SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 1

BC672124 July 27, 2021
ROBERT KIRKMAN ET AL VS AMC FILM HOLDINGS LLC ET AL 10:07 AM

Judge: Honorable Daniel J. Buckley
Judicial Assistant: S. Chung
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 06/29/2021, now rules as follows:

Background

On August 14, 2017, Plaintiffs filed this contract action related to the television shows The Walking Dead, Fear the Walking Dead, and Talking Dead. On July 22, 2020, the Court issued a Statement of Decision after a court trial on seven disputes regarding contract interpretation. The Court found the relevant agreements required the application of New York law and "[a]ll of the relevant contractual provisions are unambiguous and demonstrate that AMC's MAGR definition is binding." (Stmt. of Dec. at 4:19-21.) The Court ruled in favor of Defendants on all seven issues.

On May 5, 20201, Plaintiffs filed the Third Amended Complaint asserting causes of action for breach of Plaintiffs' The Walking Dead and Fear the Walking Dead agreements and breach of the implied covenant of good faith and fair dealing, as well as inducing breach of those agreements.

Defendants move to strike the entirety of paragraphs 67, 87, 110-112, 115, and 116(c) from the TAC as well as footnote 1 on page 22.

Defendants also demur to the first cause of action for breach of the implied covenant of good faith and fair dealing and the fourth cause of action for inducing breach of contract.

Having taken the matter under submission after the June 29, 2021 hearing, the Court has revised its previous tentative ruling, but has not changed its outcome. The Court's order addresses the New York appellate opinion Moran v. Erk, raised for the first time by Defendants at the hearing,

revises the discussion of punitive damages related to the procedural issues, and addresses Defendants' damages argument, also raised for the first time at the hearing.

Discussion

A. Legal Standard

When ruling on a demurrer or motion to strike targeting a plaintiff's complaint, the court accepts the truth of all properly pleaded material facts of the subject pleading, Aubry v. Tri-City Hosp. Dist., 2 Cal. 4th 962, 966-967 (1992), and draws reasonable "inferences favorable to the plaintiff, not the defendant." Perez v. Golden Empire Transit Dist., 209 Cal. App. 4th 1228, 1239 (2012); see Doe v. Roman Catholic Bishop of Sacramento, 189 Cal. App. 4th 1423, 1427 (2010); Clauson v. Superior Court, 67 Cal. App. 4th 1253, 1255 (1998) ("In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth."). Courts may also consider matters properly subject to judicial notice, Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985), but need not accept "contentions, deductions or conclusions of fact or law." Daar v. Yellow Cab Co., 67 Cal. 2d 695, 713 (1967).

Although their standards are the same, demurrers and motions to strike differ starkly in their respective purposes. On the one hand, demurrers can only be used to reach entire causes of action. See Ellena v. Dep't of Ins., 230 Cal. App. 4th 198, 206 (2014) ("A demurrer must be overruled if the complaint states a claim on any theory."); Kong v. City of Hawaiian Gardens Redevelopment Agency, 108 Cal. App. 4th 1028, 1047 (2002) ("[A] demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy."). On the other hand, the purpose of a motion to strike is "to reach certain kinds of defects in a pleading that are not subject to demurrer." Baral v. Schnitt, 1 Cal. 5th 376, 388 (2016) (citing 5 Witkin, Cal. Proc. 5th, Pleading § 1008 (2008)) (internal quotation marks omitted) (emphasis added). "A trial court has authority to strike . . . pleadings, . . . not filed in conformity with its prior ruling." Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel 6 Cal. App. 4th 157, 162 (1992)

B. Demurrer

1. Breach of the Implied Covenant of Good Faith and Fair Dealing – First Cause of Action.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of

performance." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002).

"Within every contract is an implied covenant of good faith and fair dealing. [Citation] This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. [Citation] For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513, 513–514 (N.Y. App. Div. 1999).

The Court construes Plaintiffs' breach of the implied covenant of good faith and fair dealing cause of action as asserting two separate causes of action for purposes of this motion: one based upon Defendants' development of the MAGR term and one based upon alleged avoidance of the Affiliated Transaction Provision ("ATP").

a. Setting the MAGR Term.

Defendants contend "the contracts expressly mandate that MAGR 'shall' be defined by AMC's 'standard definition' of MAGR, and the imputed license fee is indisputably part of AMC's standard MAGR definition. Under binding New York law, Plaintiffs cannot use the implied covenant to contradict the terms of their contracts. AMC's 'standard definition' of MAGR controls, even though Plaintiffs think that definition should be even more generous to them." Mot. at 8:15-19; Reply at 1:11-3:2 Defendants' reliance upon the phrase "standard definition" is not persuasive here because the MAGR definition did not exist when the parties entered into their contracts. TAC ¶¶ 34, 48-49, 94. The MAGR definition was not provided until after the first season of The Walking Dead aired. TAC ¶ 49 ("AMC waited until March 2011, after the successful first season of The Walking Dead, to provide Kirkman, Alpert, Hurd, and Eglee the MAGR definition.").

Defendants' contention that Darabont v. AMC Network Entertainment LLC, 193 A.D.3d 500 (N.Y. App. Div. 2021) "reject[ed] an essentially identical implied covenant claim" is inaccurate. Mot. at 9:16-20; Reply at 3:3-11. The court found the claim "was improperly asserted for the first time in opposition to defendants' motion for summary judgment" and did not allege "that AMC engaged in misconduct by formulating the MAGR definition in such a manner as to deprive plaintiffs of contractual benefits." Darabont, supra. The court further stated "to the extent

plaintiffs' breach of covenant claim is that AMC acted in bad faith by designing a MAGR definition that did not conform to certain industry customs, this claim improperly seeks to impose obligations on AMC beyond the express terms of the parties' agreement." Ibid. Here, Plaintiffs' implied covenant claim does not seek to impose industry standards upon the MAGR definition. See TAC ¶ 97 ("AMC acted in bad faith by waiting until after The Walking Dead was already a success to reverse engineer a MAGR definition that AMC knew was guaranteed to result in no or negligible profit participations at best (certainly compared to the profits earned by AMC) and thereby deny Plaintiffs the benefit of AMC's promise to pay contingent compensation.").

As noted by Defendants, the Court's Statement of Decision suggested a potential explanation as to why Defendants would not create an arbitrary or unreasonable MAGR definition. Opp. at 8:20-9:6; Kirkman v. AMC Film Holdings LLC, 2020 WL 4364279, at *6 (Cal.Super.); SOD at 11. However, the Court's Statement of Decision addressed contract interpretation issues and did not finally adjudicate whether Defendants acted appropriately in determining the final version of MAGR.

Plaintiffs' implied covenant claim alleges Defendants knew they had a unilateral right to craft the MAGR term, waited until the success of The Walking Dead was well-established to develop the MAGR term, and specifically crafted a MAGR term to ensure Plaintiffs did not recover under the known circumstances. TAC ¶¶ 48-55, 94, 97. The Walking Dead premiered on October 31, 2010, which was the highest rated premiere ever for AMC Network and the highest rated debut for any cable series in 2010. Id. ¶ 45. AMC announced a second season even before the final episode aired on December 5, 2010, which AMC Network President Charlie Collier stated "no other cable series had ever attracted as many Adults 18-49 as The Walking Dead." Id. ¶¶ 46-47. "AMC announced that the season finale was the most watched of the season attracting six million total viewers. Not only that, but the announcement proclaimed that the series was the most watched drama series among adults aged 18 to 49 in basic cable history. The Walking Dead was the number one rated series among adults ages 18 to 49 and in the top five among all viewers in 2010." TAC ¶ 47. Defendants did not provide the MAGR term until March 2011 and therefore crafted the MAGR term with the full knowledge of the show's success. TAC ¶ 49. Nevertheless, the TAC alleges, Defendants' MAGR term "as they had projected, did not result in profit participations for the first six years of the series.'" TAC ¶ 94(f).

The implied covenant prevents parties with unilateral power from imposing excessive fees. See e.g. Lonner v. Simon Property Group, Inc., 57 A.D.3d 100, 109 (N.Y. App. Div. 2008) ("Even were the defendant entitled to charge dormancy fees, it is still precluded under the implied

covenant of good faith and fair dealing from setting such fees at grossly excessive amounts."); Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 302 (N.Y. App. Div. 2003) ("even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract."). Duration Mun. Fund, L.P. v. J.P. Morgan Securities Inc., 25 Misc.3d 1203(A) (N.Y. Sup. Ct. 2009) ("New York courts have repeatedly affirmed that a party may be in breach of an implied duty of good faith and fair dealing, even if it is not in breach of its express contractual obligations, when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denied or to deprive the other party of the fruit of its bargain."); In Touch Concepts, Inc. v. Cellco Partnership (S.D.N.Y. 2013) 949 F.Supp.2d 447, 467 ("But New York cases have expanded the use of the implied covenant of good faith in a manner other than as a gap-filler. For example, it is used to cabin some contractual rights, holding that a contractual right affording discretion may not be exercised in bad faith—arbitrarily, irrationally, or malevolently.").

Defendants note New York law does not permit an implied covenant claim to negate an express term of a contract. Murphy v. Am. Home Prod. Corp., 58 N.Y.2d 293, 304 (1983) ("No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship."); Veneto Hotel & Casino, S.A. v. German Am. Cap. Corp., 160 A.D.3d 451, 452 (2018) ("[T]he implied covenant of good faith and fair dealing 'cannot negate express provisions of the agreement[.]'").

However, the Court finds guidance in Richbell, supra, which addressed this same argument:

Jupiter urges the rigorous application of the rule in Murphy v American Home Prods. Corp. (58 NY2d 293, 304 [1983]), that the implied covenant of good faith cannot create new duties that negate explicit rights under a contract [Citations]. We recognize that there is clearly some tension between, on the one hand, the imposition of a good faith limitation on the exercise of a contract right and, on the other, the avoidance of using the implied covenant of good faith to create new duties that negate explicit rights under a contract. However, the allegations here clearly go beyond claiming only that Jupiter should be precluded from exercising a contractual right; they support a claim that Jupiter exercised a right malevolently, for its own gain as part of a purposeful scheme designed to deprive plaintiffs of the benefits of the joint venture and of the value of their pre-existing holdings in Harpur. These allegations do not create new duties that negate Jupiter's explicit rights under a contract, but rather, seek imposition of an entirely proper duty to eschew this type of bad faith targeted malevolence in the guise of business dealings.

Richbell, supra, 309 A.D.2d at 302. The ability to create the MAGR term, after the contract was in place and the first season was completed, "did not relieve [Defendants] of [their] duty to act in good faith." Carvel Corp. v. Diversified Management Group, Inc., 930 F.2d 228, 231 (2d Cir. 1991).

At the hearing, Defendant argued Moran v. Erk, 11 N.Y.3d 452 (2008) was controlling and dispositive. The Court finds this argument unpersuasive. The contract addressed in Moran "explicitly stated that '[t]his Contract is contingent upon approval by attorneys for Seller and Purchaser by the third business day following each party's attorney's receipt of a copy of the fully executed Contract,' and further provided that '[i]f either party's attorney disapproves this Contract before the end of the Approval Period, it is void'" Id. at 456. In rejecting an implied covenant claim, the court focused on the contingent nature of the contract. The court noted the implied covenant protects "the fruits of the contract," which do not arise until after the relevant contingency is met. Id. at 457 ("Yet the plain language of the contract in this case makes clear that any 'fruits' of the contract were contingent on attorney approval, as any reasonable person in the Morans' position should have understood."). The court also discussed numerous policy reasons that weighed against imposing an implied limitation in an attorney approval contingency and held "where a real estate contract contains an attorney approval contingency providing that the contract is 'subject to' or 'contingent upon' attorney approval within a specified time period and no further limitations on approval appear in the contract's language, an attorney for either party may timely disapprove the contract for any reason or for no stated reason." Id. at 459. The narrow issues addressed in Moran do not apply here.

The demurrer is OVERRULED as to the first claim for breach of the implied covenant of good faith and fair dealing based upon the creation of the MAGR term. Defendants request the Court strike paragraph 110 and 112, which include allegations based upon this claim. The motion to strike paragraphs 110 and 112 is DENIED.

As with a number of other rulings on a demurrer, the Court's decision does not result in a victory for Plaintiffs. This Court is in the unusual position of knowing many facts, supported by admitted evidence, given the trial on contract interpretation while ruling on a demurrer. Defendants will have ample opportunity, via a motion for summary judgment or a second trial, to counter the allegations in the Third Amended Complaint with those facts. One example is the argument that the fact the same MAGR was used in subsequent contracts demonstrates no intent to deprive Plaintiffs the benefits of the contract. The Court cannot weigh that fact against the allegations in the pleading. This argument may lead to a different result if raised in a motion or trial.

b. Avoiding the Affiliated Transaction Provision.

Plaintiffs also allege Defendants breached the implied covenant of good faith and fair dealing by depriving Plaintiffs of the benefit of the ATP. TAC ¶¶ 56-62, 98-99. Specifically, the TAC alleges AMC Network and AMC Studios (AMCFH in the Court's Statement of Decision, see TAC ¶ 19) "never entered into any agreement, written or otherwise, memorializing the terms" of the arrangement to air The Walking Dead. TAC ¶ 61. This allegedly varied with AMC's practice with other transfers of The Walking Dead rights to subsidiaries. TAC ¶¶ 59-60, 98. The ATP provides: "AMC agrees that AMC's transactions with Affiliated Companies will be on monetary terms comparable with the terms on which AMC enters into similar transactions with unrelated third party distributors for comparable programs after arms length negotiation." TAC Ex. 1 at 10 § 24 ("Dealings with Affliates"). Plaintiffs allege this allowed AMC "to claim that there was no 'transaction' between AMC Studios and AMC Network with the result that the affiliated transaction provisions of those contracts would not apply." TAC ¶ 62.

Defendants argue that Plaintiffs' claim "makes no sense" because the ATP would never apply and there was nothing to avoid. Mot. at 10:7-11:3. Thus, any transfer of rights would not have any effect on the imputed license fee or Plaintiffs' profit participation. The Court addressed the application of the ATP to the purported transfer of rights between AMC Network and AMC Studios in its Statement of Decision under the heading "The Transfer Of Rights From AMC Network To AMCFH Does Not Trigger Application Of The ATP And Override The Imputed License Fee." SOD at 39.

In opposition, Plaintiffs contend "implied covenant claims—where one party structures a transaction to avoid a contractual provision—are well recognized by New York courts." Opp. at 14:25-26. Plaintiffs cite Wilson v. Mechanical Orguinette Co., 170 N.Y. 542 (1902) in which the court found a defendant was precluded by the implied covenant of good faith and fair dealing from avoiding the payment of royalties after it merged its company with another. Plaintiffs also cite Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc., 97 A.D.3d 781 (N.Y. App. Div. 2012) in which the court found allegations that a wholesale milk dealer who stopped selling plaintiff's milk to Starbucks pursuant to the parties' exclusive contract, and instead started delivering milk from other processors to Starbucks, were sufficient to state a claim for breach of the implied covenant of good faith and fair dealing. Specifically, the defendant allegedly converted its milk distribution business, covered by the exclusive contract, into a milk delivery business, thereby diverting business away from the plaintiff to different processors. Id. at 784. Finally, Plaintiffs cite Pernet v. Peabody Engineering Corp., 20 A.D.2d 781 (N.Y. App. Div. 1964) in which the

court held allegations that a parent company caused a subsidiary to declare bankruptcy to avoid plaintiff's rights under the contract were sufficient to state a claim for breach of the implied covenant of good faith and fair dealing.

Plaintiffs further contend Defendants' reliance on the Court's Statement of Decision is misplaced because Defendants' actions "specifically to deprive the Plaintiffs of the benefit of the ATP is a question of fact unrelated to the contract interpretation issues tried in the mini-trial." Opp. at 15:9-11. Thus, Plaintiffs argue, Defendants' "attempt to stretch the statement of decision's reasoning, based on the facts presented for the purpose of contract interpretation, to cover how the Court should decide factual issues attendant to the implied covenant claim exceeds both what can be decided on demurrer and the scope of Plaintiffs' waiver of their right to a jury trial." Id. at 15: 17-20.

The Court does not find Plaintiffs' arguments persuasive. Defendants' argument does not invade Plaintiffs' right to a jury trial or improperly extend the Court's Statement of Decision. Rather Defendants argue, based upon the Court's interpretation of the relevant contract terms, Defendants' alleged conduct did not deprive Plaintiffs of anything and therefore Plaintiffs implied covenant claim fails. See Reply at 4:8-9 ("AMC did not need to 'structure[]' anything to ensure the ATP would not apply to the imputed license fee because the ATP never applies to the imputed license fee."). The Court agrees. The Court's Statement of Decision expressly found that the ATP does not govern the calculation of MAGR for AMC Network's exhibition of The Walking Dead on its own channel. SOD at 35-44; Kirkman, supra, 2020 WL 4364279, at *19-24. The implied covenant of good faith and fair dealing protects against conduct "that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Aventine, supra, 265 A.D.2d at 513–514. The Court's Statement of Decision found Plaintiffs have no contractual right to apply the ATP in the manner asserted. Accordingly, any alleged conduct by Defendants to avoid the ATP in structuring its transaction, did not deprive Plaintiff of any benefits under the agreement.

At the hearing, Defendants extensively argued for the first time that it was unclear how Plaintiffs would prove their damages and what a permissible measure of damages would be if the implied covenant clam survives. Defendants expressed concern that the damages sought could improperly negate the Court's findings in the Statement of Decision. However, this is an argument more appropriate for summary judgment or trial. An allegation of damages is all that is required at the pleading stage to survive a demurrer. See e.g. Domino v. Mobley, 144 Cal. App. 2d 24, 30 (1956) ("Whether the correct measure of damages is pleaded is not important in the face of a general demurrer."); Hartzell v. Myall, 115 Cal. App. 2d 670, 677–678 (1953)

("Damages constitute the relief which the law affords for the invasion of the right and the extent of the relief depends upon the proof, the relief being limited by the measure of the damage which the law prescribed. This measure need not be pleaded, nor is the plaintiff required to state in his pleading the manner in which he computes the amount of the damages which he demands.").

The demurrer is SUSTAINED without leave to amend as to the second claim for breach of the implied covenant of good faith and fair dealing based upon the ATP. Defendants' request to strike the related allegations in paragraph 111 is GRANTED.

2. Inducing Breach of Contract – Fourth Cause of Action.

Under New York law, "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 424 (1996). Under California law, "[t]he elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990).

The existence of a choice of law clause in the parties' contract is insufficient to establish the applicability of New York law to this claim. Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc., 414 F.3d 325, 335 (2d Cir. 2005) ("Under New York law, then, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract, even when the contract also includes a broader forum-selection clause."). Accordingly, the Court would still engage in a choice of law analysis to determine which law applies to the tort claims. Tucci v. Club Mediterranee, S.A., 89 Cal.App.4th 180, 188 (2001) ("When it is the forum, California resolves choice-of-law questions in disputes arising out of a tort using the 'governmental interest analysis,' which balances the interests of the involved states and parties."). "This governmental interest analysis involves three steps. (1) The court determines whether the foreign law differs from that of the forum. (2) If there is a difference, the court examines each jurisdiction's interest in the application of its own law to determine whether a 'true conflict' exists. [Citation] When both jurisdictions have a legitimate interest in the application of its rule of decision, (3) the court analyzes the comparative

impairment of the interested jurisdictions. [Citation] The court applies the law of the state whose interest would be the more impaired if its law were not applied." Id. at 189 (quotations omitted).

Defendants do not argue that the TAC fails to allege the above elements of the fourth cause of action under either New York or California law. Mot. at 14:20-15:21. Rather, Defendants argue the fourth cause of action is barred by the economic interest defense between a parent and subsidiary, which exists under New York law only. Foster v. Churchill, 87 N.Y.2d 744, 750 (1996) ("economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality."); Asahi Kasei Pharma Corp. v. Actelion Ltd., 222 Cal. App. 4th 945, 962 (2013) ("But the California courts have not recognized a corporate owner's absolute privilege to interfere with its subsidiary's contract."). Thus, it is clear that California and New York law conflict on this issue.

Plaintiffs are all California residents and California-based entities. TAC ¶¶ 5-15. Defendants regularly conduct business in California. TAC ¶ 18. The agreements "were largely negotiated and substantially performed by Plaintiffs in Los Angeles County" and "Plaintiffs' injuries arising from Defendants' wrongdoing largely occurred in Los Angeles County." TAC ¶ 27. Defendant's "Senior Vice President of Business Affairs, Marci Wiseman, "who oversaw the details of the series' creation and day-to-day operations" was based in California. TAC ¶ 18. Wiseman is alleged to have engaged in the tortious conduct on behalf of Defendant. TAC ¶ 110. Defendants' principal places of business are in New York. TAC ¶¶ 18-20.

Defendants' contend New York has the greatest interest in this dispute noting Defendants are headquartered in New York and their agreement applied New York law. Mot. at 14:28-15:3. Defendants cite Abogados v. AT&T, Inc., 223 F.3d 932 (9th Cir. 2000), which weighs against the application of New York law here. In Abogados, the plaintiffs asserted a tortious interference claim against AT&T in California and addressed whether the laws of New York or Mexico applied to the claim. The court found:

The complained-of conduct in this case took place primarily, if not entirely, in the foreign jurisdiction, Mexico. While some decisions may have been made in the United States, they were carried out in Mexico. A Mexican notary public revoked Coufal's power of attorney in Mexico. The legal services contract with which appellees allegedly interfered was a Mexican contract, governed by Mexican law, to be performed completely in Mexico.

Abogados, supra, 223 F.3d at 935. Thus, "[i]t is nonsensical to suggest that Mexico has no interest in regulating conduct that affects contracts made in Mexico." Ibid. The court then

rejected plaintiffs' contention that New York law should apply because AT&T was incorporated in New York. Id. at 936 ("Coufal has not pointed to any activities that occurred in New York. . . . The only reason behind Coufal's assertion that New York law should apply appears to be that AT & T's state of incorporation is New York. He argues that New York has an interest in regulating its resident corporations' conduct. However, a company's contacts with a state that are not significantly related to the cause of action at issue are an insufficient basis for the application of that state's law.") In this case, based upon the allegations in the TAC, all of the relevant conduct occurred in California, not New York, and Defendants' contention that New York law should apply is similarly based upon Defendants' location.

Defendants also cite Ortho-Med, Inc. v. Micro-Aire Surgical Instruments, Inc., 1995 WL 293180, at *8 (C.D. Cal., Apr. 10, 1995), which similarly does not aid Defendants here. In Ortho-Med the court found the "Ortho-Med is a Florida corporation with its principal place of business in Florida. The alleged tort occurred in Florida, where Ortho-Med's customers reside. Florida has the greater interest in protecting its citizens from tortious conduct in Florida. Finally, Florida law requires a plaintiff to prove more than California law, and the Ninth Circuit has cautioned against 'undercutting the efficacy' of other states' laws by allowing litigants to avoid its requirements by choosing a different forum." Thus, the court found the home state of the plaintiff had the greater interest in connection with alleged torts committed within its borders. Ibid. See also Abogados, supra, 223 F.3d at 935 ("Although the situs of the injury is no longer the sole consideration in California choice-of-law analysis, California courts have held that, 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.'") quoting Hernandez v. Burger, 102 Cal.App.3d 795, 802 (1980).

Defendants contend applying California law would undercut the efficacy of New York's economic interest defense. The court in Ortho-Med cited Engel v. CBS Inc., 981 F.2d 1076, 1082 (9th Cir. 1992) in support of this statement. The court in Engel addressed a malicious prosecution claim brought by a California resident against a New York resident. The court found New York law should apply based upon the following:

The prosecution complained of by Engel was instituted in New York by a New York corporation (CBS) to enforce a New York contract that expressly provided that it would be governed by New York law. Engel is a member of the New York Bar, practices law in New York, and represented Scholz in the New York action. The cause of action upon which the malicious prosecution claim is based was filed and litigated in New York. New York law restricts relief for malicious prosecution by requiring special-injury. If New York litigants can avoid this requirement, and successfully sue other New York litigants for malicious prosecution by choosing a different

forum then the efficacy of New York's special-injury requirement will be undercut.

Engel, supra, 981 F.2d at 1081–1082. As in Abogados, all of the relevant conduct in Ortho-Med and Engel took place in a state other than California. The court in Engel expressed concern that "[i]f a plaintiff can circumvent this [special-injury] requirement by filing his or her claim in a different forum, New York's policy of limiting malicious prosecution actions, based on New York litigation, will be seriously impaired." Id. at 1082. The conduct here is alleged to have occurred in California, not New York.

"California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders [Citation] and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 97–98 (2010). California has a materially greater interest in ensuring that its residents are compensated for torts committed against them in California than New York has in ensuring corporations are shielded from liability for torts committed in other states, particularly where, as here, the New York corporations conduct substantial business in California. California's interest would be more seriously impaired if its laws were not applied. The Court finds California law applies to Plaintiffs' tort claim and Defendants' demurrer to the fourth cause of action based upon the application of New York's economic interest defense is OVERRULED.

C. Motion to Strike.

1. Footnote 1 on Page 22 of the TAC is Properly Stricken.

Defendants move to strike footnote 1 on page 22 of the TAC on the ground that it constitutes an improper attempt to revive the superseded complaints. Mot. at 11:11-12:10. The footnote provides:

Plaintiffs' prior complaints alleged that their contracts with AMC did not allow AMC to unilaterally impose a MAGR definition without good faith negotiation and that their contracts required AMC to use an actual license fee between AMC Studio and AMC Network to govern the airing of The Walking Dead on AMC Network. By failing to comply with those provisions, Plaintiffs alleged that AMC breached their contracts. Plaintiffs also alleged that AMC's implied license fee breached the affiliated transaction provision of their contracts because it was not a

fair market value and because it was not on comparable terms with similar transactions. The Court's statement of decision and opinion on Defendants' demurrer forecloses Plaintiffs from further pursuing those claims at this time. Although Plaintiffs reserve their rights to appeal those rulings on these and other issues, the causes of action alleged herein presume the propriety of the Court's decision. Because their implied covenant claims rely on allegations contrary to the facts underlying their previously pled breach of contract claims which are now preserved for appeal, they are pled in the alternative.

TAC at 22 n.1. Defendants contend Plaintiffs cannot reserve their rights to appeal because the TAC replaced the Second Amended Complaint citing Grell v. Laci Le Beau Corp., 73 Cal. App. 4th 1300, 1303 (1999). Plaintiffs contend "footnote 1 does not seek to preserve dismissed claims for trial, but simply notes that the Court's prior orders dismissing Plaintiffs' claims without leave to amend are reviewable on appeal" and argues Defendants are incorrect regarding the appealability of this Court's orders. Opp. at 19:5-8. The parties' arguments are misdirected as the Court of Appeal, not this Court, determines whether Plaintiffs' claims are the proper subject of an appeal.

However, the footnote is clearly "irrelevant matter" within the meaning of Code of Civil Procedure section 436(a) as Plaintiffs concede it is not an essential allegation to the claims in the TAC. See Code Civ. Proc. § 431.10 ("(b) An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense. . . . (c) An 'immaterial allegation' means 'irrelevant matter' as that term is used in Section 436."). The motion to strike footnote 1 is GRANTED.

2. The Alleged New Audit Claims Are Not New.

Defendants also contend Plaintiffs have added a new audit claim regarding Starz and Fox International's retention of revenue from distributing The Walking Dead and Fear the Walking Dead in paragraphs 67 and 87 of the TAC. Dem. at 12:11-13:8. Paragraph 67 alleges "AMC also allowed Starz and Fox International to retain a significant portion of the revenue from distributing The Walking Dead and then deducted that revenue on Plaintiffs' profit participation statements. Nothing in Plaintiffs' agreements or AMC's MAGR definition allow AMC to withhold this revenue from the calculation of MAGR." TAC ¶ 67. Paragraph 87 similarly alleges "AMC Studios allowed Starz to retain a portion of the revenue from distributing Fear and then deducted that revenue on Plaintiffs' profit participation statements. Nothing in Plaintiffs' agreements or AMC's MAGR definition allow AMC to withhold this revenue from the calculation of MAGR." TAC ¶ 87.

As argued by Plaintiffs, these allegations are not new. The Second Amended Complaint alleged the same retention based allegations. Opp. at 18:1-8. See SAC ¶ 107(c)(i) ("Starz retains a 15% share of the Adjusted Gross Receipts which is not reported on Plaintiffs' TWD MAGR statements. None of Plaintiffs' TWD Agreements allow AMC to deduct the additional 15% share of Adjusted Gross Receipts retained by Starz"); SAC ¶ 107(c)(ii) ("FIC retains a 30-50% share of the net receipts which is not reported on Plaintiffs' TWD MAGR statements. None of Plaintiffs' TWD Agreements allow AMC to deduct the additional 30-50% share of net receipts retained by FIC."); SAC ¶ 129(b)(i) ("Starz retains a 2.5% share of the net receipts which is not reported on Plaintiffs' FTWD MAGR statements. None of Plaintiffs' FTWD Agreements allow AMC to deduct the additional 2.5% share of the net receipts retained by Starz."). Paragraphs 67 and 87 of the TAC are merely restated versions of these paragraphs of the SAC.

Accordingly, Defendants' request to strike these allegations is procedurally barred. Code Civ. Proc. § 435.5(b) ("A party moving to strike a pleading that has been amended after a motion to strike an earlier version of the pleading was granted shall not move to strike any portion of the pleadings on grounds that could have been raised by a motion to strike as to the earlier version of the pleading."). Defendants' request in reply that the Court treat its motion to strike as a motion for judgment on the pleadings is misplaced. Reply at 7:8-8:1. A motion for judgment on the pleadings must dispose of an entire cause of action, which would not be accomplished by the negating the allegations in paragraphs 67 and 87. Code Civ. Proc. § 438(c)(3)(ii); Heredia v. Farmers Ins. Exchange, 228 Cal. App. 3d 1345, 1358 (1991).

The motion to strike paragraphs 67 and 87 from the TAC is DENIED.

3. Punitive Damages Allegations Are Sufficient.

Finally, Defendants contend the TAC fails to adequately plead malice to support a claim for punitive damages and therefore seeks to strike paragraphs 115 and 116(c) of the TAC. Mot. at 3:14-28; 13:9-14:19. Plaintiffs similarly argue the previous complaints asserted a request for punitive damages and Defendants did not specifically move to strike those allegations. Defendants' contention that its motion as to the punitive damages "could be construed as a motion for judgment on the pleadings," Reply at 8 n.4, is unpersuasive because punitive damages are not a "cause of action" and therefore are not the proper subject of a motion for judgment on the pleadings. See generally 569 East County Boulevard LLC v. Backcountry Against the Dump, Inc., 6 Cal. App. 5th 426, 430 n.3 (2016) ("In California, it is settled there is no separate cause of action for punitive damages. [Citation] Instead a claim for punitive damages is merely an

additional remedy that is dependent on a viable cause of action for an underlying tort."). Upon further consideration, including Defendants' argument at the hearing, the Court is not inclined to deny Defendants' motion as to punitive damages on procedural grounds. Defendants successfully challenged all of Plaintiffs' tort claims during the previous pleading challenge, thereby rendering a separate challenge to the individual punitive damages allegations superfluous.

The Court previously found the allegations of malice sufficient in its April 14, 2021 order. "Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Civ. Code § 3294(c)(1). "Pleading in the language of the statute is not objectionable when sufficient facts are alleged to support the allegation." Perkins v. Superior Court, 117 Cal. App. 3d 1, 6-7 (1981). As argued by Plaintiffs, the TAC alleges sufficient facts demonstrating Defendants acted with an intent to injure Plaintiffs and in conscious disregard of their rights. TAC ¶¶ 55, 110, 112-115. Specifically, AMC Parent allegedly was fully aware of Plaintiffs' contractual rights, yet interfered with their contracts by dictating and requiring AMC Studios to breach its contracts. These actions were done "intentionally, fraudulently, without justification and in their own self-interest, with malice and oppression, and in conscious disregard of Plaintiffs' rights." TAC ¶ 115; Perkins, supra, 117 Cal. App. 3d at 6 ("Taken in context, the words 'wrongfully and intentionally' . . . describe a knowing and deliberate state of mind from which a conscious, disregard of petitioner's rights might be inferred-a state of mind which would sustain an award of punitive damages."). The motion to strike paragraphs 115 and 116(c) is DENIED.

Conclusion

Defendants' motion to strike is GRANTED without leave to amend as to footnote 1 on page 22 of the TAC as well as paragraph 111. The motion is otherwise DENIED.

The demurrer is SUSTAINED without leave to amend as to the second claim for breach of the implied covenant of good faith and fair dealing based upon the ATP and otherwise OVERRULED.

Defendants shall have 20 days to answer the Third Amended Complaint.

The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.

BC672124 July 27, 2021
ROBERT KIRKMAN ET AL VS AMC FILM HOLDINGS LLC ET AL 10:07 AM

Judge: Honorable Daniel J. Buckley
Judicial Assistant: S. Chung
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None