed those services. Moreover, the "further obligations" contemplated in the provision are financial obligations related to matters such as insurance and indemnity.

In opposition, plaintiffs argue that defendants' obligations to negotiate with Darabont for Season 3 fall under the term "further obligations which may become due" in the "pay or play" provision. They assert that if there is an inconsistency between paragraph 1 (d) of the Season 2 Amendment and the "pay or play" provision, the inconsistency must be resolved in favor of the obligations set forth in the Season 2 Amendment inasmuch as paragraph 21(i) of the 2010 Agreement states that in the event of an inconsistency, the terms of the agreement shall control. *See 2010 Agreement ¶21(i).* As such, plaintiffs assert, defendants are not entitled to summary judgment on this point.

This court agrees with defendants' position that Darabont's negotiations rights under paragraph 1 (d) of the Season 2 Amendment did not survive his termination under the "pay or play" provision. As defendants point out, the "pay or play" provision expressly states that defendants "shall not be obligated to utilize Artist's services or the Work." *See 2010 Agreement, Exhibit B ¶11.* Requiring defendants to negotiate with Darabont to further utilize his services is incompatible with such language. In addition, the right to negotiate work on the third season of the Series is not a payment obligation; Nor is it a "further obligation[] which may become due with respect to Artist's services and the Work, if any, actually utilized by Company." Interpreting this phrase to include the right to negotiate for providing additional services would run afoul of the well-settled principle that a contract should not be interpreted to produce an absurd result. *See Cole v Macklowe*, 99 A.D.3d 595, 595 (1st Dept 2012). In other words, reading a termination clause that allows an employer to abstain from further utilizing an employees services as also requiring the employer to negotiate with the employee for future services is unreasonable. *See id.*

Contrary to plaintiffs' contention, there is no inconsistency between the "pay or play" provision and paragraph 1 (d) of the Season 2 Amendment. Indeed, the rights conferred under paragraph 1 (d) are expressly "subject to the other terms of the Agreement," which would include the "pay or play" provision pursuant to which Darabont was terminated. Therefore, defendants' request to dismiss paragraph 63(B) of the second amended complaint, alleging that defendants breached paragraph 1 (d) of the Season 2 Amendment, is granted.

**Derivative Production Rights**

Next, plaintiffs assert that defendants deprived "Darabont of his contractual right of first negotiation to render services and receive payment on all derivative works of the Series, including but not limited to *Talking Dead* and the spinoff of the Series titled *Fear the Walking Dead"*. *Second Amen. Comp., ¶63(C).* Darabont's rights with respect to derivative productions based on the series are set forth in paragraphs 14 and 15 of the 2010 Agreement, which state:

> "14. *First Negotiation*
>
> ***If Artist is accorded sole 'written by' or 'teleplay by' credit on the Pilot and sole 'created by' credit on the Series (subject to Paragraph 17 below), Company and Artist agree to negotiate in good faith (within Company's customary parameters consistent with Artist's stature) for a period of thirty (30) days with respect to Artist writing, pilot directing and executive producing the first derivative production based on the Series, on terms no less favorable than the terms hereof with respect to a comparably budgeted television pilot and/or series. The foregoing first negotiation right shall 'roll' with respect to each subsequent derivative production, provided that Artist furnished writing, pilot directing and/or producing services on the immediately preceding derivative production.*** If no agreement is reached during said thirty (30)-day period, Company shall have no further obligation to Artist with regard to such derivative production except as provided in Paragraph 15 below.

15. *Passive Payments*

***If Artist does not render services pursuant to the preceding paragraph and Artist receives sole 'written by' or 'teleplay by' credit on the Pilot and sole 'created by' credit on the Series (subject to Paragraph 17 below), then [he] shall receive*** (i) with respect to a generic spin-off, fifty percent (50%) of the Series royalties and contingent compensation set forth above, reducible to twenty-five percent (25%) of the Series royalties and contingent compensation set forth above if Artist is entitled to shared 'written by' or 'teleplay by' and/or shared 'created by' credit on such Series; or (ii) with respect to a planted spin-off, twenty-five percent (25%) of the Series royalties and contingent compensation set forth above, reducible to twelve and one-half percent (12.5%) of the Series royalties and contingent compensation set forth above with respect to a planted spin-off if Artist is entitled to shared 'written by or to Lender #1 'teleplay by'and/or shared 'created by' credit on such Series; or (iii) a passive payment to be negotiated in good faith within Company's customary parameters consistent with Artist's stature for any other derivative production"

*See 2010 Agreement, at 14-15* (emphasis added).

Defendants assert that they are entitled to dismissal of this claim for two reasons. First, they argue that their use of the "pay or play" provision to remove Darabont extinguished any obligation they may have had with respect to Darabont's services, and limited their obligations "to pay" him certain amounts. An obligation to negotiate for potential future employment is not a "payment" and therefore is not the type of obligation that survives invocation of the "pay or play" provision. Second, defendants assert that any obligation to negotiate with Darabont that may have survived his July 27, 2011 termination was clearly extinguished by the time production of *Fear the Walking Dead* commenced, because plaintiffs allege that *Talking Dead* (which pre-dated *Fear the Walking Dead* by several years) was a derivative production of the Series subject to paragraph 14 of the 2010 Agreement, and plaintiffs admit Darabont did not render any services in connection with *Talking Dead*. Since paragraph 14 states that the first negotiation rights at issue "shall roll" with respect to each subsequent derivative production, "provided that

[Darabont] furnished . . . services on the immediately preceding derivative production," at the very least, they are entitled to dismissal of the claim that defendants breached the first negotiation rights with respect to *Fear the Walking Dead.*

In response, plaintiffs contend that Darabont's rights of "first negotiation" for derivative productions under paragraph 14 of the 2010 Agreement vested immediately upon his receiving "teleplay by" credit on the Pilot and "developed by" credit on the Series. Since these rights vested long before defendants exercised the "pay or play" provision, defendants were obligated to negotiate with Darabont on derivative productions for a period of 30 days, with a minimum allowable offer to him being at the floor of his agreement for the Series. Under paragraph 15, if no deal was reached defendants were obligated to make "passive payments" to Darabont.

For the same reasons that Darabont's right to negotiate providing services on the third season of the Series does not survive his termination under the "pay or play"provision, his first negotiation rights with respect to working on derivative productions is also extinguished once defendants exercised the "pay or play" provision. However, defendants have not established that the right to passive payments under paragraph 15 was extinguished. The right to passive payments under paragraph 15 is triggered (1) "[i]f the Artist does not render services pursuant to" [paragraph 13] and (2) "Artist receives sole 'written by' or 'teleplay by' credit on the Pilot and sole 'created by' credit on the Series." *See 2010 Agreement ¶15.* Since both of these conditions were satisfied, defendants are not entitled to dismissal of this claim.

__**Contractual Screen Credits**__

Next, in paragraph 63(D) of the second amended complaint, plaintiffs allege that defendants deprived "Darabont of his screen credit in violation of Section B(3)(c) of the Agreement." During oral argument on September 15, 2017, plaintiffs' counsel stated that plaintiffs are not opposing the branch of defendants' motion that seeks to dismiss this claim. *See Tr. 148:9 – 148:14 (September 15, 2017) (Anne Marie Scribano, SCR)* (stating "so what we have collectively decided to do is not oppose that aspect of the motion"). Therefore, defendants' request to dismiss this claim is granted.

__**Share of Developed by and EP/Showrunner Profits**__

In paragraph 63(E) of the second amended complaint, plaintiffs allege that defendants breached the parties' agreement "[b]y improperly reducing Darabont's share of Developed by Profits and EP/Showrunner Profits under Paragraph 13 of the Agreement and by failing to apply Darabont's EP/Showrunnder Profits to all episodes produced during Season 2 and beyond." The relevant provision of the 2010 Agreement reads:

> "13. *Contingent Compensation*
> Provided that Lender and Artist and not in material uncured breach hereunder, Lender # 1 shall be entitled to a contingent participation . . . as follows:
> (a) __Participation__:
> If Artist receives sole 'created by' credit on the Series (subject to Paragraph 17 below), Lender #1 shall be entitled to 10% of 100% of the Modified Adjusted Gross Receipts ('MAGR'), reducible dollar-for-dollar by participations payable to other writers sharing 'created by' credit to a floor of 5% of 100% of the MAGR if Artist is entitled to shared 'created by' credit; ***provided, however, that Artist's sole 'created by' credit participation shall be increased to 12.5% of 100% of the MAGR for all episodes on which Artist renders executive producer/showrunner services.*** If Artist does not receive any 'created by' credit, Artist shall not be entitled to any contingent participation.

. . .
(c) <u>Vesting</u>:
Contingent Participation shall vest ¼ at each of the following events: (i) delivery to Company of Pilot rewrite; (ii) delivery of Pilot, provided that Artist renders executive producing services on the Pilot; (iii) conclusion of first season of the Series, provided that Artist renders executive producing services on all episodes produced during the production of the first season; and (iv) ***conclusion of second season of the Series, provided that Artist renders executive producing services on all episodes produced during the production of the second season.***" *See 2010 Agreement, at 11-12* (emphasis added).

In relevant part, Paragraph 3 of the Season 2 Amendment states:
"***Contingent Compensation***

***Provided that Artist renders executive producer/showrunner services on all episodes produced during Season 2 pursuant to this Season 2 Amendment . . ., Paragraph 13 of the Agreement shall be amended as follows:***

(a) <u>Contingent Participation Percentage</u>: ***In the event Artist renders full-time executive producer/showrunner services for Season 2 as set forth herein***, the increase in Lender #1's Contingent Participation percentage under Paragraph 13(a) of the Agreement to ***12.5% of 100% MAGR shall apply to all episodes of the Series*** (i.e., including with respect to episodes for which Artist does not render executive producer/showrunner services), subject to the other provisions of Paragraph 13 and the terms of the Agreement (As hereby amended)".
*See Season 2 Amendment, at 5* (emphasis added).

Plaintiffs assert that since Darabont received the sole "developed by" credit on the Series, he is entitled, under paragraph 13(a), to 10% of 100% of MAGR. Further, he is entitled to an additional 2.5% of 100% profits for all episodes of the Series on which he rendered executive producer/showrunner ("EP/showrunner") services. They claim that defendants are wrongfully treating Darabont's profit participation as being only 75% vested, whereas his profit participation under paragraph 13(a) is 100% vested, inasmuch as Season 2 has concluded and Darabont rendered executive producer services on *all* episodes produced during Season 2. In this regard, the second amended complaint alleges that while Darabont was removed during Season 2:

> "Darabont worked tirelessly as an executive producer and showrunner of the Series from the conclusion of Season 1 in December 2010 until AMC removed Darabont from the Series on July 27, 2011, after more than six months of continuous work on Season 2. During the production of Season 2, Darabont created the entire season's story arcs, selected writers, directors, and cast for all episodes of Season 2, led the writers' room, selected locations to fit AMC's budget, promoted the Series at Comic-Con and mapped out the stories for the entire second season for AMC. After Darabont was removed from the Series, executive producer Robert Kirkman noted that Darabont was present before and during production of Season 2 until he left in late July, 'mapping things out' for the balance of the second season and that Darabont's 'stamp [would] be all over it.' By the time Darabont was removed from the Series, he had rendered executive producer services for every episode produced during Season 2" *Second Amen. Comp. ¶55.*

Plaintiffs assert that while Darabont ceased rendering full-time services once he was removed from the series, he had been working full-time on all of the entire Season's episodes before his removal. Therefore, it is argued that he participated in and contributed, on a full-time basis, to all of the episodes in Season 2. Defendants are alleged to have admitted this fact by giving Darabont his executive producer credits on all episodes of Season 2.

In addition, plaintiffs allege that under paragraph 3(a) of the Season 2 Amendment, the parties agreed that if Darabont rendered full-time executive producer/showrunner services for Season 2, the additional 2.5% of EP/Showrunner Profits would apply to all episodes of the Series for the life of the Series, regardless of whether Darabont continued to render executive producer or showrunner services on the Series after Season 2. Darabont also rendered full-time executive producer/showrunner services on Season 2 up until he was removed from the show in July 2011 and that his rendering of full-time executive producer/showrunner services until his removal entitles him to 2.5% of EP/Showrunner Profits for the life of the Series under the terms of the Season 2 Amendment.

In moving to dismiss this claim, defendants contend that Darabont's profit participation did not vest 100%, because it could not vest 100% until the "conclusion of second season of the Series". *See 2010 Agreement, ¶13(c).* Defendants point out that when Darabont was terminated, the second season of the Series had not yet concluded. Therefore, they assert, his contingent compensation was not fully vested at the time of his termination. The "pay or play" provision only obligates defendants to pay Darabont his "*vested* contingent compensation." Since Darabont's contingent compensation was only 75 % vested at the time he was removed under the "pay or play" provision, that is all defendants are obligated to pay Darabont.

In response to this argument, plaintiffs contend that Darabont's contingent compensation fully vested upon the conclusion of the second season of the Series. It does not matter that he was terminated prior to that occurrence, so long as he "render[ed] executive producing services on all episodes produced during the production of the second season". *2010 Agreement, ¶13(c).* The "conclusion of the second season" is merely the point in time to which possession or enjoyment of Darabont's contingent compensation is delayed. Plaintiffs point out that there is no language in the "pay or play" provision which states that defendants are only obligated to pay contingent compensation that was vested as of the date of Darabont's termination. They contend that paying vested compensation is a perpetual duty that could come due at any point in time and highlight that the "pay or play" provision obligates defendant "to perform any further obligations which may become due," which includes postponed payment of vested contingent compensation.

In reply, defendants assert that given the language, that the fourth vesting event occurs at the "conclusion of second season of the Series, provided that Artist renders executive producing services on all episodes produced during the production of the second season," it could not be clearer that rendering services through the conclusion of Season 2 is a condition precedent to 100% vesting. They assert that the coupling of these two condition precedents underscores the parties' common sense intent to tie Darabont's contingent compensation for Season 2 to a full-season's worth of rendering services.

Once defendants exercised the "pay or play" provision, they were only obligated to pay Darabont his "vested contingent compensation." Since the fourth vesting event had yet to occur, his contingent compensation was only 75% vested as of the date of his termination. However, under the "pay or play" provision, defendants were also obligated to "perform any further obligations which may become due with respect to Artist's services and the Work, if any, actually utilized by Company (e.g., insurance and indemnity obligations)". *See 2010 Agreement, Exhibit B, Standard Terms and Conditions, ¶11.* Defendants point to no language in the contract indicating that the parties intended for Darabont's contingent compensation stop vesting upon his termination. Therefore, upon the occurrence of the fourth vesting event, a "further obligation[] . . . bec[ame] due". *Id.* Although the fourth vesting event also required Darabont to have "render[ed] executive producing services on all episodes produced during the production of the second season," it is possible, as plaintiffs allege, for Darabont to have rendered some executive producing services on all of the episodes produced during that season notwithstanding his removal from the Series in the middle of that season.

Defendants' assertion that the "further obligations which may become due" refers only to financial obligations along the lines of "insurance and indemnity" is unpersuasive. The insurance and indemnity obligations referenced in the "pay or play" provision are preceded by the Latin abbreviation "e.g." (meaning "for example"), rather than "i.e." (meaning "that is"). Therefore, the provision's reference to these types of obligations is not exhaustive.

Defendants also assert that Darabont was let go before the conclusion of Season 2 and did not render full-time, in-person services on all episodes of Season 2. Therefore, they claim, the fourth vesting event was not satisfied. Defendants derive this "full-time, in person" language from paragraph 1(c)(i) of the Season 2 Amendment, which states:

> "1. *Series Producing*
> . . .
> (c) Services; Exclusivity; First Look: The following shall apply with respect to Season 2 in lieu of the exclusivity provisions set forth in the Agreement:
>
> i. Artists's *Season 2 executive producer/showrunner services shall be rendered on a full-time and in-person basis*, with no outside services to materially interfere with Artist's services on the Series".
>
> *See Season 2 Amendment, at 2-3, ¶ 1(c)(i)* (emphasis added).

The highlighted language does not revise the vesting provision, which only requires for Darabont to have rendered "executive producing services on all episodes produced during the production of the second season." *See Season 2 Amendment* ¶*3*. Paragraph 1(c) specifies that it "shall apply with respect to Season 2 *in lieu of the exclusivity provisions set forth in the Agreement,*" which are set forth in paragraph 11 of the 2010 Agreement. *See id at* ¶*1(c)*. There is no indication that it was also intended to apply to the vesting requirements set forth paragraph 13 of 2010 Agreement. Moreover, on this record, issues of fact exist as to whether Darabont provided some full-time, in-person executive producer/showrunner services on all episodes of

Season 2 before he was removed from the Series. Such questions include the nature of the services which were rendered on each episode and when those services were rendered. In light of the foregoing, defendants' request to dismiss this claim is denied.

**Failing to Properly Account for Profits pursuant to Profits Definition Negotiated in Good Faith**

In paragraph 63(F) of the second amended complaint, plaintiffs allege that defendants breached the parties' agreement by "failing to properly account to Darabont for Profits from Series pursuant to a Profits definition negotiated in good faith". *See Second Amen. Comp.* ¶*23*. Plaintiffs explain that the intended meaning of this claim is that defendants "breached the Agreement by imputing a license fee for the Series millions of dollars below the contractual threshold of the Affiliate Transaction Provision". *See Plaintiffs' Memorandum of Law in Opposition to AMC's Motion for Summary Judgment, at 30, n 10.* Since this court cannot rule, as a matter of law, whether the Affiliate Transaction Provision applies to the imputed license fee, defendants' request to dismiss this claim is denied.

***(ii) Breach of Covenant of Good Faith and Fair Dealing***

Defendants contend that the second cause of action for breach of the covenant of good faith and fair dealing should be dismissed as duplicative of the first cause of action for breach of contract. A cause of action for breach of the covenant of good faith and fair dealing is duplicative if it "arises from the same [operative] facts and seeks the same damages as [the] breach of contract claim". *See Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 104 (1st Dept 2014) (noting that conduct need not be identical in every respect and that "it is enough that they arise from the same operative facts"); *see also Hong Leong Fin. Ltd. [Singapore] v. Morgan* Stanley, 131 A.D.3d 418, 419 (1st Dept 2015).

Plaintiffs assert that their good faith claim should not be dismissed as duplicative inasmuch as it is properly being asserted as an alternative to their breach of contract claim; arguing that if a jury concludes that the Affiliate Transaction Provision does not apply to the imputed license fee, the jury could still conclude, based upon a different set of facts, that defendants breached the implied covenant of good faith and fair dealing by setting an imputed license fee that does not fairly reflect the runaway success of the Series. They point out in this regard that assuming defendants had the discretion to set an imputed license fee without regard to the Affiliate Transaction Provision, the implied covenant obligated defendants "to exercise such discretion in good faith, not arbitrarily or irrationally". *See Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 41 A.D.3d 269, 270 (1st Dept 2007). Plaintiffs' claim for breach of the implied duty of good faith and fair dealing is based on separate facts as their claim for breach of contract. Defendants' refusal to apply the Affiliate Transaction Provision to the imputed license fee is separate from their alleged failure to set an imputed license fee in good faith, not arbitrarily or irrationally. Since issues of fact exist in this regard, defendants' request to dismiss this cause of action is denied.

***(iii) Declaratory Judgment***

Finally, defendants contend that since plaintiffs have an adequate legal remedy for breach of contract, the cause of action for a declaratory judgment must be dismissed. While the existence of another adequate remedy does not preclude this court from issuing a declaration. *See Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 148 (1983), *cert denied* 464 US 993 (1983) (under CPLR 3001 ("[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract"); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dept 1988) (noting that a cause of action for declaratory judgment is inappropriate where the Plaintiff has an alternative remedy at law); *Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 358 (1st Dept 2006) (noting that declaratory relief is unavailable where the Plaintiff has other remedies at law). Here, plaintiffs' cause of action for a declaratory judgment parallels the breach of contract claims and merely seeks a declaration of the same rights and obligations as will be determined under the first cause of action. Therefore, this branch of defendants' motion is granted and the declaratory judgment claim is dismissed.

**III. CONCLUSION**

In light of the factual issues the Plaintiff's motion seeking partial summary judgment regarding declaratory relief must be denied. Defendants' motion must be granted in part as to the claims for breach of the pay or pay provision (Second Amend. Comp. ¶63(B)), contractual screen credits (Second Amen. Comp. ¶63(D)), which was withdrawn by the Plaintiff, and the causes of action for an accounting, which was also withdrawn by the Plaintiff, and declaratory judgment cannot be sustained as there are alternative remedies available to the Plaintiff. It must be denied in all other respects given that factual issues exist which prohibit this Court from making a determination as a matter of law.

**IV. ORDER**

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion, pursuant to CPLR 3212, for partial summary judgment on their cause of action for declaratory relief is denied (Motion Sequence No. 012); and it is further

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint is granted only with respect to those branches of the motion which seek to dismiss paragraphs 63(B) and 63(D) of the first cause of action for breach of contract, the third cause of action for an accounting, and the fourth cause of action for declaratory relief, and defendants' motion is otherwise denied (Motion Sequence No. 013).

This constitutes the decision and order of the Court.

Dated: December 7, 2018

ENTER:

Eileen Bransten

**Hon. Eileen Bransten, JSC**