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Superior Court of California
County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk
By _____ Deputy
Stephanie Chung

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROBERT KIRKMAN, et al.,

Plaintiff,

v.

AMC FILM HOLDINGS LLC, et al.,

Defendants.

LASC Case No: BC672124

STATEMENT OF DECISION

Judge Daniel J. Buckley
Department 1

INTRODUCTION

This is a contract dispute between Plaintiffs Robert Kirkman, David Alpert, and Gale Anne Hurd (collectively, "Plaintiffs"), on the one hand, and AMC Film Holdings, LLC ("AMCFH"), AMC Network Entertainment, LLC ("AMC Network"), and AMC Networks Inc. ("AMC Inc.," and, collectively with AMCFH and AMC Network, "AMC" or "Defendants"), on the other. (There also are alleged disputes between AMC and Plaintiffs Charles Eglee and Glen Mazzara. The parties agreed, however, that this phase of the case would focus on Kirkman, Alpert, and Hurd.) Defendants produce and broadcast the television shows *The Walking Dead*, *Fear the Walking Dead*, and *Talking Dead* on the AMC channel. Plaintiff Kirkman is the creator of *The Walking Dead* comic books, and he and the other two Plaintiffs are executive producers of *The Walking Dead* and *Fear the Walking Dead* and consulting producers of *Talking Dead*.

Plaintiffs allege Defendants breached contracts between the parties regarding these shows. The Court conducted a bench trial to interpret key provisions of the parties' contracts, particularly provisions related to AMC's calculation and payment of "contingent" compensation to Plaintiffs. Contingent compensation (also commonly called "profit participation") is calculated as a percentage of a show's contractually defined "profits." Because this compensation becomes available only if a show is sufficiently profitable, this type of compensation is "contingent" on a show's success.

In this case, Plaintiffs argue that Defendants have improperly calculated the contingent compensation to which Plaintiffs are contractually entitled. Defendants respond they have accurately calculated and paid contingent compensation pursuant to the terms of the parties' agreements. Defendants say Plaintiffs—who vigorously negotiated the terms of their contracts, including their contingent compensation terms—are asking the Court to rewrite their agreements and award them greater compensation than required by the agreements.

The contracts also provide that Plaintiffs will receive "fixed" compensation for their work, in the form of guaranteed per-episode fees enumerated in the contracts, and, in Kirkman's case, up-front payments for the rights to his graphic novels. In this lawsuit, Plaintiffs do not complain about Defendants' payment of their fixed compensation.

The contingent compensation terms at the heart of this case were thoroughly negotiated and this is not a case where one party imposed contract terms on the other. Plaintiffs were represented by sophisticated and experienced talent lawyers who negotiated at length with AMC about the parties' respective rights and obligations with respect to *The Walking Dead*. Discussions regarding compensation were the centerpiece of the parties' negotiations before Plaintiffs executed their *The Walking Dead* agreements. The agreements included numerous and detailed provisions regarding compensation, including an entire separate section devoted specifically to and entitled "Contingent Compensation." (In Alpert's and Hurd's contracts, this section is entitled "Contingent Participation.") In these sections of their contracts, each Plaintiff agreed that his or her contingent compensation would be calculated as a percentage of what is

known as "modified adjusted gross receipts" or "MAGR." MAGR is a pool of certain revenues or "receipts" associated with a show, less certain expenses associated with that show. The receipts that go into MAGR and expenses that come out of MAGR are typically set forth in a document known as a MAGR "definition."

In their contracts, Plaintiffs agreed that "MAGR ***shall*** be defined" using AMC's standard MAGR "definition"—provided, however, that the definition must include certain MAGR terms negotiated for and specified in the parties' contracts.

Plaintiffs now challenge AMC's use of its MAGR definition to calculate Plaintiffs' contingent compensation for *The Walking Dead* and *Fear the Walking Dead*. More specifically, Plaintiffs argue AMC cannot use its MAGR definition to calculate the MAGR paid in connection with AMC's exhibition of the shows on AMC's own channel. AMC's standard MAGR definition provides that the MAGR derived from the telecast of the shows on the AMC channel is to be calculated using an "imputed license fee"—a set amount of money added to the MAGR pool for each episode of a show that AMC creates and broadcasts on its own channel. For the past nine years, AMC has calculated the MAGR attributable to its broadcast of *The Walking Dead* and *Fear the Walking Dead* on the AMC channel by using that "imputed license fee" in the MAGR Definition.

AMC's MAGR definition specified that "[a]s the license fee payable for the right to broadcast [*The Walking Dead*] 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**')," set to equal 65% of the production costs of the series, up to a per-episode cap (set at $1,450,000 per hour-long episode), increasing 5% each season. Ex. 9 at 6; Ex. 129 at 127; Ex. 2027 at 27 (emphasis in original). The MAGR definition also specified that Gross Receipts would include: (1) all fees received from *other* television broadcasts of the show (i.e., other than AMC's broadcast on its channel); (2) revenues received from home video distribution; and (3) "[a]ll other revenues" received from a variety of sources, including merchandising and the licensing of film rights. Ex. 9 at 6-7; Ex.

129 at 27-28; Ex. 2027 at 27-28. AMC's MAGR definition also provided the detailed formula for how MAGR would be calculated, specifying the distribution fees, charges, and production costs that would be deducted from the Gross Receipts. Ex. 9 at 8-12; Ex. 129 at 29-33; Ex. 2027 at 28-33.

Plaintiffs contend AMC's written MAGR definition and the imputed license fee in that definition are unenforceable. They say AMC cannot use the imputed license fee because the MAGR definition containing the imputed license fee was provided to Plaintiffs after they signed their *The Walking Dead* contracts. Plaintiffs argue that the Court should not enforce that MAGR definition, and instead should impose a new and different MAGR definition by looking to industry custom and practice and other provisions of the parties' contracts.

Defendants respond that the parties' agreements expressly state that AMC's MAGR definition is binding. Defendants argue that the parties agreed in their *The Walking Dead* contracts that AMC's MAGR definition "shall" govern the calculation of MAGR, subject to specific MAGR terms (such as the inclusion of home video revenue in MAGR) for which Plaintiffs separately bargained. Therefore, Defendants contend, the terms of AMC's MAGR definition govern, including the MAGR definition's imputed license fee.

Upon consideration of the contracts, the record, the parties' arguments, and the law, Defendants' position is correct.

This case must be decided based on the plain terms of the agreements and New York contract law. All of the relevant contractual provisions are unambiguous and demonstrate that AMC's MAGR definition is binding. Even if extrinsic evidence is considered, it supports Defendants' interpretation of the contracts.

The agreements state that MAGR "shall be defined" pursuant to AMC's "standard definition" of MAGR, "provided, however, that" each Plaintiff receives the benefit of certain MAGR terms specified in their contracts.[1] The meaning of this contract language is clear and

[1] This quoted language is from Kirkman's *The Walking Dead* Agreement. The language in Alpert's and Hurd's contracts differs slightly, but the effect is the same: "MAGR shall be defined, computed and paid by

unambiguous: Plaintiffs bargained for and received certain MAGR terms, and in exchange agreed that AMC "shall" have the right to define the balance of MAGR.

Plaintiffs argue the parties merely agreed to negotiate the balance of the MAGR terms at some unspecified, future date. This reading contradicts the plain terms of the agreements. The agreements do not state that MAGR shall be defined after some future agreement; they expressly state that AMC's MAGR definition "shall" be binding. The Court cannot rewrite the parties' contracts or treat their agreement that "MAGR *shall* be defined" by AMC as if it were meaningless.

Plaintiffs' reading of the contracts would also render them unenforceable. Under New York law, an "agreement to agree" does not create a binding obligation, yet that is what Plaintiffs ask. According to Plaintiffs' expert witness, the parties did not "have a complete agreement" on the MAGR definition terms at the time of contracting, and instead "ha[d] to strive to get that complete agreement" through future negotiations. 2/11/20 Trial Tr. 11:21-23 (Ziffren). If Plaintiffs' interpretation is correct, there would be no operative MAGR definition at all. This would render the contracts unenforceable, and defeat Plaintiffs' claims in this case, which are predicated on a breach of the MAGR requirements in the contracts.

RULINGS

The Court pushed the parties to litigate the disputed issues of contract interpretation before jumping into a protracted, complicated jury trial. The parties determined seven disputes regarding contract interpretation should be decided by the Court. Each issue is discussed below with the pertinent factual findings and law provided in each section. The decisions on these

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[AMC] in accordance with [AMC]'s MAGR definition," which, "for purposes of the calculation of Artist's participation hereunder . . . shall" contain certain specific terms. Exs. 3, 4 § 4(d)(ii).

seven issues do not need a copious recitation of the facts relating to backgrounds, relationships, motivations, negotiations, conflicts and communications.

Plaintiffs ignored the Court's instruction to assert objections to declaration testimony within the proposed Statement of Decision and only as to material testimony. The Court will not provide rulings on the individual objections in the 162-page document entitled "Plaintiffs Objections to Defendants' Direct Testimony Declarations." If the Court cites to such testimony, the objection is overruled.

Both sides raised objections to certain exhibits or portions of exhibits. All objections are overruled although the Court does not necessarily find that these exhibits had much evidentiary value. All redactions in these documents are to be maintained.

Both sides offered opinion testimony regarding custom and practice in the television industry from lay witnesses who had not been offered as experts and then turned around to object to some of the testimony proffered by the adversary. Again, while one may question the value of some, if not much, of that testimony, the objections are overruled.

Plaintiffs asked Kenneth Ziffren, an undoubtedly renowned expert on entertainment law, to express various opinions. The Court cannot consider those portions of Ziffren's testimony which purport to interpret the meaning of the contracts themselves. It is well settled that "the meaning of [a] [contract] is a question of law about which expert opinion testimony is inappropriate." *Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1100 (1995). That is because "[t]he interpretation of a[] . . . contract, as with that of any written instrument, is primarily a judicial function." *Id.*; *see also In re Tobacco Cases I*, 186 Cal. App. 4th 42, 51 (2010) ("[T]he interpretation of contractual language is a legal matter for the court."). Thus, courts in this State have long found "[e]xpert opinion on the legal interpretation of contracts . . . to be inadmissible." *Summers v. A.L. Gilbert Co.*. 69 Cal. App. 4th 1155, 1180 (1999); *see also*

Schaffter v. Creative Capital Leasing Grp., LLC, 166 Cal. App. 4th 745, 752 n.2 (2008) ("Expert opinion on contract interpretation is usually inadmissible."). The Court thus does not consider Ziffren's testimony about the meaning of the contracts at issue. *See, e.g.*, Ziffren Decl. ¶ 46(b) (Ziffren's interpretation of the meaning of the term "initial license fee"); *id.* ¶ 84 (purporting to interpret whether a term effects "the right to negotiate"); *id.* ¶ 49 (offering several pages of impermissible opinion testimony about the meaning of Paragraph 24 of Kirkman's *The Walking Dead* contract).

A. Issue #2: Whether What Plaintiffs Call AMC's Proposed MAGR Definitions And Defendants Call The MAGR Definitions Govern The Calculation, Reporting, And Payment Of MAGR Under Plaintiffs' *The Walking Dead* And *Fear The Walking Dead* Agreements?[2]

This is the threshold and controlling issue in this case. If the AMC MAGR definition controls, its imputed license fee for AMC Network's exhibition of the shows on AMC's channel controls as well—which resolves Issue #1 (whether an imputed license fee is allowed at all), Issue #3 (whether the *Fear the Walking Dead* agreements also demonstrate that the imputed license fee applies), Issue #4 (whether the ATP, *instead* of the imputed license fee, determines what MAGR receipts are attributable to AMC's exhibition of the shows on the AMC channel), and Issue #5 (whether the imputed license fee applies to Hurd).

Because AMC had never previously produced a show in-house, The Walking Dead was the first show that used its standard MAGR definition. The definition was drafted in the months prior to March of 2011, as AMC and its counsel devised a "market-comparable M.A.G.R. definition" that could be used in The Walking Dead and in future AMC shows. 2/18/20 Trial Tr. 206:4-10 (Arar). That standard definition is still in use by AMC, "10 years later." Id. at 206:8-10 ("[T]hat is the definition that they used then and here we are 10 years

[2] The parties have used slightly different phraseology to characterize the issues, although they appeared to agree on the language when the issues were first given to the Court. The differences are largely immaterial—however phrased, the key issue is whether AMC's MAGR definition controls, and it does.

later and they still use it."). This standard definition has now been used in at least "dozens, if not hundreds, of deals" with profit participants. Id. at 206:11-12. As AMC's transactional counsel explained, "it's their standard definition for everybody." Id. at 206:19-20.

1. The Parties Agreed That AMC's MAGR Definition "Shall" Control.

In their contracts, all three Plaintiffs agreed that "MAGR ***shall be defined***, computed, accounted for and paid in accordance" with AMC's MAGR definition. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b) (emphasis added); Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii). The meaning of this provision is unambiguous: AMC's definition of MAGR *must* be used to define, compute, account for, and pay MAGR. *N.Y. State Elec. & Gas Corp. v. Aasen*, 157 A.D.2d 965, 968 (3d Dep't 1990) (the word "shall" is "mandatory"); *Stop & Shop Cos., Inc. v. Assessor of City of New Rochelle*, 924 N.Y.S.2d 766, 771 (Sup. Ct. Westchester Cty. 2011) (contract's "use of the mandatory words 'shall'" confers an "unfettered right"); SHALL, Black's Law Dictionary (11th ed. 2019) ("Shall" means "is required to"). That resolves this issue: "shall" means "shall," and AMC's MAGR definition is controlling.

Plaintiffs argue that it would be unfair or unreasonable to find they agreed to be bound by a MAGR definition they had not seen or negotiated, but this argument is contradicted by the law, the express terms and structure of the contracts, and common sense.

The agreements are clear that AMC "shall" have authority to define MAGR, and Plaintiffs' fairness arguments are thus foreclosed by the express terms of the parties' contracts. *See Greenfield*, 98 N.Y.2d 569-70 ("[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity."). These contracts are readily enforceable—New York courts routinely uphold the right of one party to a contract to fix a material price term in the future. In *Arbitron, Inc. v. Tralyn Broadcasting, Inc.*, 400 F.3d 130 (2d Cir. 2005), for example, the court held that a license

agreement for radio ratings information gave the licensor the unilateral right to change the license fee, subject only to the requirement that the licensor abide by the "duty of fair dealing under New York law." *Id.* at 138-40 (citing *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475 (1989)). And in *Cordell v. McGraw-Hill Companies, Inc.*, 2012 WL 5264844 (S.D.N.Y. Oct. 23, 2012), *aff'd*, 525 F. App'x 22 (2d Cir. 2013), the court held that the parties lawfully agreed that a publisher could sell the plaintiffs' books at the price "it shall deem suitable." *Id.* at *3; *see also id.* at *4 ("Cordell's contention that McGraw-Hill had the implicit obligation to sell the works at fair market value—irrespective of what McGraw-Hill deemed suitable—would imply a term inconsistent with the express terms of the Agreement."). Similarly, here, Plaintiffs agreed that AMC "shall" have the right to define MAGR, and this express contractual agreement should be enforced according to its terms. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b).

In any event, Plaintiffs' bargain was not unfair or unreasonable. Plaintiffs agreed to grant AMC authority to define MAGR only after securing numerous provisions in the agreement that strengthened their contingent compensation rights and limited AMC's authority.

First, Plaintiffs bargained for—and received—specific MAGR protections in their *The Walking Dead* contracts that they considered important. For example, Kirkman negotiated that "MAGR shall include home video/DVD and merchandising" and that "[n]o network sales fee" would be deducted from the show's initial license fee. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *see also* Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii) (capping "distribution fees" and the "administrative overhead charge" charged against MAGR); Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii) (prohibiting the charge of a "studio supervisory fee" against MAGR and certain "overhead" charges). Plaintiffs granted AMC Network a broad right to set a "standard definition" of MAGR, "*provided, however*, that" the definition would include the MAGR terms that Plaintiffs individually negotiated. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b) (emphasis added); *see also* Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii) ("AMC's MAGR definition shall include the following terms and conditions . . . ."); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii) (including similar term).

Where, as here, a contract states that one party shall have the right to later set a term, a "provided that" clause constrains that authority and imposes certain limitations. *Cent. Sch. Dist. No. 1 of Towns of Dewitt v. Litz*, 1969 WL 10979, at *1 & n.1 (Sup. Ct. Onondaga Cty. Oct. 16, 1969) (contract's use of "provided that" following a "shall" provision imposed a "limit" and "state[d] [a] legal duty"). All three Plaintiffs secured such specific limitations on AMC Network's right to define MAGR. Plaintiffs thus used the "provided, however, that" clause in their contracts to constrain AMC Network's authority—while also confirming that AMC Network's authority was essentially unbounded *except* as set forth in the proviso. *See, e.g.*, *Safka Holdings LLC v. iPlay, Inc.*, 42 F. Supp. 3d 488, 494-95 (S.D.N.Y. 2013) (contract that gave defendant the right to withhold approval of plaintiffs' use of certain materials, "*except* to the exten[t] such failure or refusal is a result of fraud," gave defendant nearly the unbounded right to withhold approval, limited *only* by its agreement not to practice "fraud or willful misconduct" (emphasis added)); *Litz*, 1969 WL 10979, at *1 & n.1 ("provided that" clause "limit[ed]" arbitrator's power, but *only* in the ways expressly stated in the clause). Based on these clear contract terms, AMC Network was free to exercise its right to define MAGR so long as it complied with the MAGR protections negotiated by and agreed to by the parties in the "provided, however, that" clause of their *The Walking Dead* agreements.

Second, Plaintiffs bargained for and received the protection of an MFN provision, ensuring that they would receive the benefit of any more "favorable" MAGR terms obtained by any other *The Walking Dead* profit participant in the future. *E.g.*, Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b)(ii). Plaintiffs' negotiators acknowledged the value of these MFN protections, and that they were of prime importance during the negotiations of the contingent compensation terms in Plaintiffs' *The Walking Dead* Agreements. *See, e.g.*, 2/11/20 Trial Tr. 132:14-17 (Rosenbaum). That is because, as Plaintiffs' negotiators testified, the MFN provisions provided Plaintiffs with a "safety net"—i.e., the security that the Plaintiffs' MAGR terms would be the very best terms received by any other participant on the series. *See* 2/13/20 Trial Tr. 126:3-19 (Rosenman); 2/14/20 Trial Tr. 124:27-125:5 (Nochimson), 187:1-16 (Abramson). Kirkman's

counsel testified at his deposition, read into the record at trial, that once he secured for his client this "M.F.N." and "other protections" in *The Walking Dead* agreement, he was comfortable "advising [his] client to sign an agreement that referenced an M.A.G.R. definition that [he] had never seen." 2/13/20 Trial Tr. 127:8-24 (Rosenman); *see also id.* at 126:16-19.

Third, it defies common sense to credit Plaintiffs' argument that they would not have given AMC the right to define MAGR because AMC could then define MAGR as consisting of nothing at all. AMC expressly agreed it would define MAGR with a "standard definition" of MAGR that it would use throughout its business. AMC could not create some arbitrary, idiosyncratic, and oppressive MAGR definition that it would use only for the purpose of denying profits to Plaintiffs. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *see also* Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii) (mandating the use of "AMC's MAGR definition," not a definition custom-made for Plaintiffs). Had AMC created an oppressive or commercially unreasonable definition for Plaintiffs, it would have been obligated to use that same definition with every other profit participant—an obligation that deterred AMC from implementing such an unreasonable definition in the first place. *Cf.* 2/18/20 Trial Tr. 206:19-207:5 (Arar) (future profit participants would stop dealing with AMC if it used "an unreasonably low standard imputed license fee" in their "standard definition for everybody").

Plaintiffs' bargain—to receive specific MAGR protections that they wanted, rely on an MFN safety net, and otherwise give AMC Network the right to use its "standard" definition to define the rest of the MAGR calculation—should be enforced in accordance with the parties' expressed intent. *Quadrant*, 23 N.Y.3d at 564 ("[U]nder our law where the language of the contract is clear we rely on the terms of the document to give effect to the parties' intent.").

2. The Parties Agreed To Be Bound By AMC's MAGR Definition.

Plaintiffs argue that because AMC's MAGR definition was not attached to Plaintiffs' *The Walking Dead* Agreements or shown to them at the time of contracting, MAGR was effectively left undecided—to be agreed upon by the parties at some future date, after "good faith negotiation."

Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). According to Plaintiffs, they would *never* have agreed to be bound by a MAGR definition they had not yet seen. But that is precisely what Plaintiffs did when they agreed that MAGR "*shall*" be defined by AMC's MAGR definition.

Further, this argument was directly contradicted by one of Plaintiffs' own transactional counsel, who admitted that "this was not the first time in [his] career where [his] clients have signed a deal like this and the MAGR definition was provided later." 2/14/20 Trial Tr. 125:16-19 (Nochimson).

To begin, Plaintiffs' arguments have no support in the text of Alpert's and Hurd's agreements. Those contracts provide that if AMC produces the show, then "MAGR ***shall*** be defined, computed and paid by [AMC Network] in accordance with AMC [Network]'s MAGR definition," *without* any mention of "good faith negotiation." *See* Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii) (emphasis added); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii) (same). The contracts make clear that Alpert and Hurd have no right to engage in "good faith negotiation" over AMC's MAGR definition—a conclusion that is further supported by the fact that their contracts *do* include such a "good faith negotiation" right if the show is produced by a third party. *See* Ex. 4 § 4(d)(i) (providing that if the series "is produced with a third-party supplying producer" then "MAGR shall be defined" by the "standard definition" of that third party, "subject to good faith negotiation"); Ex. 3 § 4(d)(i) (same). "The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings." *NFL Enters. LLC v. Comcast Cable Commc'ns, LLC*, 51 A.D.3d 52, 60-61 (4th Dep't 2008) (language in one term "that is similar, yet not identical" to language in another term demonstrated the parallel terms had different meanings); *Frank B. Hall & Co. of N.Y., Inc. v. Orient Overseas Assocs.*, 48 N.Y.2d 958, 959 (1979) ("The difference in the language of the two [parallel] provisions" dictates that "the parties must be deemed to have intended different meanings."). The presence of a "good faith negotiation" term in the MAGR provisions dealing with a *different* situation—where there is a third-party producer—confirms that the absence of that same language in *this* situation—where

AMC is the producer—was intentional and meaningful. *See also, e.g.*, Wiseman Decl. ¶¶ 43, 45 (decision not to give any good faith negotiation right if AMC produced the show "was a deliberate differentiation").

Kirkman's contract does provide that the MAGR definition is "subject to good faith negotiation." *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). But granting a right of good faith negotiation does not give any party the right to unilaterally disregard or change negotiated and agreed upon terms. It means that the parties must act "in good faith" if they choose to further negotiate a binding contract that was already agreed to. *See Scholastic, Inc. v. Harris*, 1999 WL 1277246, at *7 (S.D.N.Y. Nov. 29, 1999) (applying New York law) ("Although the parties also agreed to negotiate in good faith" this "does not vitiate that which was already agreed."). Here, then, the parties agreed that AMC's MAGR definition "shall" be binding on the parties, and that the parties would negotiate in "good faith" if Kirkman later wanted to seek improvements to that binding MAGR definition. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). This reading is dictated by the plain language of the agreement and gives effect to all of the words in Section 11(b). *See Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 196 (1st Dep't 1995) ("An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation.").

This reading of the plain language of the contracts is also confirmed by the testimony of AMC's negotiators at trial. *See, e.g.*, Arar Decl. ¶ 31 ("'*[S]ubject to* good faith negotiation' did not mean there would be no operative MAGR definition *absent* such negotiation . . . . The exact opposite is true. The language in Section [11](b) says that 'MAGR ***shall*** be defined, computed, accounted for and paid in accordance with the standard definition thereof' (emphasis added). This is intentional and clearly mandatory. It meant that AMC's standard MAGR definition would be binding on Mr. Kirkman. And, unless and until 'good faith negotiation' occurred, AMC's standard MAGR definition would govern. Even if good faith negotiations occurred, AMC's standard MAGR definition necessarily would continue to govern unless and until any changes were agreed upon. I can say without question that is how 'subject to good faith negotiation'

language is intended to work in practice."); 2/18/20 Trial Tr. 116:20-26 (Arar) ("While A.M.C. had the . . . obligation to entertain a negotiation with Mr. Kirkman's representatives over its provisions, as long as they were operating in good faith in saying no to whatever requests were made, . . . the M.A.G.R. definition remains operative as originally tendered."); *id.* at 68:10-11 (explaining that the "subject to good faith negotiation" provision in Section 11(b) of Kirkman's contract "does not negate the mandatory nature of 'shall be defined'"); *id.* at 117:2-6 (describing the "subject to good faith negotiation" provision in Section 11(b) as a "right to request negotiated changes").

Kirkman's counsel never attempted to negotiate that MAGR definition prior to threatening litigation. 2/11/20 Trial Tr. 143:1-10 (Rosenbaum) (Kirkman's counsel admits that "prior to threat of litigation in this case, neither [she] nor [her] partner . . . sought to negotiate in good faith A.M.C.'s M.A.G.R. definition"). The "good faith" language did not give Kirkman an indefinite time to commence or effectuate negotiations.

Plaintiffs argue that the language of Kirkman's MAGR provision should be read as if it stated that "MAGR shall be defined ***by further agreement after*** good faith negotiation," but this is a re-writing of the contract, not an interpretation of it. *See Lui v. Park Ridge at Terryville Ass'n, Inc.*, 196 A.D.2d 579, 581 (2d Dep't 1993) ("A court should not, under the guise of contract interpretation, . . . rewrite the contract."). Plaintiffs' reading would render meaningless the parties' contractual agreement that "MAGR *shall be defined*" by AMC's "standard definition." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b) (emphasis added). Such a reading cannot be adopted, because the contract cannot be interpreted in a way that would leave the agreement that "MAGR shall be defined" by AMC without force or effect. *See, e.g., City of Buffalo City Sch. Dist. v. LPCiminelli, Inc.*, 159 A.D.3d 1468, 1473 (4th Dep't 2018) ("[W]e may not interpret the contract in such a manner as to render any provision meaningless."); *Ruttenberg*, 215 A.D.2d at 196 ("It is a recognized rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect."). The reading argued by Defendants, by contrast, gives effect both to the contractual clause that states "MAGR shall be

defined" by AMC and the clause that states any further negotiation shall be in "good faith."

"[T]he easiest way for a party to make clear an intention not to be bound is to say so," and Plaintiffs easily could have avoided being bound by AMC's MAGR definition by *not* agreeing that it "shall" control. *Scholastic*, 1999 WL 1277246, at *7. But they did agree to that language, and the they cannot be released from the clear bargain they made years ago.

At trial, Plaintiffs' witnesses also contended that AMC was obliged to initiate a negotiation of its MAGR definition once AMC provided Plaintiffs with a copy, or at least was obliged to inform Plaintiffs that AMC believed its definition was binding and operative. *See* Trial Tr. 2/13/20 28:8-19 (Rosenbaum). There is no support for these contentions in the text of the parties' agreements. First, it would be commercially unreasonable for AMC to agree to (1) furnish a MAGR definition, and *then* (2) take on the burden of chasing Plaintiffs so that Plaintiffs could negotiate even better terms for themselves. *See Lipper*, 1 A.D.3d at 171 ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties."). Second, the parties contractually agreed that AMC's MAGR definition "shall" control. *See, e.g.*, Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). AMC did not have an affirmative obligation to remind Plaintiffs of this provision of their agreements or inform Plaintiffs that AMC intended to abide by the provision.

3. Plaintiffs' Argument Would Render Their Contracts Unenforceable.

Plaintiffs' argument that their *The Walking Dead* agreements were merely "agreements to negotiate" about MAGR fails for another reason. It is undisputed that the terms governing the calculation of MAGR are material terms of the agreements. 2/10/20 Trial Tr. 42:25-43:1 (Ziffren) (Plaintiffs' expert testifies that "M.A.G.R. terms" were "material"). Therefore, if Plaintiffs are correct and there was no agreement on MAGR, but rather an agreement to agree on MAGR in the future, then their agreements are missing a material term and are unenforceable. *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981) ("a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable"). The law prohibits an interpretation of agreements which then create unenforceable agreements. *See*

Lee v. Joseph E. Seagram & Sons, Inc., 413 F. Supp. 693, 697-98 (S.D.N.Y. 1976), *aff'd*, 552 F.2d 447 (2d Cir. 1977) ("[T]he law of New York expresses a clear preference for a [contract] construction in favor of validity."); *see also Warden v. E.R. Squibb & Sons, Inc.*, 840 F. Supp. 203, 207 (E.D.N.Y. 1993) ("[I]f there are two reasonable interpretations of an agreement, preference should be given to that which renders the agreement enforceable." (applying New York law)).

As the New York Court of Appeals has explained, "it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin*, 52 N.Y.2d at 109; *Rao v. Verde*, 222 A.D.2d 569, 570 (2d Dep't 1995) (an "agreement to 'negotiate in good faith'" over sale price did not create any sale contract). Here, the definition of MAGR—which is required to calculate Plaintiffs' contingent compensation—is clearly a material term of the contracts. *See, e.g.*, *Gutkowski v. Steinbrenner*, 680 F. Supp. 2d 602, 610 (S.D.N.Y. 2010) ("Price or compensation are material terms in a contract requiring definiteness" to be enforceable under New York law) (collecting cases); *DerOhannesian v. City of Albany*, 110 A.D.3d 1288, 1291 (3d Dep't 2013) ("Price is a material term of a contract."); *Allen v. Robinson*, 2011 WL 5022819, at *6 (S.D.N.Y. Oct. 19, 2011) (under New York law, "compensation" was "a material term of the agreement").

This was confirmed by testimony from both sides at trial. Plaintiffs' expert testified that "M.A.G.R. terms" were "material." 2/10/20 Trial Tr. 42:25-43:1 (Ziffren). (This reference to Ziffren does not open the door to opinions on the interpretation on the contract, but to show Plaintiffs cannot dispute this conclusion.) Defendants' expert was in agreement, testifying that the "M.A.G.R. protections" in Plaintiffs' contracts addressing how "MAGR shall be defined" are "material to parties negotiating profit participation agreements." 3/9/20 Trial Tr. 178:28-179:7 (Sabin). Therefore, if the parties merely agreed to "negotiate in good faith" about the MAGR definition and leave that definition undetermined until a future agreement—as Plaintiffs argue—then there would be no contract. *See Goodstein Constr. Corp. v. City of New York*, 80 N.Y.2d 366, 373 (1992) (plaintiff could not recover in contract for breach of agreement "to negotiate in good faith"); *Fairchild Corp. v. State*, 169 A.D.3d 643, 645 (2d Dep't 2019).

Putting materiality aside, New York law is clear that any contract provision that is left open to further negotiation is by definition not enforceable—for the obvious reason that there is nothing to enforce. *See, e.g.*, *Spherenomics Glob. Contact Centers v. vCustomer Corp*, 427 F. Supp. 2d 236, 249 (E.D.N.Y. 2006) (even when contract otherwise exists, "a mere agreement to agree" on a term does not provide any grounds "to enforce" that term); *see also Carmon v. Soleh Boneh Ltd.*, 206 A.D.2d 450, 451 (2d Dep't 1994) ("open terms" left to negotiation are unenforceable). Here, Plaintiffs are suing to recover MAGR. If MAGR was never agreed to in the first place, then there is no MAGR to recover at all.

Plaintiffs attempt to avoid this problem by arguing that because the parties purportedly did not agree on how MAGR should be defined, the Court should *create* a MAGR definition. 2/11/20 Trial Tr. 27:3-7 (Ziffren) (Plaintiffs' expert testifies that "if the parties don't agree, then -- forgive me -- the Court has to decide"); *id.* at 62:23-38 (Plaintiffs' expert testifies that "because . . . no M.A.G.R. definition was agreed to, the Court needs to fill in the missing terms").

Plaintiffs' argument that the Court can create a MAGR term to which the parties never agreed has no support in the text of the contract or New York law. The New York Court of Appeals opinion in *Joseph Martin* is instructive. There, the parties to a rental contract did not agree on a rental price at the time of contracting, and their contract merely specified that the rental price was "to be agreed upon." 52 N.Y.2d at 108. In that case, the plaintiffs—much like Plaintiffs here—argued that even though the parties had merely "agreed to agree" on a rental price, the court could create its own "fair market" or "reasonable" rental term. *Id.* at 108-09. New York's highest court rejected this argument, holding that "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Id.* at 109. The contract gave no indication that the parties intended to be bound by a "fair market" or "reasonable" term—and the court could not create a term to which the parties never agreed. *Id.* at 111 ("There is not so much as a hint at a commitment to be bound by the 'fair market rental value' . . . or [a] 'reasonable rent' . . . much less any definition of either.").

Just as in *Joseph Martin*, here there "is not so much as a hint" in the parties' contracts "to

be bound by [a] 'fair market'" or "reasonable" standard. *Id.* The Court cannot step in to create a brand new MAGR term itself: "Nowhere is there an inkling that either of the parties directly or indirectly assented" that MAGR would be "fixed judicially[.]" *Id.* If the parties merely had an "agreement to agree" on the definition of MAGR there would be no binding MAGR right and Plaintiffs would have no right to sue for MAGR under the contract. *Id.* at 109.

Plaintiffs also argue that custom and practice in the television industry dictate that MAGR definitions are merely proposals and do not become binding until the participant has seen and signed off on the definition's particular terms. There is no support for this argument in the law or the record. Television agreements are subject to the same rules of construction as other agreements—"an agreement to negotiate in good faith" an MAGR is unenforceable, regardless of what Plaintiffs may say is customary in their industry. *Fairchild Corp.*, 169 A.D.3d at 645 ("an agreement to negotiate in good faith" about a term does not create "an enforceable commitment" about the term); *see also Greenfield*, 98 N.Y.2d at 569 (in the entertainment industry, "long-settled common-law contract rules still govern the interpretation of agreements"). Moreover, purported industry custom cannot contradict the express terms of an agreement—and here, the express terms mandate that the producer's standard MAGR definition "shall" control, notwithstanding the fact that Kirkman did not know who the producer would be or what its "standard definition" would look like. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *Croce v. Kurnit*, 737 F.2d 229, 238 (2d Cir. 1984) ("[E]vidence of industry practice may not be used to vary the terms of a contract that clearly sets forth the rights and obligations of the parties."). The MAGR definition was not a proposal; it was binding because of the parties' express agreement that AMC "shall" define MAGR. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b).

In any event, actual industry custom appears to be at odds with Plaintiffs' argument. Parties to profit participation contracts—the entertainment company, on the one hand, and talent, on the other hand—do not leave a term as important as MAGR for resolution at some later date. They understand that, by the time a profit participation agreement is signed, the show's owner has secured whatever agreement it needs to calculate MAGR going forward. Sabin Decl. ¶¶ 27-29.

A television "network wouldn't undertake to finance and green-light such an expensive and complicated production" like *The Walking Dead* if the network believed that the parties had not yet reached an agreement on contingent compensation. 3/9/20 Trial Tr. 197:25-198:2 (Sabin). Including the words "subject to good faith negotiation" in a profit participation agreement does not change that analysis. In the television industry, when parties agree that MAGR will be "subject to good faith negotiation," the words are understood to obligate the parties to act in good faith *if* they negotiate about MAGR—they do not mean that MAGR is undecided and further negotiation is *needed* to resolve it. Sabin Decl. ¶¶ 49-54.

Alpert's own transactional counsel acknowledged that Plaintiffs' reading of the contract would result in the possibility that MAGR might *never* be agreed to—a result that would not just render the contract unenforceable, but also would be commercially absurd. *See* 2/14/20 Trial Tr. 212:3-10 (Abramson) ("Q. But based on your understanding that it would not become operative until an agreement at the end of any negotiation, it was your understanding that that may never happen *and the parties would remain without an operative M.A.G.R. definition; correct*? A. I guess." (emphasis added)); *see also Lipper*, 1 A.D.3d at 171 ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (citations omitted)).

Ultimately, Plaintiffs' effort to avoid the plain language of the agreements is unavailing. Even if Plaintiffs were correct and the calculation of MAGR was never agreed to, their claims would fail because they would have no contract to enforce. But in fact the parties *did* agree: AMC's MAGR definition "shall" control the calculation of MAGR. That resolves this issue, and much of this case.

4. The Parties' Course of Performance Confirms Their Intent To Be Bound By AMC's MAGR Definition.

The express language of the contracts establishes that AMC's MAGR definition "shall" be binding. Although extrinsic evidence therefore is not relevant or necessary because the contracts are not ambiguous, the parties' post-agreement conduct—waiting years to object to

AMC's MAGR definition, negotiating additional fixed compensation but not MAGR, and cashing an advance subject to recoupment using the MAGR definition—demonstrates that when the Plaintiffs executed their *The Walking Dead* contracts they intended that AMC would define MAGR, subject only to the specific MAGR terms they secured.

Kirkman and Alpert waited nearly four years—from March 2011 until February 2015—to raise any objection to AMC's MAGR definition. Defendants' outline of facts, found at pages 21 to 32 of their Proposed Statement of Decision, demonstrates that Plaintiffs did not object to, and accepted benefits under, the MAGR definition.

During these four years, Kirkman and Alpert repeatedly accepted benefits under that definition and confirmed their intent to be bound by that definition: they cashed an advance that they explicitly were told would be recouped against AMC's MAGR definition; they received participation statements calculated based on that definition; they signed amendments reaffirming that their *The Walking Dead* Agreements and their compensation terms remained binding and effective; they exercised audit rights granted to them pursuant to AMC's MAGR definition; and they signed *Fear the Walking Dead* Agreements in which they expressly agreed that "[t]he definition of MAGR applicable to [their] contingent compensation on [*The Walking Dead*]" would "apply" to the new show. *See* Exs. 27 at 4, 171 at 5.

Their conduct clearly demonstrates that they understood AMC's MAGR definition bound them and controlled the calculation of their MAGR distributions. *See Record Club of Am., Inc. v. United Artists Records, Inc.*, 1991 WL 73838, at *11 (S.D.N.Y. Apr. 29, 1991) (acceptance of payment calculated pursuant to opponent's interpretation of contract and "statements" reflecting opponent's interpretation of the payment terms demonstrates acquiescence in or agreement with opponent's interpretation); *In re Marshall v. Pittsford Cent. Sch. Dist.*, 100 A.D.3d 1498, 1500 (4th Dep't 2012) ("Parties cannot accept benefits under a contract fairly made and at the same time question its validity." (citations omitted)); *Melnitzky v. Sotheby Parke Bernet*, 300 A.D.2d 201, 202 (1st Dep't 2002). Their February 2015 objections came far too late, and there is "no explanation" as to why they would have waited nearly four years to protest AMC's use of its

MAGR definition if they believed it was inapplicable. *See Disney Enters., Inc. v. Finanz St. Honore, B.V.*, 2016 WL 7174650, at *6 (E.D.N.Y. Dec. 7, 2016) (failure to explain acquiescence in opposing party's interpretation of contract is further evidence that opposing party's interpretation is correct).

Hurd objected earlier than the other Plaintiffs, but she did not have a right to object because she agreed to be bound by AMC's MAGR definition and did not even have a right of good faith negotiation. *See* Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii). Moreover, her conduct still evidences that, at the time of contracting, she intended to be bound by AMC's MAGR definition. Like the other Plaintiffs, she did not object or reserve any rights when AMC sent its definition in March 2011. Instead, she "ratified and confirmed" her *The Walking Dead* Agreement after receiving AMC's MAGR definition, Ex. 2079 at 2, and she did not object when she received a detailed participation statement in late 2011 that calculated MAGR using AMC's MAGR definition, Ex. 2076 at 2. Only after Hurd and her representatives had spent over a year demonstrating an understanding that AMC's MAGR definition controlled did her representative raise objections—and even then, only in the context of trying to negotiate her compensation for a different show. *See* Ex. 155. Even after raising that objection, Hurd and her representatives cashed a $750,000 advance that they were explicitly told would be recouped against AMC's MAGR definition. Ex. 2077 at 2.

Later, when Hurd audited AMC, she did so by exercising audit rights that were granted by AMC's MAGR definition and did not exist anywhere else in her *The Walking Dead* Agreement. On cross-examination, Hurd's counsel, David Nochimson, admitted that when he "noticed the audit" of AMC's books and records regarding MAGR, he did so "pursuant to" "the [Accountings] provision of the M.A.G.R. definition." 2/14/20 Trial Tr. 141:8-24 (Nochimson). In other words, Hurd exercised the audit rights conferred on her by the same MAGR definition she now claims in this lawsuit she never agreed to and is inoperative. New York law makes clear that "[p]arties cannot accept benefits under a contract fairly made and at the same time question its validity." *In re Marshall*, 100 A.D.3d at 1500 (citations omitted).

Although Hurd raised concerns earlier than Kirkman or Alpert, there is still "no explanation" for her failure to object to AMC's MAGR definition for more than a year—and to accept benefits under the definition even after raising the objection—other than that she understood that AMC's MAGR definition did, in fact, control. *See Disney*, 2016 WL 7174650, at *6; *see also Record Club*, 1991 WL 73838, at *11 (receipt of roughly one year's worth of quarterly statements and payments established course of performance). Hurd's conduct, and that of her attorney, merely demonstrates that she believed she could rely on her clout in the industry to seek to negotiate the AMC MAGR definition and secure a better deal—not that she had any contractual right to do so.

Thus, even if the *The Walking Dead* Agreements were ambiguous—and they are not—the "parties' course of performance under the contract[s]" constitutes the "most persuasive evidence" that the parties intended for AMC's MAGR definition to be binding. *Fed. Ins. Co.*, 258 A.D.2d at 44.

B. <u>Issue #1</u>: Whether Kirkman's *The Walking Dead* Agreement Requires AMC Network To Pay Actual License Fees To AMCFH in Connection With AMC Network's Exhibition of *The Walking Dead*?

The decision on Issue #2 is dispositive of Issue #1. Issue #1 asks whether Kirkman's 2009 *The Walking Dead* Agreement required AMC Network to pay an "actual license fee" to its wholly-owned subsidiary, AMCFH, for the right to exhibit *The Walking Dead* on the AMC channel. AMC's binding and operative MAGR definition answers this question. That definition explains that the amount of money put into the MAGR pot from AMC Network's broadcast of the show on its own channel is an "imputed license fee," which is set at a particular amount of the show's production costs. Because that definition is binding, as decided in Issue #2, the "imputed license fee" that is part of the definition is binding as well. Therefore, AMC Network was *not* required to pay an "actual license fee" to exhibit *The Walking Dead*; rather, an imputed license fee is the requirement set forth in the MAGR definition.

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1. AMC Network's Broadcast Of *The Walking Dead* On Its Own Channel Is Controlled By The MAGR Definition, Which Prescribes An Imputed License Fee.

"Modified adjusted gross receipts" or "MAGR" is a creature of contract and is calculated however the parties agree to calculate it. *See* 2/10/20 Trial Tr. 41:25-42:7 (Ziffren) (Plaintiffs' expert agrees that profit participants and networks negotiate "to address what goes into M.A.G.R. and what comes out of M.A.G.R."). Here, the parties agreed that "MAGR shall be defined" by AMC's MAGR definition, excepting only those MAGR terms specifically set forth in the contracts. *See* Issue #2, *supra*. If a particular MAGR term is not specifically agreed to in the parties' contracts, then that term is governed solely by AMC's MAGR definition. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii) (emphasis added); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii).

Here, Kirkman's *The Walking Dead* Agreement does not address how the "gross receipts" derived from AMC Network's broadcast on its channel will be calculated—leaving that element of MAGR to AMC's MAGR definition. The contract does not say that the "receipts" from AMC's broadcast will be calculated using an "actual" license fee, an "imputed" license fee, or anything else. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b) (specifying that "MAGR shall include" home video revenue, but not including any specific term addressing gross receipts derived from AMC's broadcast). In fact, the contract does not specify whether MAGR will include *any* receipts from AMC Network's broadcast of the show on its channel. *See id.* Therefore, AMC's MAGR definition controls how gross receipts derived from AMC's broadcast of the show shall be calculated. And AMC's MAGR definition expressly provides that the "Gross Receipts" derived from AMC's broadcast over its own "programming services" (i.e., the AMC channel) will be calculated using an "**Imputed License Fee**." Ex. 9 at 6 (emphasis in original); *id.* ("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 [the following formula] . . . ."). Thus, an imputed license fee governs the

computation of MAGR derived from AMC Network's broadcast on its own channel.

Kirkman argues that the final sentence of Section 11(b)—which states "No network sales fee shall be charged regarding AMC's initial license fee"—demonstrates that AMC must use an actual license fee to account for MAGR receipts derived from its broadcast of the show on its own channel. Kirkman is wrong. This sentence, by its plain terms, simply prohibits AMC Network from deducting a line item known as a "network sales fee" from any receipts that are attributable to the "initial license fee" for the show. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *see also* 2/11/20 Trial Tr. 179:9-12 (Rosenbaum) (Kirkman's counsel agrees that the final sentence of Section 11(b) "prevents A.M.C. from taking a distribution fee on the initial domestic exhibition of [*The Walking Dead*]"); Sabin Decl. ¶ 58 (explaining that the final sentence of Section 11(b) is "a very common MAGR term that has nothing to do with mandating any particular kind of license fee and everything to do with preventing one specific charge from going on the expense side of the MAGR calculation"). Plaintiffs argue this sentence should be read as if it states that "AMC must use an actual license fee to account for MAGR derived from its broadcast of the show on its own channel," but there is nothing even approaching that language in this sentence. Further, the words "actual license fee" do not appear anywhere in the contract. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *see also* Arar Decl. ¶ 34 ("The sole purpose of the final sentence of Section[11](b) was to exclude one particular charge—the 'network sales fee'—from the MAGR pot, whether that charge was on an 'actual license fee' or on an imputed license fee. . . . I did not intend for the final sentence of Section [11](b) to prescribe any particular type of license fee that must be used to calculate MAGR."). Plaintiffs' argument that it should rewrite the provision to include an unstated "actual license fee" obligation cannot be accepted. *E.g.*, *Vt. Teddy Bear*, 1 N.Y.3d at 475 ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").

Kirkman agreed that "MAGR *shall* be defined, computed, accounted for and paid in accordance with" AMC's MAGR definition, provided that AMC adjusted that definition to

account for the handful of specific MAGR terms Kirkman bargained for. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b) (emphasis added). The method of calculating the gross receipts derived from AMC's broadcast of the show on its own channel is not one of those bargained-for terms. And because AMC's standard definition provides that the gross receipts derived from AMC's broadcast of its show on its channel are computed using an "**Imputed License Fee**," that imputed fee controls—not some other, "actual" fee that is not mentioned anywhere in the contract or AMC's MAGR definition.

There is no need to resolve what, exactly, an "initial license fee" refers to or whether a "network sales fee" can be charged against an "actual" license fee or an "imputed" fee. The only relevant issue is whether the single sentence of the contract prohibiting the charge of a "network sales fee" against an "initial license fee" *also* creates an obligation to pay an "actual license fee" for AMC's broadcast of the show on its own channel. As explained, the plain language of this provision—which does not mention "actual" or "imputed" fees—does not include any such obligation. Both AMC's interrogatory responses and its witnesses are consistent on this dispositive point. *See* Ex. 80 at 34-35 ("Section 11(b) of Kirkman's TWD Agreement neither contains the phrase 'actual license fees' or any language reflecting any 'promise' that AMC Network would pay 'actual license fees.'"); Arar Decl. ¶ 8(a) ("[T]here is nothing in the agreement that says an actual license fee is required, and it would make no sense for the agreement to do so.").

2. The Parties Intended That An Imputed License Fee Would Be Used.

Even if Issue #2 was decided in Plaintiffs' favor, Defendants still prevail on Issue #1. Without AMC's MAGR definition, the *The Walking Dead* Agreement is silent about the type of license fee that may be used to calculate MAGR. The law is clear, however, that "silence does not equate to contractual ambiguity." *Greenfield*, 98 N.Y.2d at 573. Instead, the entire agreement must be considered "as a whole to determine its purpose and intent," and, in light of its intent, the contract is "susceptible to only one reasonable interpretation" with regard to the use of an imputed license fee. *Id.* at 572 (intent to grant broad ownership rights in music to

producer demonstrated that producer had rights to use artist's works in ways not explicitly allowed in the contract). Considering Kirkman's *The Walking Dead* Agreement as a whole, the only reasonable interpretation of the agreement is that it allows for MAGR to be computed using an imputed license fee—because, among other things, at the time of contracting the parties did not know if there would ever be an "actual" license fee paid in connection with the initial exhibition of the show on AMC's channel.

Kirkman granted AMC Network both the production *and* exhibition rights in *The Walking Dead*, meaning that AMC Network could, simply by exercising its contract rights, produce and broadcast the show on its channel. Ex. 1 (Kirkman *The Walking Dead* Agreement) Sch. I, § 3 (granting AMC Network exclusive production rights—"the exclusive right to make the Production(s) based on [*The Walking Dead*]"—and distribution rights—"to transmit, reproduce, distribute, exhibit, advertise and exploit such Productions in any manner by any means"). As Kirkman's counsel admitted on cross-examination, "A.M.C. the network . . . obtained all the rights it needed from Mr. Kirkman to produce 'The Walking Dead,' to distribute 'The Walking Dead,' and to exhibit 'The Walking Dead' on its channel." 2/11/20 Trial Tr. 162:22-28 (Rosenbaum). In such a situation, there would be no "actual license fee" paid in connection with the show's initial broadcast because there would be no "license" at all—AMC Network would be the producer and the distributor, and would not need to pay itself to exhibit its own show on its channel. Kirkman's counsel tellingly concluded "if the rights [to *The Walking Dead*] were kept at the [AMC] Network level, it would be absurd for the Network to pay a license to itself." 2/13/20 Trial Tr. 21:10-12 (Rosenbaum).

Kirkman's sophisticated counsel assuredly wanted the pot of money from which their client was to be paid (MAGR), to include some value attributed to the initial broadcast of the show (here, AMC Network's broadcast on its channel). But they also understood that if AMC Network exercised its own right to produce and broadcast *The Walking Dead*, there would be no "actual" license fee paid—because AMC Network would not pay a license fee to itself, and certainly not for the broadcast rights it already owned. 2/13/20 Trial Tr. 21:10-12

(Rosenbaum); *see also* 3/9/20 Trial Tr. 95:14-22 (Sabin) ("the only way" to give Kirkman "some inflow of revenue by virtue of the broadcast of the show on A.M.C. . . . would have been through an imputed license"). In that situation, restricting the MAGR attributable to the initial broadcast to a portion of an "actual license fee" would leave Kirkman with nothing—because there would be no "actual" license fee at all. It would be absurd to suggest that Kirkman and his counsel would have agreed to—and indeed insisted on—an "actual license fee" arrangement that would have prevented Kirkman from receiving *any* value if AMC Network simply exercised the rights granted to it via Kirkman's *The Walking Dead* Agreement. *See, e.g.*, *Lipper*, 1 A.D.3d at 171 ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties."); *Reape v. N.Y. News, Inc.*, 122 A.D.2d 29, 30 (2d Dep't 1986) ("[W]here a particular interpretation would lead to an absurd result, the courts can reject such a construction in favor of one which would better accord with the reasonable expectations of the parties."). In fact, Kirkman and his counsel did not specify how the MAGR attributable to the initial broadcast would be calculated at all—and simply left that term to AMC. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *see also* 2/11/20 Trial Tr. 181:18-182:4, 184:1-5 (Rosenbaum) (Kirkman's counsel acknowledges that Kirkman's contract does not mention an "actual license fee" or an "imputed license fee").

Departing from the text of the agreement, Plaintiffs argue that under the custom in the television industry, a profit participant (like Kirkman) would never agree to an imputed license fee without seeing the specific terms of the fee first. Thus, they argue, because no MAGR definition (and no imputed license fee) was presented to Kirkman by the time he signed his contract, the parties impliedly agreed no imputed license fee would be used.

Although a court may generally refer to industry practice to provide context to the Agreement's written terms, it cannot consider *this* purported industry practice, because it varies from the terms of the Agreement itself. The law is clear that "evidence of industry practice may not be used to vary the terms of a contract that clearly sets forth the rights and obligations of the

parties." *Croce*, 737 F.2d at 238 (citing *In re W. Union Tel. Co.*, 299 N.Y. 177, 184-85 (1949); *Cable-Wiedemer, Inc. v. Friederich & Sons Co.*, 336 N.Y.S.2d 139, 141 (Monroe Cty. Ct. 1972)); *see id.* (rejecting argument that "industry custom" could change the express terms of a songwriting royalty provision). Here, the terms of Kirkman's *The Walking Dead* Agreement make clear that AMC Network had full rights to broadcast the show without ever paying an "actual license fee." Instead, the parties agreed that the producer's "standard definition" would control the fee, knowing that this could result in revenue for the initial broadcast being recognized in any manner of ways—including through an imputed license fee. Kirkman may now wish that his counsel had negotiated the MAGR provision differently, but a court cannot now imply a requirement for an "actual license fee" that the parties did not negotiate or specify. *See, e.g.*, *Vt. Teddy Bear*, 1 N.Y.3d at 475 ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").

Further, the other *The Walking Dead* Agreements in this case disprove Plaintiffs' contention that a profit participant *always* reviews and approves the terms of an imputed fee before agreeing to it. Both Alpert's and Hurd's *The Walking Dead* Agreements expressly state that an "imputed license fee" will be used to calculate MAGR if AMC Network produces the show, Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(ii); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii), even though neither Hurd nor Alpert were presented with the terms of the imputed license fee before they signed their contracts. Thus, contrary to Plaintiffs' argument, two other profit participants in this case, including Kirkman's manager, agreed to an imputed license fee without knowing its terms.

Other witnesses provided further support. *See* 3/10/20 Trial Tr. 46:5-18 (Stein) (testifying that Section 4(d)(ii) of Hurd's *The Walking Dead* Agreement is drafted to incorporate the terms of the imputed license fee that would be used in the MAGR definition, and indicates that Hurd "agree[d] to those terms, sight unseen"); 2/19/20 Trial Tr. 58:9-19 (Wiseman) (explaining that the terms of an imputed license fee are "often not articulated in the body of [an] agreement," and

instead are "often articulated in other documents").

Although the plain language of the contract forecloses Plaintiffs' argument, the testimony of Defendants' expert, Edward Sabin, is persuasive that talent representatives universally expect that a network rights-holder—like AMC Network here—will use an imputed license fee to calculate MAGR derived from the network's own exhibition of the show. *See* Sabin Decl. ¶ 70. Sabin explained that a network will not pay itself a fee to exhibit a series it already owns, and profit participants thus understand that when they contract with a network, they will earn no revenue from the initial exhibition of a show on the network's channel *unless* there is an imputed license fee. *See id.* ¶ 68. Sabin's extensive experience at Fox Television Studios and A+E confirmed this standard industry practice. *See* 3/9/20 Trial Tr. 86:3-21 (Sabin); *see also id.* at 177:17-178:16. It is not credible Kirkman's sophisticated representatives did not expect an imputed license fee would be used to calculate the MAGR derived from AMC Network's broadcast of the show on its own channel. *See* 3/9/20 Trial Tr. 106:15-107:3 (Sabin); *contra* 2/11/20 Trial Tr. 172:6-17 (Rosenbaum) (Kirkman's counsel suggests she did not think AMC Network would use an imputed license fee).

AMC's MAGR definition and its imputed license fee are binding, *see* Issue #2, but even if that definition were *not* binding, nothing in the parties' agreements precludes or prescribes a particular type of license fee when calculating the gross receipts attributable to AMC's broadcast of the show on its own channel. *See* Arar Decl. ¶¶ 8(a), 34; Sabin Decl. ¶¶ 58-61. That broadcast can be accounted for using an "imputed" license fee.

3. The Parties' Course Of Performance Confirms That Kirkman's *The Walking Dead* Agreement Did Not Require Payment Of An "Actual" License Fee.

Given that Kirkman's *The Walking Dead* Agreement unambiguously allows the use of an imputed license fee, the review of extrinsic evidence is unnecessary. But even if such evidence is considered, the same conclusion is reached.

Prior to filing this lawsuit in 2017, Kirkman *never* objected to the use of an imputed license fee. His counsel admitted on cross-examination that "[t]here is not a single letter or a single e-mail or a single piece of paper from either of [Kirkman's attorneys] on behalf of Mr.

Kirkman objecting to A.M.C.'s use of an imputed license fee between 2011 when [Kirkman] received the definition and 2017 when [Kirkman] filed this litigation." 2/11/20 Trial Tr. 170:9-22 (Rosenbaum); *see also id.* at 155:5-13 (Kirkman's counsel admits that between March 2011 and May 2014, she "never contacted anyone at A.M.C. and said, we don't agree to the use of an imputed license fee, just so you know A.M.C."). Kirkman and his counsel stayed silent, despite receiving AMC's MAGR definition in 2011, which explicitly included an "**Imputed License Fee**" (Ex. 9 at 6 (emphasis in original)), a $500,000 advance to be recouped based on that MAGR definition containing an "**Imputed License Fee**," (Ex. 2100 (emphasis in original)), and multiple profit participation statements based on that imputed fee. *See* 2/11/20 Trial Tr. 155:14-26 (Rosenbaum) (Kirkman's counsel admits she stayed silent while "[k]nowing that A.M.C. was accounting, all the while, to [her] client on the basis of an imputed license fee"). This demonstrates that Kirkman always understood his *The Walking Dead* Agreement allowed for an imputed license fee, until his position changed in the complaint filed in this lawsuit.[3]

Kirkman's failure to object for *more than six years* to the imputed license fee in the MAGR definition is dispositive. After March 2011, when Kirkman received AMC's MAGR definition with its "**Imputed License Fee**" identified in bold text, Kirkman repeatedly signed amendments in which he "ratified and confirmed" his *The Walking Dead* Agreement—including its contingent compensation provisions. *See* Exs. 2019, 64. He signed two *Fear the Walking Dead* Agreements stating that MAGR would be based on "[t]he definition of MAGR applicable to [Kirkman's] contingent compensation on [*The Walking Dead*]," and that this *The Walking Dead* definition "shall specify an imputed license fee." Ex. 171 at 5, 19-20 (emphasis added). Even more telling, in December 2012 he received a $500,000 MAGR advance from AMC, accompanied by a letter stating that the "advance will be recouped *in accordance with the MAGR definition previously provided.*" Ex. 2100 at 2 (emphasis added). Kirkman's acceptance of profit statements and even a MAGR payment that was expressly subject to AMC's MAGR definition, including its imputed license fee, is strong evidence that he understood the definition

[3] The Court limits its analysis to Kirkman's conduct, given that there is no dispute that Hurd's and Alpert's *The Walking Dead* Agreements *expressly* allow for an imputed license fee.

and fee to be appropriate. *See Jobim v. Songs of Universal, Inc.*, 732 F. Supp. 2d 407, 416 (S.D.N.Y. 2010) ("Universal's royalty statements have always utilized a 'net receipts' arrangement [that Plaintiffs later challenged in litigation]. Plaintiffs, represented by sophisticated counsel and accounting advisors, failed to object to this calculation.") (applying New York law); *Record Club*, 1991 WL 73838, at *11 (acceptance of one year of royalty payments and failure to object to "four quarterly statements" demonstrated acquiescence in other party's interpretation). And Kirkman persistently failed to object to AMC's MAGR definition and its imputed license fee—despite having numerous opportunities to do so, including when he was asked to ratify that *The Walking Dead* Agreement's terms were in full force and effect—and he "offers no explanation for [his] actions, which further supports [AMC]." *Disney*, 2016 WL 7174650, at *6 (failure to explain acquiescence in opposing party's interpretation of contract is further evidence that opposing party's interpretation is correct).

"The parties' interpretation of the contract in practice, *prior to litigation*, is compelling evidence of the parties' intent," and here, prior to litigation, Kirkman did not interpret his contract as barring the use of an imputed license fee. *Aircraft Servs. Resales LLC v. Oceanic Capital Co.*, 2013 WL 4400453, at *3 (S.D.N.Y. Aug. 14, 2013), *aff'd*, 586 F. App'x 761 (2d Cir. 2014) (quoting *Ocean Transp. Line, Inc. v. Am. Philippine Fiber Indus., Inc.*, 743 F.2d 85, 91 (2d Cir. 1984)) (applying New York law); 2/11/20 Trial Tr. 170:14-26 (Rosenbaum) ("[T]here is not a single letter or a single e-mail or a single piece of paper from either [Rosenbaum or Rosenman] on behalf of Mr. Kirkman objecting to A.M.C.'s use of an imputed license fee between 2011 when [she] received the definition and 2017 when [Plaintiffs] filed this litigation.").

Although the Court concludes that Kirkman's *The Walking Dead* Agreement always permitted the use of an imputed license fee, even if the Agreement had *not* allowed an imputed license fee at contract formation, the course of performance described here would be sufficient to effectuate an amendment. New York courts "acknowledge that 'any written agreement, even one which provides that it cannot be modified except by a writing signed by the parties, can be

effectively modified by a course of actual performance.'" *Gaia House Mezz LLC v. State St. Bank & Tr. Co.*, 720 F.3d 84, 90-91 (2d Cir. 2013) (quoting *Rosen Tr. v. Rosen*, 53 A.D.2d 342, 352 (4th Dep't. 1976)).

C. Issue #3: Whether Kirkman's *Fear The Walking Dead* Agreements Clarified And/Or Confirmed That The MAGR Definition Applicable To Kirkman's *The Walking Dead* Agreement Contains An Imputed License Fee?

The third issue to resolve is whether Kirkman's *Fear the Walking Dead* Agreements confirmed that the MAGR definition applicable to his contingent compensation on *The Walking Dead* contains an imputed license fee. AMC's MAGR definition—which included an imputed license fee—controlled Kirkman's MAGR calculations under his *The Walking Dead* Agreement (*see* Issue #2). Because the unambiguous language of Kirkman's contract makes clear that AMC's MAGR definition applies, including its implied license fee, there is no need to consider extrinsic evidence—including Kirkman's later *Fear the Walking Dead Agreements.*

Nevertheless, whether or not AMC's MAGR definition and imputed license fee controlled, one must conclude that Kirkman's *Fear the Walking Dead* Agreements offer relevant course of performance evidence confirming that, pursuant to Kirkman's *The Walking Dead* Agreement, MAGR for *The Walking Dead* is calculated using an imputed license fee.

When evaluating the parties' course of performance under Kirkman's *The Walking Dead* Agreement, other agreements that the parties entered into may be considered to provide evidence that Kirkman was acquiescing in AMC's interpretation of the original *The Walking Dead* Agreement. *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 651 (1993) (course of performance, also known as "practical construction," is evidence demonstrating that a party engaged in conduct "expressly or inferentially" demonstrating its view of the "doubtful provision," accompanied by "knowledge thereof and acquiescence therein, express or implied, by the other [party]"); *see also In re 4Kids Entm't, Inc.*, 463 B.R. 610, 697-98 (Bankr. S.D.N.Y. 2011) (course of performance evidence in interpreting 2001 license agreement included evaluating use of the same disputed term in a subsequent 2008 agreement; party "cannot be faulted for relying on the course of conduct that had developed since the inception of the 2001 Agreement and on contractual

language that was adopted verbatim in the 2008 Agreement").

The text of Kirkman's two *Fear the Walking Dead* Agreements demonstrates that he and his counsel understood and agreed—not once, but twice—with AMC's view that Kirkman's *The Walking Dead* Agreement allowed for an imputed license fee. Both of Kirkman's *Fear the Walking Dead* Agreements provide that "[t]he definition of MAGR applicable to [Kirkman's] contingent compensation on [*The Walking Dead*] will also apply to [Kirkman's] Contingent Compensation on [*Fear the Walking Dead*], ***which definition shall specify an imputed license fee*** in connection with [AMC's] license and rights to exhibit the Series on AMC. . . ." Ex. 171 (Kirkman *Fear the Walking Dead* Agreements) at 5 (emphasis added). The contracts thus plainly state that "[t]he definition of MAGR applicable to . . . [*The Walking Dead*]" includes an "imputed license fee." *Id.* This was a reference to the MAGR definition that AMC sent to Kirkman's representatives two years prior to the *Fear the Walking Dead* negotiations, which included an imputed license fee. Ex. 9 at 6. Kirkman's counsel were thus well aware that AMC understood the imputed license fee in its MAGR definition to apply to the MAGR calculation for *The Walking Dead*, and made no attempt to draw any distinction between the type of license fee allowed on *The Walking Dead* and *Fear the Walking Dead* at the time Kirkman was negotiating his *Fear the Walking Dead* Agreements. 2/11/20 Trial Tr. 148:14-15 (Rosenbaum) (Kirkman's counsel understood by the time that she received AMC's MAGR definition in March 2011 that it was AMC's "position that there would be an imputed license fee"); *id.* at 155:14-26 (Kirkman's counsel did not object for years after 2011, despite "knowing that A.M.C. was accounting, all the while, to [her] client on the basis of an imputed license fee").

Plaintiffs incorrectly argue that the statement that the "definition *shall* specify an imputed license fee" demonstrates that the definition for *The Walking Dead* did not *already* include such a fee. The *Fear the Walking Dead* Agreements' use of forward-looking language (such as that the "definition of MAGR applicable to . . . [*The Walking Dead*] *will* also apply" and that the "definition *shall* specify an imputed license fee") is merely a linguistic device intended to convey that the parties "will" and "shall" be bound from the date of execution of the *Fear the Walking Dead*

Agreements—they do not demonstrate that the "definition of MAGR" that the *Fear the Walking Dead* Agreements refer to did not already exist. Moreover, to the extent Plaintiffs argue in Issue #1 that no imputed license fee could *ever* be used in calculating MAGR under Kirkman's *The Walking Dead* Agreement, even a forward-looking provision conclusively rebuts that claim.

Kirkman's counsel made clear that they believed there *already was* a binding MAGR definition for *The Walking Dead*, and affirmatively demanded that this definition apply to *Fear the Walking Dead*. The evidence shows that Kirkman's representatives were adamant during negotiations that their client's MAGR definition for *Fear the Walking Dead* should be the same as his MAGR definition for *The Walking Dead*. Ex. 11 at 2; *see also* Ex. 10 at 3 (Kirkman's representative insisting that MAGR terms for *Fear the Walking Dead* should be no "less favorable" than MAGR terms for *The Walking Dead*). Kirkman's counsel would not insist that his *Fear the Walking Dead* agreement use a MAGR definition for *The Walking Dead* unless they understood that definition was already extant and in force.

Kirkman's counsel agreed, without complaint, that the MAGR definition "applicable to" both *The Walking Dead* and *Fear the Walking Dead* included "an imputed license fee," demonstrating that the MAGR calculation for *The Walking Dead* was, in fact, governed by the use of such an imputed fee. If Kirkman and his representatives truly believed that Kirkman's *The Walking Dead* Agreement did not permit an imputed license fee, they would have made clear in the "Contingent Compensation" sections of Kirkman's *Fear the Walking Dead* Agreements that an imputed license fee could *not* be used for *The Walking Dead*. *Scholastic*, 1999 WL 1277246, at *7 ("'[T]he easiest way for a party to make clear an intention not to be bound is to say so.'") (quoting Farnsworth on Contracts § 3.7 (2d ed. 1998)). Instead, they agreed to contract language stating that the MAGR definition applicable to both *The Walking Dead* and *Fear the Walking Dead* included an imputed license fee.

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D. Issue #4: Issues Pertaining To Section 24 Of Kirkman's *The Walking Dead* Agreement And Section 4(d)(ii) Of Alpert's *The Walking Dead* Agreement (The "Affiliate Transaction Provision(s)" Or "ATP(s)"):

1. Sub-Issue #1: Whether The ATPs Apply To AMC Network's Exhibition Of *The Walking Dead* On The AMC Channel?

The parties dispute whether Section 24 of Kirkman's *The Walking Dead* agreement, referred to as the "ATP," governs the calculation of MAGR for AMC Network's exhibition of *The Walking Dead* on its own channel.[4] It does not.

The ATP (Affiliate Transaction Provision) provides, in relevant part, 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." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24 ("Dealings with Affiliates").

Plaintiffs argue that the ATP controls the calculation of MAGR derived from AMC Network's broadcast of *The Walking Dead* on its own channel. This result, Plaintiffs argue, is a consequence of AMC Network's transfer of its right to broadcast the show to its wholly-owned subsidiary, AMCFH. According to Plaintiffs, because AMCFH now holds the exhibition rights for *The Walking Dead*, AMC Network must "license" those rights back from ACMFH in order to broadcast the show on AMC Network's channel. Plaintiffs argue that this purported "license" constitutes a "transaction" with an affiliated company under the ATP. Therefore, Plaintiffs contend, the ATP requires AMC Network to pay a broadcast license fee to AMCFH that complies with the ATP—and this license fee must be used to calculate the MAGR derived from AMC Network's broadcast of the show on its channel.

Defendants respond that the ATP cannot supersede the binding imputed license fee that governs the MAGR derived from AMC Network's telecast of the show on the AMC channel. Defendants contend that Plaintiffs and their sophisticated counsel negotiated extensively with

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[4] Alpert's *The Walking Dead* agreement also contains an ATP, which is worded similarly to the ATP in Kirkman's contract. *See* Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(iii). None of the parties have argued that there is any meaningful distinction between Kirkman's ATP and Alpert's ATP. The interpretation of Kirkman's ATP controls Alpert's ATP as well.

AMC regarding how their contingent compensation would be calculated and paid, securing certain specific MAGR terms and protections and giving AMC the right to define the remainder of the MAGR terms. This agreement was memorialized in the "Contingent Compensation" section of Kirkman's contract (§ 11) and the "Contingent Participation" section of the other Plaintiffs' agreements (§ 4), which state that AMC "shall" have the authority to define MAGR. AMC exercised its right to define MAGR by, among other things, using an "imputed license fee" in AMC's MAGR definition to calculate the MAGR derived from AMC Network's broadcast of the show on its channel. Therefore, Defendants argue, this imputed license fee is a binding term of the MAGR definition and constitutes the parties' agreement. The ATP, by contrast, applies to self-dealing transactions among AMC affiliates that Plaintiffs do not have a seat at the table to negotiate. Unlike a self-dealing transaction where the Plaintiffs do not have any ability to negotiate, the imputed license fee here was the result of an arm's-length transaction between sophisticated parties—Plaintiffs and AMC. Plaintiffs heavily negotiated their contingent compensation terms, and ultimately agreed that MAGR "shall" be defined by AMC's MAGR definition—including any imputed license fee in that definition.

Thus, the imputed license fee governs the calculation of MAGR derived from AMC Network's broadcast, and that imputed license fee is a term of the parties' agreements that cannot be overridden by the ATP.

a. The Imputed License Fee Governs AMC Network's Exhibition Of The Show On The AMC Channel.

Pursuant to the parties' agreements, the imputed license fee, not the ATP, governs the calculation of MAGR for AMC Network's exhibition of the show on the AMC channel.

As decided in Issue #2, Section 11(b) of Kirkman's *The Walking Dead* Agreement expressly states that AMC's MAGR definition "shall" control the calculation of MAGR, provided that the definition is consistent with specific MAGR terms agreed to in that section. *Id.* § 11(b); § III.A.1, *supra*. The "Contingent Compensation" sections of all three Plaintiffs' *The Walking Dead* agreements include specific negotiated MAGR protections, which were summarized at trial in Demonstrative Exhibit 2168. Ex. 1 (Kirkman *The Walking Dead*

Agreement) § 11(b); Ex. 4 (Alpert *The Walking Dead* Agreement) §4(d)(ii); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(ii). The agreements make clear that, aside from these specific protections, the balance of the MAGR terms were left to AMC, which "shall" have the right to define MAGR in accordance with AMC's standard MAGR definition. *See id.* § 11(b). AMC's standard MAGR definition, which Kirkman and the other Plaintiffs received in 2011, states that an "**Imputed License Fee**" would be used to calculate and pay contingent compensation for exhibition of the show on AMC's channel, and provides the detailed formula for calculating that imputed license fee. Ex. 9 at 6 (§ I.B.1(a)(i) (emphasis in original)). Thus, per the express terms of Section 11(b) of Kirkman's *The Walking Dead* Agreement, the imputed license fee in AMC's MAGR definition determines the amount of MAGR resulting from AMC Network's exhibition of the show on the AMC channel.

The imputed license fee governs AMC Network's broadcast of the show; the ATP does not. As Plaintiffs' expert conceded, the ATP does not override or supersede any other term of Kirkman's contract—it is meant to govern "transactions" between AMC and its affiliates when the profit participant has no seat at the table to negotiate the transaction and cannot shape its terms. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24; *see also* 2/10/20 Trial Tr. 107:15-21 (Ziffren) (the "A.T.P. comes into play" to ensure "that profit participants are not deprived [of] the ability to participate in the profits of a deal they have no ability to shape"); *id.* at 103:10-19 ("the A.T.P. sets a benchmark for the transaction because talent doesn't have a seat at the table and they don't want to be deprived of the ability to participate in profits to a deal to which they have no ability to shape").[5] The imputed license fee here is not the result of any "transaction" between affiliated companies—it is a binding term in the MAGR definition, and thus a binding term in Kirkman's contract, which incorporates that MAGR definition. *See* Ex. 9 at 6 (§ I.B.1(a)(i)); Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); *Jones v. Cunard S.S. Co.*, 238 A.D. 172, 173 (2d Dep't 1933) (an incorporated document is "made a part of the

[5] For example, if AMC later gave away its international broadcasting rights for free to an affiliate, the profit participants could not control that "transaction"—and would need the ATP's protection. Sabin Decl. ¶ 81; 2/10/20 Trial Tr. 107:7-21 (Ziffren).

instrument as if incorporated into the body of it"). Because the imputed license fee is a binding term of Kirkman's contract, the ATP does not apply to it or negate it.

Plaintiffs carefully negotiated the aspects of MAGR that they deemed important before signing their agreements, which further supports the conclusion that the ATP does not apply to MAGR terms like the imputed license fee. As with any other contractual term, Kirkman was free to negotiate how the MAGR derived from AMC's broadcast would be calculated before he signed his contract—and he did, in fact, take advantage of the opportunity to negotiate the contingent compensation terms that were important to him. *See, e.g.*, 2/11/20 Trial Tr. 132:14-17 (Rosenbaum) (Kirkman's counsel negotiated the contingent compensations provisions "that were important to [her] client"). He secured certain material MAGR terms—such as the inclusion of "home video/DVD and merchandising" revenue in MAGR—as well as an MFN. Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). If Kirkman wanted to further negotiate how MAGR derived from AMC Network's broadcast on its own channel would be calculated, he could have done so. *See* 2/10/20 Trial Tr. 106:15-20 (Ziffren) ("Q. Now, when a rightsholder is negotiating, in this case, with A.M.C. Network, as Mr. Kirkman did, as we established, there's an ability to negotiate a whole range of contract terms, including compensation terms; correct? A. Absolutely."). He chose not to, secure in the knowledge that he had obtained the MAGR terms that were most important to him in Section 11 and had an MFN that would provide him with the most favorable MAGR definition available to any profit participant. Kirkman agreed to be bound by the terms of AMC's MAGR definition, and any imputed license fee it might include.

Kirkman's own transactional counsel agreed with Defendants that where, as here, a contract includes a binding imputed license fee that is used to calculate the MAGR derived from a broadcast, that imputed license fee—and not an ATP—controls the calculation of contingent compensation for that broadcast. At trial, Kirkman's counsel admitted that if a contract includes a binding, "agreed" upon imputed license fee, that imputed license fee "would *not* have been governed by the A.T.P." 2/13/20 Trial Tr. 159:19-160:2 (Rosenman) (emphasis added); *id.* at 155:19-26 (deposition testimony, read into the record, that "[the imputed license] fee

addresses what it addresses . . . . But anything that's *not* covered by that would be covered by the A.T.P." (emphasis added)); *id.* at 156:5-7 (deposition testimony that "IL[F] for what's covered . . . in this part of the provision. A.T.P. for everything else.").

Witnesses' understandings of the meaning of contractual provisions are not relied on to interpret the contract. *See Greenfield*, 98 N.Y.2d at 569 (unambiguous contract "must be enforced according to the plain meaning of its terms"). Nevertheless, the fact that Plaintiffs' transactional counsel understood the contract to operate in a manner that is contrary to Plaintiffs' position in this litigation further confirms the finding that the ATP does not apply here.

Therefore, the parties negotiated how contingent compensation would be calculated, agreed that Kirkman would receive various MAGR terms and protections and AMC would receive the right to define the remainder of MAGR in its MAGR definition, agreed that the binding MAGR definition's imputed license fee determines the amount of MAGR derived from the broadcast on AMC's channel, and agreed that this imputed license fee cannot be superseded or overridden by the ATP.

b. The Transfer Of Rights From AMC Network To AMCFH Does Not Trigger Application Of The ATP And Override The Imputed License Fee.

The imputed license fee is a binding term of Kirkman's agreement that governs how much MAGR is derived from AMC Network's broadcast of the show on its own channel. Nevertheless, Plaintiffs argue that this binding term should be ignored, because, according to them, Kirkman and AMC Network agreed the ATP, and not an imputed license fee, would be used to calculate the MAGR derived from AMC Network's broadcast of the show. Plaintiffs argue Kirkman and AMC Network expected and impliedly agreed that AMC Network would transfer its broadcast rights to an affiliate and then "license" back those rights to AMC Network. The parties planned on this transfer occurring, Plaintiffs contend, so the ATP would be triggered—and the MAGR derived from AMC Network's broadcast would be a "license fee" paid from AMC Network to AMCFH in compliance with the ATP standard.

This argument fails because, as already decided, the imputed license fee *is* the contractual term that controls the calculation of MAGR from AMC's broadcast on its channel. Further, the argument fails on its own terms for the following reasons.

(1) The Contract Does Not Require That AMC Network Transfer Its Rights And License Them Back. Contrary to Plaintiffs' argument, nothing in Kirkman's *The Walking Dead* Agreement demonstrates the parties intended for AMC Network to transfer its own broadcast rights to an affiliate (and later license them back) to trigger the ATP. Rather, at the time of contracting, the parties agreed AMC Network had the right to broadcast the show on its channel without entering into any further transaction with its affiliates or anyone else. *See Evans*, 1 N.Y.3d at 458 (court must "ascertain the intention of the parties at the time they entered into the contract"). AMC Network did not need any other rights in order to broadcast *The Walking Dead* on its channel.

When AMC and Kirkman contracted in 2009, Kirkman granted to AMC nearly unlimited rights to produce, broadcast, and distribute the show. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) Schedule I § 3(a)(i). As both of Kirkman's transactional counsel admitted at trial, AMC Network acquired all the rights it needed to exhibit the show on its own channel and did not need to enter into any further transactions to do so. 2/11/20 Trial Tr. 189:2-14 (Rosenbaum) ("Q. There's nothing in the agreement that requires A.M.C. to create any additional entities in order to produce or air 'The Walking Dead,' is there? A. Yes. . . . That's correct. . . . A. [The contract] does not require the assignment or creation of affiliates."); *id.* at 162:7-9 (Rosenbaum) (Kirkman's transactional counsel testifies that in 2009, "A.M.C. was getting from Mr. Kirkman the right to produce and to air 'The Walking Dead'").

Thus, at the moment of contracting in 2009, AMC Network "obtained all the rights it needed from Mr. Kirkman to produce 'The Walking Dead,' to distribute 'The Walking Dead,' and to exhibit 'The Walking Dead' on its channel." *Id.* at 162:19-28 (Rosenbaum). Even under Plaintiffs' theory, this meant—as acknowledged in Rosenbaum's testimony—that "[t]he ATP would *not* be implicated" if AMC Network had simply broadcast the show after it

contracted with Kirkman. *Id.* at 190:14-17 (Rosenbaum) (emphasis added). By Plaintiffs' own admission, then, Kirkman signed an agreement that, on the one hand, granted him numerous benefits including fixed and contingent compensation, and on the other hand, permitted AMC Network to produce and broadcast the show without entering into any additional transaction to do so. Plaintiffs were not, at the time of contracting, *relying* on or even expecting AMC Network to engage in a transaction or transfer that AMC Network had no obligation to undertake.

The fact AMC Network ultimately did, in fact, transfer its rights to its wholly owned subsidiary for administrative purposes is irrelevant—nothing in the contract indicates the parties anticipated this transfer, much less that they were relying on it. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement). When interpreting the intent of the parties, "it is their intention as it existed at the time the contract was executed which must control rather than any subsequent intention tailored to complement an individual's posture once an agreement has gone sour." *U.S. for Use & Benefit of Falco Constr. Corp. v. Summit Gen. Contracting Corp.*, 760 F. Supp. 1004, 1013 (E.D.N.Y. 1991) (applying New York law). Here, the intention of the parties, expressed in the words of their agreement, is clear: Kirkman granted to AMC Network the exclusive right to "transmit, reproduce, distribute, exhibit, advertise and exploit" *The Walking Dead* on television, and did not need to enter any further transaction to do so. Ex. 1 (Kirkman *The Walking Dead* Agreement) Sch. I § 3(a)(i). "Therefore, [Plaintiffs'] attempt to rewrite the [] contract with the benefit of hindsight is rebuffed." *Summit Gen.*, 760 F. Supp. at 1013.

In addition, Plaintiffs failed to support their position that networks *always* transfer their rights to their own shows to affiliates and then license those same rights back before broadcasting those shows. As Plaintiffs' expert admitted, AMC Network is a "cable television network" that is in the business of broadcasting the "initial exhibit[ion] of television programs." 2/10/20 Trial Tr. 108:8-15 (Ziffren). The evidence at trial revealed numerous examples of networks that acquire the rights to a show, produce a show in-house, and then air the show while still holding those rights—disproving Plaintiffs' assertion that networks like AMC Network

invariably transfer their rights to an affiliate and then license them back before a show is broadcast. *See* 2/18/20 Trial Tr. 153:20-23 (Arar) (explaining that "A.M.C. itself exhibited many unscripted programs where it was [both] the rightsholder and the network and there were no affiliates involved"); *id.* at 153:27-154:12 (explaining that "Showtime" had four scripted series "in the last year" where the network owned and broadcast the series, and merely subcontracted the task of production); *id.* at 210:21-211:24 (explaining that Showtime was a network "that acquired rights to produce and exhibit [and] distribut[e] [a] show" and "did not assign those rights to an affiliated entity").

Therefore, there is no evidence that, at the time of contracting, the parties expected that the ATP would be implicated by AMC Network exercising the very rights to broadcast the show that it acquired from Kirkman in the first place. The contract cannot be interpreted in a manner that does not align with the parties' original expectations. *Evans*, 1 N.Y.3d at 458.

(2) AMC Network's Airing Of Its Own Show Is Not A Covered "Transaction." The language of the ATP confirms that AMC Network's airing of its own show on its own channel did not constitute a "transaction" governed by the ATP. Kirkman's ATP provides 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." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24. Accordingly, by its plain terms, the ATP applies only to "AMC's transactions with Affiliated Companies" *if* there are "similar transactions" that AMC could have entered into "with unrelated third party distributors for comparable programs after arms length negotiation." *Id.*

When AMC Network exercises its own broadcast rights to exhibit the show on its own channel, there is no "similar" transaction that AMC Network could enter into "with unrelated third party distributors." *Cf. id.* That is, when AMC Network acquires the rights to a show, it does so in order to air the show on its own channel—not to license the rights to air the show to a third-party network. Arar Decl. ¶ 82 ("When AMC Network obtains the rights to exhibit a

show like *The Walking Dead*, it exhibits the show itself; it does not enter into further transactions with third-party distributors to broadcast the show."). The very purpose of AMC Network's contract with Kirkman was to give AMC Network the right to exhibit the show on its own channel. *See id.*; Ex. 1 (Kirkman *The Walking Dead* Agreement) Schedule I § 3(a)(i) (granting AMC Network broad rights to produce and air the show). The only transactions that AMC Network (or any other network) *could* enter into with "unrelated third party distributors" would be transactions for distribution of the show *beyond* the initial exhibition on the network's own channel—for example, licensing the show for exhibition on a third-party streaming service, like Netflix or Hulu; licensing the show for distribution by a third-party abroad; or licensing the show to a company that handles home video distribution. *Id.* ¶¶ 17, 47. By its terms, the parties here agreed that the ATP would apply *only* to transactions that could have been entered into "with unrelated third party distributors." This means that the ATP does not apply to AMC Network's distribution of the show on *its own* channel. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24.

(3) The Administrative Rights Transfer Between AMC Network and AMCFH Did Not Create Any Revenue Or Deprive Plaintiffs Of Any MAGR. The parties' experts agree that, in the television industry, ATPs are understood to apply only to "self-dealing" transactions between affiliates that "deprive the profit participant of money" to which he is otherwise entitled. 2/10/20 Trial Tr. 100:1-5 (Ziffren) (objective of ATP is to address "affiliated companies self-dealing" undertaken "to deprive the profit participant of money"); Sabin Decl. ¶ 91. That is not the case here.

As noted above, Plaintiffs negotiated and agreed how their contingent compensation would be calculated. Plaintiffs do not dispute that they had a seat the table—a full and fair opportunity to negotiate contingent compensation before they signed their agreements. Plaintiffs took advantage of that opportunity—they negotiated for and received the MAGR terms and protections they deemed important and agreed that AMC would have the authority to define

the balance of MAGR. *See* §§ I.B.1, III.A.1, *supra*; Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b).

The internal rights transfers here between AMC Network and AMCFH were not the kind of transactions that presented a risk of self-dealing that would "deprive the [Plaintiffs] of money" that the parties' agreement on contingent compensation entitled them to. *See* 2/10/20 Trial Tr. 100:1-5 (Ziffren). It is this potential situation—shortchanging profit participants through affiliate transactions—which, according to Plaintiffs' own expert, the ATP is designed to address. *See id.* That situation is not presented in this case because Plaintiffs negotiated their contingent compensation rights for AMC Network's exhibition of the show on the AMC channel.

It is significant that the internal rights transfers from AMC Network to its wholly-owned subsidiary do not have any economic consequence at all to profit participants like Plaintiffs here. As recounted in the unrebutted testimony of Stefan Reinhardt, AMC Network's President of Business Operations and Studio Operations, AMC Network transferred its intellectual property to a single-purpose production entity, TWD Productions, LLC, and then to AMCFH for administrative reasons—namely, to make it easier to obtain valuable production tax credits and more efficient to license content to third-party distributors. Reinhardt Decl. ¶¶ 20, 29-30; § I.E, *supra*. These administrative transfers did not have any economic impact on Plaintiffs—Plaintiffs' own expert, Kenneth Ziffren, conceded that he "can't point to any revenue, money, to which Mr. Kirkman was deprived, as a result of these intracompany affiliated rights transfers within A.M.C." 2/10/2020 Trial Tr. at 115:7-25. This admission is significant. As Defendants' expert, Edward Sabin, explained, ATPs do not apply to such "purely internal transactions of no economic consequence." Sabin Decl. ¶ 91. Therefore, on this record, these internal rights transfers had no negative economic consequence for Plaintiffs and do not trigger application of the ATP.

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2. Sub Issue #2: Whether The ATP Requires "AMC's Transactions With Affiliated Companies" To Be At Fair Market Value And/Or Whether A Participant Suing For Breach Of The ATP May Pursue Fair Market Value Damages?

Although the ATP is not applicable here, the parties have requested that the Court resolve whether the ATP requires "AMC's transactions with Affiliated Companies" to be at fair market value, and, relatedly, whether a profit participant (like Plaintiffs) suing for breach of the ATP may recover damages measured at a fair market value rate. The ATPs neither impose a fair market value standard nor allow for fair market value damages.

The plain language of the ATP forecloses application of a fair market value standard. Kirkman's ATP states 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." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24 (emphasis added).[6] Thus, where applicable, the ATP requires consideration of other deals that "AMC"—not the "market" generally—has actually entered into with third parties. *See id.* Construing the ATP to instead require that affiliate transactions be judged by what would be required in the "market" contravenes the plain language of the parties' agreement. *See Quadrant*, 23 N.Y.3d at 564 ("[U]nder our law where the language of the contract is clear we rely on the terms of the document to give effect to the parties' intent.").

What is more, "fair market value" is a well-known term, but it does not appear in the ATP or anywhere else in Kirkman's and Alpert's *The Walking Dead* Agreements. *See generally* Ex. 1 (Kirkman *The Walking Dead* Agreement); Ex. 4 (Alpert *The Walking Dead* Agreement); *see also* Sabin Decl. ¶ 98 (explaining that fair market value provisions are always explicitly stated when used in television profit participation contracts). As Plaintiffs' own counsel has acknowledged, fair market value is an incredibly rare standard in contemporary

[6] The relevant sentence of the ATP in Alpert's *The Walking Dead* Agreement provides 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." Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(iii).

television profit participation agreements. *See* Ex. 2131 (Nessim, "Profit Participation Claims") at 8 (explaining that while fair market value standards were sometimes used in *earlier* participation contracts in the 1990s, "[r]equring that fair market value be paid . . . create[s] a very difficult standard for a studio to meet and almost invite[s] litigation if the program is successful. Contractual provisions like these *will probably never again be seen* in participation contracts with studios." (emphasis added)). Plaintiffs' expert likewise testified that "fair market value" is a standard that is "very, very hard" for profit participants to bargain for and receive in the television industry. 2/10/20 Trial Tr. 82:14-83:5 (Ziffren). If the sophisticated parties who negotiated these agreements in 2009 and 2010 wanted to include such a rare standard, they would have said so explicitly in the agreements. *See, e.g.*, *Vt. Teddy Bear*, 1 N.Y.3d at 475 ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").

Indeed, as discussed in Issue #2, New York courts consistently refuse to imply a "fair market value" term in contracts that do not already include them. *Joseph Martin*, 52 N.Y.2d at 111 ("There is not so much as a hint at a commitment to be bound by the 'fair market rental value'" in contract that did not have that term); *Stone Key Partners LLC v. Monster Worldwide, Inc.*, 333 F. Supp. 3d 316, 333-34 (S.D.N.Y. 2018), *aff'd*, 788 F. App'x 50 (2d Cir. 2019) ("Stone Key's only argument to the contrary is that Monster's assets should be measured according to their fair market value . . . . But Stone Key provides no basis to conclude that the [contract]'s reference to 'assets'" should use a fair market value standard) (applying New York law); *Cordell*, 2012 WL 5264844 at *4 ("Cordell's contention that McGraw-Hill had the implicit obligation to sell the works at fair market value . . . would imply a term inconsistent with the express terms of the Agreement."); *Hales v. HSBC Bank USA, N.A.*, 2008 WL 11435681, at *7 n.13 (S.D.N.Y. June 10, 2008) ("[T]he settlement [contract] makes no reference to selling the shares at 'fair market value' and the Court declines to read such a term into the agreement.").

Plaintiffs' are wrong that the phrase "after arms length negotiation" means the ATP demands a fair market value standard, as that would require ignoring practically the entirety of

the relevant provision. The ATP states that the relevant comparison transactions are those "which *AMC enters into* . . . with unrelated third party distributors for comparable programs *after arms length negotiation*." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24 (emphasis added). The reference to "after arms length negotiation" simply clarifies that for purposes of the ATP, the universe of AMC's "similar transactions" that are considered does not include sweetheart transactions that were not negotiated at arms' length. But this qualification at the end of the sentence does not delete the preceding language, which makes clear that the relevant transactions are only those that "*AMC* enters into," not transactions conducted at "fair market value" generally.

Finally, Plaintiffs argue that if the ATP requires affiliate transactions to be conducted only on terms "comparable" with AMC's other transactions, Plaintiffs are entitled to *damages* measured at a *different*, "fair market value" standard if the ATP is breached. This argument is rejected. Plaintiffs' argument that they can recover damages under a "fair market value" standard that varies from the substantive standard in the ATP. This would contravene one of the most basic propositions of contract law: damages can only "put [the plaintiff] in as good a position as it would have been in had the contract been performed." *Goodstein*, 80 N.Y.2d at 373 (citing Restatement (Second) of Contracts § 347 cmt. a (1981)). The ATP standard is "monetary terms comparable with the terms on which AMC enters into similar transactions with unrelated third part[ies]." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 24. This is *not* a fair market value standard, and Plaintiffs cannot claim damages based on something they would never have received "had the contract been performed" in the first place. *Goodstein*, 80 N.Y.2d at 373.

Alpert's transactional counsel, Howard Abramson, admitted his client's damages for any breach of the ATP would be the difference between the amount AMC had used to calculate MAGR and the money *required to go into MAGR by the ATP*—not fair market value. 2/14/20 Trial Tr. 232:23-233:21 (Abramson) (Abramson testifies at his deposition, read into the record, that the relevant question is the difference between what the ATP requires and what AMC had used).

Ultimately, this sub-issue is straightforward. Because the ATP expressly requires consideration of *AMC's own* transactions—not consideration of every transaction done at "fair market value"—"[Plaintiffs'] contention that, under this agreement, it is somehow entitled to the equivalent of fair market value is simply without substance." *Cobble Hill*, 74 N.Y.2d at 485.

E. Issue #5: Whether Hurd's 2010 *The Walking Dead* Agreement Requires AMC To Use A Fair Market Value Imputed License Fee For Purposes Of Calculating, Reporting, And Paying MAGR?

The fifth issue is whether Hurd's MAGR for *The Walking Dead* must be calculated using a "fair market value" imputed license fee. Plaintiffs argue that when a profit participation agreement specifies that MAGR will be calculated using an imputed license fee but does not specify the precise terms of the imputed license fee or include an ATP, the imputed license fee must be calculated based on a "fair market value" standard.

Again, the decision on Issue #2 controls. Because Hurd, like the other Plaintiffs, is bound by the definition of MAGR she agreed to—that is, AMC's definition, as modified by the specific terms Plaintiffs agreed to in the contract—she cannot receive a different, "fair market value" imputed license fee contrary to the terms of her agreement.

Even setting Issue #2 aside, Plaintiffs' argument that when the elements of a compensation term—such as an imputed license fee—are not specified, an implied "fair market value" term is substituted in its place is misplaced. This assertion is contrary to long-established New York law, which holds that courts will not imply "fair market value" terms that are not expressly stated in the contract. *See, e.g.*, *Cordell*, 2012 WL 5264844 at *4 ("Cordell's contention that McGraw-Hill had the implicit obligation to sell the works at fair market value . . . would imply a term inconsistent with the express terms of the Agreement."); *Joseph Martin*, 52 N.Y.2d at 111 (The contract's "simple words leave no room for legal construction or resolution of ambiguity. . . . There is not so much as a hint at a commitment to be bound by the 'fair market rental value. . . .'"). That is especially true here, where the parties agreed on the manner in which MAGR would be defined: in accordance with AMC's MAGR definition, not a "fair market value" standard.

While Hurd's *The Walking Dead* Agreement unambiguously does not require the use of a "fair market value" license fee, if the Agreement were ambiguous, the extrinsic evidence would support the same conclusion. After receiving AMC's MAGR definition in March 2011, Hurd did not raise any concerns for over a year, instead accepting a profit participation statement based on the imputed license fee she now complains about and signing an amendment to her *The Walking Dead* Agreement that "confirmed and ratified" the existing contract. Ex. 2079 at 2. Even when her counsel attempted to negotiate the definition, he did not argue that the imputed license fee must be calculated based on a fair market value standard. *See* Ex. 2078 (with respect to the imputed license fee, asking only to "eliminate the cap"); 2/14/20 Trial Tr. 139:8-13 (Nochimson) ("Q. And during any of your negotiations about the imputed license fee with AMC in that time period, did you tell AMC that you believed Ms. Hurd was entitled to a fair market value imputed license fee? A. Not at that time, no."). The evidence shows that Hurd never raised this "fair market value" argument prior to litigation, and her course of performance under the contract demonstrates that the argument is meritless. *See Aircraft Servs.*, 2013 WL 4400453, at *3 ("The parties' interpretation of the contract in practice, *prior to litigation*, is compelling evidence of the parties' intent." (emphasis added)) (applying New York law).

F. Issue #6: Whether Plaintiffs' *Fear The Walking Dead* Agreements Include The MFN In Plaintiffs' *The Walking Dead* Agreements?

The sixth issue is whether Plaintiffs' *Fear the Walking Dead* Agreements incorporate by reference the "most favored nations" or "MFN" clause in Plaintiffs' *The Walking Dead* Agreements.[7] The *Fear the Walking Dead* Agreements do *not* incorporate any MFN clause.

Plaintiffs argue that language in their *Fear the Walking Dead* Agreements incorporates the MFN clauses in their *The Walking Dead* Agreements.[8] The relevant MAGR language in

[7] In Kirkman's *The Walking Dead* Agreement, the MFN provision states that "in no event shall MAGR be defined, computed, or paid on a basis less favorable than for any other non-cast [profit participant] on the Series." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b). Alpert's and Hurd's *The Walking Dead* Agreements each contain an almost identical provision. Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(iv) ("In no event shall Artist's MAGR participation be defined less favorable than the MAGR definition accorded to [other particular participants] on the Series."); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(iii) (same).

[8] There is no dispute that Plaintiffs' *Fear the Walking Dead* Agreements do not expressly include an MFN provision. *See* Exs. 171 (Kirkman's *Fear the Walking Dead* Agreements), 27 (Alpert's *Fear the Walking Dead*

Kirkman's and Alpert's *Fear the Walking Dead* Agreements is as follows: "The definition of MAGR applicable to [the Plaintiff's] contingent compensation on [*The Walking Dead*] will also apply to [the Plaintiff's] Contingent Compensation on [*Fear the Walking Dead*], which definition shall specify an imputed license fee[.]" Ex. 171 (Kirkman *Fear the Walking Dead* Exec. Producer Agreement) at 5; *id.* (Kirkman *Fear the Walking Dead* Writing Services Agreement) at 19; Ex. 27 (Alpert *Fear the Walking Dead* Agreement) at 4. Hurd's *Fear the Walking Dead* Agreement has a shorter but similar provision: "The definition of MAGR applicable to [Hurd's] contingent compensation on [*The Walking Dead*] will also apply to [*Fear the Walking Dead*][.]" Ex. 170 (Hurd *Fear the Walking Dead* Agreement) at 4.

Plaintiffs argue that because their *Fear the Walking Dead* Agreements state that the "definition of MAGR applicable to [their] contingent compensation on [*The Walking Dead*] will also apply" to *Fear the Walking Dead*, their *Fear the Walking Dead* Agreements must incorporate the *entire sections* dealing with MAGR in their *The Walking Dead* Agreements—Section 11(b) in Kirkman's Agreement, and Section 4 in Hurd's and Alpert's Agreement—including the MFNs in those sections. This argument fails.

The relevant provisions of Plaintiffs' *Fear the Walking Dead* Agreements state that, however Plaintiffs' MAGR is "defin[ed]" on *The Walking Dead*, that "definition of MAGR" will also apply to *Fear the Walking Dead*. There is no reference to an MFN in any of the Plaintiffs' *Fear the Walking Dead* Agreements, or any indication that the parties intended to incorporate anything *other* than the "definition of MAGR applicable to [Plaintiffs'] contingent compensation on [*The Walking Dead*]." Ex. 27 (Alpert *Fear the Walking Dead* Agreement) at 4; Ex. 171 (Kirkman *Fear the Walking Dead* Exec. Producer Agreement) at 5; *id.* (Kirkman *Fear the Walking Dead* Writing Services Agreement) at 19; *see also* Ex. 170 (Hurd *Fear the Walking Dead* Agreement) at 4. And the MAGR definition applicable to Plaintiffs' contingent compensation on *The Walking Dead* does not itself contain an MFN. *See* Ex. 9.

The Plaintiffs' MFNs are provisions of their *The Walking Dead* Agreements that are

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Agreement), 170 (Hurd's *Fear the Walking Dead* Agreement).

separate from the "definition of MAGR" incorporated into those agreements. Arar explained this distinction well on cross-examination, testifying that an MFN "gives [participants] the benefit of M.A.G.R. terms other participants may have negotiated, but that would result in an upgraded M.A.G.R. definition, but . . . the M.F.N. is not itself part of the M.A.G.R. definition." 2/18/20 Trial Tr. 96:10-20; *id.* at 191:7-18 (Arar testifies that "[a]n MFN was [not] part of the [MAGR] definition itself."). The MFN creates a right to acquire any better MAGR definition that someone else on the project negotiates, but it does not define or calculate MAGR—it does not say what receipts go into MAGR or what expenses come out of it. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(iii); Ex. 4 (Alpert *The Walking Dead* Agreement) § 4(d)(iv); *see also* Stein Decl. ¶ 30. The receipts that go into MAGR and the expenses that come out of it are set forth in the MAGR definition AMC sent Plaintiffs in March 2011. *See* Ex. 9.

Based on a plain reading of these documents, the parties agreed only to incorporate into their *Fear the Walking Dead* Agreements the "definition of MAGR" applicable to *The Walking Dead*, and did not intend to incorporate separate provisions from Plaintiffs' *The Walking Dead* Agreements—including the MFNs—that are not part of that "definition of MAGR." "The well settled rule is that 'a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified*,'" and here, the only "purpose" the parties had in referencing *The Walking Dead* contracts was to incorporate the MAGR definition that applied to them, not their MFNs. *CooperVision, Inc. v. Intek Integration Techs., Inc.*, 794 N.Y.S.2d 812, 819 (Sup. Ct. Monroe Cty. 2005) (emphasis added) (quoting *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 278-79 (1916)).

This conclusion does not render Plaintiffs' MFN rights from *The Walking Dead* irrelevant to *Fear the Walking Dead*. If a profit participant on *The Walking Dead* receives a more favorable MAGR definition than Plaintiffs, Plaintiffs will receive the benefit of that more favorable definition on *The Walking Dead*. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 11(b); Ex. 3 (Hurd *The Walking Dead* Agreement) § 4(d)(iii); Ex. 4 (Alpert *The Walking Dead*

Agreement) § 4(d)(iv). This will *also* benefit Plaintiffs' *Fear the Walking Dead* compensation, because their compensation for that show is governed by the same "definition of MAGR" applicable to *The Walking Dead*—and thus an improvement in their *The Walking Dead* definition will be mirrored by an improvement in their *Fear the Walking Dead* definition. Thus, Plaintiffs' MAGR definitions on *both* shows will always be at least as favorable as that used for any other relevant profit participant in *The Walking Dead*.

But Plaintiffs' *Fear the Walking Dead* Agreements do not *also* give them the right to a MAGR definition that is at least as favorable as the definitions used for all other *Fear the Walking Dead* participants. Stated another way, it is possible that a participant on *Fear the Walking Dead* will have a MAGR definition that is more favorable than Plaintiffs' definition. But, as noted, no profit participant on *The Walking Dead* will have a more favorable MAGR definition than Plaintiffs' definition. No such MFN right is incorporated into the *Fear the Walking Dead* Agreements.

An MFN is not implied. *See Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include."). "MFN provisions are common and . . . all parties to these agreements knew how to write an MFN provision" if they intended to include one. Arar Decl. ¶ 135. Further, MFN provisions in profit participation agreements can have significant financial implications for a company—potentially obligating the company to pay many individuals high compensation based on the terms that the talent with the most leverage is able to command. They are not "implicitly, inadvertently, or casually granted." *Id.* ¶ 138. While the parties explicitly included MFNs in their *The Walking Dead* Agreements, the absence of "parallel" text in the related *Fear the Walking Dead* Agreements leads the Court to "presume[] that the drafters acted intentionally and intended a different meaning." *U.S. Bank v. ILDA, LLC*, 2014 WL 4290543, at *3 (S.D.N.Y. Aug. 29, 2014); *see also Quadrant*, 23 N.Y.3d at 560 ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties

intended the omissions.").

Plaintiffs' argument is thus foreclosed by the plain language of the Agreements, but the extrinsic evidence defeats their claim as well. The record shows that during the negotiations of Kirkman's *Fear The Walking Dead* Agreement, Kirkman's counsel viewed a *Fear the Walking Dead* MFN to be separate and distinct from Kirkman's *The Walking Dead* MAGR definition. While negotiating Kirkman's *Fear the Walking Dead* Agreements, Kirkman's counsel requested two distinct terms: "[MAGR] definition mfn with all other participants ***and*** [Kirkman's] def'n on [*The Walking Dead*]." Ex. 11 at 3 (emphasis added). After Kirkman's counsel made these two distinct requests—for (1) a MFN, *and* (2) Kirkman's *The Walking Dead* MAGR definition—AMC agreed only to one of them (the MAGR definition, item (2)). *See* Ex. 12 at 4 (in response to Kirkman's counsel's request for both an MFN and the MAGR definition from *The Walking Dead*, AMC offers only the latter, that "[t]he definition of MAGR applicable to [Kirkman's] Contingent Compensation on [*The Walking Dead*] will also apply to [Fear the Walking Dead]"). As AMC's negotiator testified, "[Kirkman's counsel] asked for two things . . . . She asked for an M.F.N. as one thing. And she separately asked for the same definition on 'The Walking Dead.' . . . We agreed to the one thing, which was the definition [on] 'The Walking Dead.'" 3/10/20 Trial Tr. 21:10-21 (Stein). The record demonstrates that Kirkman's counsel viewed the request for an MFN as separate and distinct from the request for Kirkman's *The Walking Dead* MAGR definition, and AMC granted only the latter request (for the MAGR definition) and rejected the former (for the MFN).

The parties agreed to incorporate the Plaintiffs' *The Walking Dead* MAGR definitions into their *Fear the Walking Dead* Agreements, but did not agree to incorporate the separate MFN provisions from their *The Walking Dead* Agreements. Therefore, Plaintiffs' *Fear the Walking Dead* Agreements do *not* include the MFNs in their *The Walking Dead* Agreements.

G. Issues #7: Whether Plaintiffs Are Entitled To Contingent Compensation In Connection With *Talking Dead*, Under Their *The Walking Dead* And *Talking Dead* Agreements, Assuming *Talking Dead* Is Derivative?

The final issue is whether Plaintiffs are entitled to contingent compensation in connection

with the talk show *Talking Dead*, assuming, for purposes of this mini-trial, that *Talking Dead* is a "derivative production" under their *The Walking Dead* Agreements.[9] Plaintiffs argue that under their *The Walking Dead* Agreements, if *Talking Dead* is a "derivative production" that is also a "series," then AMC *must* pay Plaintiffs contingent compensation on terms that are at least as favorable as their contingent compensation terms on *The Walking Dead*—regardless of whether the Plaintiffs' *Talking Dead* contracts provide for contingent compensation. Defendants argue Plaintiffs' *Talking Dead* contracts are the only agreements that govern their work on *Talking Dead*, and that the Court cannot imply a contingent compensation term that was never agreed to for *Talking Dead*. Further, Defendants point out Plaintiffs never requested contingent compensation for *Talking Dead* prior to this litigation. Defendants are correct.

The *Talking Dead* Agreements do not provide for contingent compensation. *See* Ex. 57 (Kirkman *Talking Dead* Agreement).[10] The only compensation they provide for is fixed compensation, in the amount of a $10,000 per episode producer fee. *Id.* § 1.

Plaintiffs do not dispute that their *Talking Dead* Agreements contain no contingent compensation terms. *See, e.g.*, 2/14/20 Trial Tr. 237:20-28 (Abramson) (Alpert's transactional counsel agrees that "[n]o contingent compensation is set forth in [Alpert's *Talking Dead*] agreement"). However, they argue that their *The Walking Dead* Agreements mandate that *any* agreement for *any* derivative series includes contingent compensation on at least the same terms as the contingent compensation in their *The Walking Dead* Agreements. Plaintiffs argue that this right is derived from the "First Negotiation" provisions of their *The Walking Dead* Agreements, which address Plaintiffs' rights to negotiate for executive producer roles on any "derivative production based on [*The Walking Dead*]." Ex. 1 (Kirkman *The Walking Dead* Agreement) § 17(a). Kirkman's "First Negotiation" provision states, in relevant part:

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[9] The parties have agreed that the Court should assume *Talking Dead* is a derivative production for purposes of the mini-trial, with the question whether *Talking Dead* actually is a derivative production to be decided later, if necessary.

[10] Alpert's and Hurd's *Talking Dead* Agreements are substantially the same as Kirkman's Agreement, and also have no reference to contingent compensation. *See* Exs. 2047 (Alpert *Talking Dead* Agreement), 2096 (Hurd *Talking Dead* Agreement).

> AMC and [Kirkman] agree to negotiate in good faith for a period of thirty (30) days, with respect to [Kirkman] rendering executive producer services in connection with each derivative production based on the Series, with a floor of . . . the executive producing financial terms of this deal (i.e., development fee, executive producer fee and Producing Participation) for any comparably budgeted television series. . . .

Id. "Producing Participation" is defined in the contract as one-half of Kirkman's contingent compensation. *Id.* § 11(a). Alpert's and Hurd's "First Negotiation" provisions, while similar to Kirkman's, contain slightly different language:

> [AMC Network] and [Alpert] agree to negotiate in good faith (within [AMC Network]'s customary parameters) for a period of thirty (30) days with respect to [Alpert] executive producing derivative productions based on the Series (i.e., any theatrical film or television spin-off, prequel, sequel and/or remake of the Series), on terms no less favorable than the terms hereof with respect to a comparably budgeted television pilot and/or series. If no agreement is reached during said thirty (30)-day period, [AMC Network] shall have no further obligation to [Alpert] with regard to such derivative production.

Ex. 4 (Alpert *The Walking Dead* Agreement) § 8.[11] Plaintiffs argue that these provisions require AMC to offer at least *some* contingent compensation on any series that is a "derivative production" of *The Walking Dead.*

Plaintiffs' argument is misplaced. The "First Negotiation" provisions give Plaintiffs a right to *negotiate* executive producer agreements for derivative series—they do not dictate what terms the parties must ultimately agree to, or that they must reach agreement at all. *See, e.g.*, Ex. 4 (Alpert *The Walking Dead* Agreement) § 8 ("If no agreement is reached during said thirty (30)-day period, [AMC Network] shall have no further obligation to [Alpert] with regard to such derivative production."); *see also* Sabin Decl. ¶¶ 108, 111 (explaining that these kinds of "right of negotiation" provisions allow a profit participant to protest if the show's owner refuses to negotiate, but do not set any final terms). Here, there is no dispute that the parties *did* negotiate, and that as a result of those negotiations Plaintiffs signed *Talking Dead* contracts that do not provide for contingent compensation. Because the parties did, in fact, "negotiate in good faith" (and Plaintiffs do not argue otherwise), the "First Negotiation" provisions were not breached. *See* Ex. 1 (Kirkman *The Walking Dead* Agreement) § 17(a); Ex. 4 (Alpert *The Walking Dead*

[11] Hurd's "First Negotiation" provision contains slight differences from Alpert's, but is substantively the same. *See* Ex. 3 (Hurd *The Walking Dead* Agreement) § 10.

Agreement) § 8; Ex. 3 (Hurd *The Walking Dead* Agreement) § 10.[12]

Even if the First Negotiation clauses dictate terms for *some* derivative production agreements—rather than merely require negotiation—Defendants still prevail because the clauses do not apply to *these* executive producer agreements for *Talking Dead*. The clauses require that there be a "floor of . . . the executive producing financial terms of this deal . . . *for any comparably budgeted television series*[.]" Ex. 1 (Kirkman *The Walking Dead* Agreement) § 17(a) (emphasis added). If a show is not "comparably budgeted" to *The Walking Dead*, then the "floor" does not apply. *See id.* It is undisputed that *Talking Dead* is *not* comparably budgeted to *The Walking Dead*. 2/14/20 Trial Tr. 234:3-235:15 (Abramson) (Alpert's transactional counsel testifies that it is his understanding that "the budget for *Talking Dead* is much less than *The Walking Dead*, because [*Talking Dead* is] a talk show," and that *Talking Dead*'s budget is not "comparable to that of *The Walking Dead*"); *see also* Rosenman Decl. ¶ 49(b)(ii) (arguing that Kirkman would be entitled to *Talking Dead* contingent compensation but assuming that it is "not a comparably budgeted series"); Nochimson Decl. ¶ 43(b) (same); Wiseman Decl. ¶ 73 (explaining that *Talking Dead* is "promotional and ephemeral," unlike *The Walking Dead*). Therefore, by the plain words of *The Walking Dead* Agreements, the "floor" Plaintiffs point to in the First Negotiation provisions of those agreements does not apply for *Talking Dead*.

Plaintiffs nevertheless argue that the First Negotiation provisions create a sliding scale—requiring financial terms that are equivalent to Plaintiffs' *The Walking Dead* Agreements if the derivative series is "comparably budgeted" to *The Walking Dead*, and requiring proportionally less generous contingent compensation terms—but still *some* terms—if the derivative series has a smaller budget. *See* Rosenman Decl. ¶ 49(b)(ii). There is no textual support in the First Negotiation provisions for this argument. The provisions state that there shall be a "floor" of "the executive producing financial terms of this deal . . . for any comparably budgeted series[.]" Ex. 1 (Kirkman *The Walking Dead* Agreement) § 17(a). But there is no mention of any

[12] Plaintiffs do not argue, for instance, that AMC Network breached the good faith negotiation provision by failing to make an offer with an appropriate financial "floor."

"floor"—even a less generous "floor"—applying to a *non*-comparably budgeted series. Simply put, if the derivative show is not "comparably budgeted" to *The Walking Dead*, no floor applies. For this reason, the absence of an integration clause in Plaintiffs' *Talking Dead* Agreements is, however unintentional, irrelevant—given that the Plaintiffs' *The Walking Dead* Agreements do not provide for a contingent compensation "floor" on a show that is not comparably budgeted, as is indisputably the case with *Talking Dead*.

In fact, David Alpert's transactional counsel, Howard Abramson, testified that the First Negotiation provision does *not* apply to *Talking Dead*. Abramson testified that he believes "the budget for *Talking Dead* is much less than *The Walking Dead*, because [*Talking Dead* is] a talk show," and that *Talking Dead*'s budget is not "comparable to that of *The Walking Dead*." 2/14/20 Trial Tr. 234:3-235:15 (Abramson). And, as he admitted, if *Talking Dead* is "not a comparably budgeted show, [AMC] did not have to offer terms" for contingent compensation under the First Negotiation provision of *The Walking Dead* contracts. *Id.* at 238:11-23. Thus, at his deposition, read into the trial record, Abramson testified that "[i]t's not [his] understanding that any rights to contingent compensation Mr. Alpert has for *Talking Dead* are based on this First Negotiation right." *Id.* at 240:9-18. Abramson is correct—if *Talking Dead* is not comparably budgeted to *The Walking Dead*, then the First Negotiation provision of *The Walking Dead* contracts does not apply.

Moreover, the Court cannot assume that AMC Network agreed to give Plaintiffs contingent compensation in contracts that do not mention or even suggest that such compensation has been promised. "[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Rowe*, 46 N.Y.2d at 72. This is particularly true with something as potentially valuable as contingent compensation. Price terms are typically the most fiercely negotiated term of a contract, and the Court cannot assume that the parties agreed to give Plaintiffs some of *Talking Dead*'s profits but neglected to ever say so. *See, e.g.*, *Riverside S. Planning Corp.*, 60 A.D.3d at 68 (finding it "untenable" that the parties would not be specific about their contractual

obligations, "especially [] given the obvious need for 'commercial certainty'" in a valuable commercial contract). In this case, the parties' *Talking Dead* Agreements "should . . . be enforced according to [their] terms," and those terms do not include contingent compensation. *Vt. Teddy Bear*, 1 N.Y.3d at 475.

Even if the *Talking Dead* Agreements were ambiguous with respect to contingent compensation, the parties' course of performance confirms that they did not understand Plaintiffs to have received a right to contingent compensation on the show. Prior to this lawsuit, Plaintiffs never raised the issue of *Talking Dead* contingent compensation or demanded that AMC Network explain why it has never provided them with any *Talking Dead* profit participation statements or related documents. 2/14/20 Trial Tr. 144:5-9 (Nochimson) (Hurd's counsel agrees that he "never raised any concerns with anyone at A.M.C. about contingent compensation on 'Talking Dead' at any time before this lawsuit was filed in August 2017"); 2/13/20 Trial Tr. 146:23-147:12 (Rosenman) (Rosenman agrees that "between 2012 and 2017 when [his] client filed this lawsuit, [he] never reached out to AMC to discuss the issue of contingent compensation on the 'Talking Dead,'" other than an unrelated conversation about "buyout"); McKean Decl. ¶¶ 41-42. That is decisive evidence that the Plaintiffs did not understand the *Talking Dead* contracts to grant them any profit participation right. *See Aircraft Servs.*, 2013 WL 4400453, at *3 ("The parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent.") (applying New York law). Plaintiffs are not entitled to contingent compensation in connection with *Talking Dead*.

Plaintiffs also argue that the Court should decide what contingent compensation, if any, they should receive if *Talking Dead* is a part of the same "Series" as *The Walking Dead* or *Fear the Walking Dead*—that is, if *Talking Dead* is an integral part of those shows, rather than its own talk show. The Court declines to address this question, given that even Plaintiffs' own witnesses testified that *Talking Dead* is its own, separately budgeted talk show. 2/13/20 Trial Tr. 138:12-15 (Rosenman) (Kirkman's transactional counsel testifies that "*Talking Dead* is a show that has a host, Chris Hardwick, who brings on guests to talk about *The Walking Dead* . . .

and *Fear the Walking Dead*"); 2/14/20 Trial Tr. 233:25-235:15 (Abramson) (Alpert's transactional counsel testifies that *Talking Dead* is "a talk show where people talk about *The Walking Dead* or *Fear the Walking Dead*," and has a budget that is "much less than *The Walking Dead*, because it's a talk show").

ORDER

In accordance with the foregoing, it is hereby ORDERED:

1. Issues One, Two, Three, Four, Five, Six, and Seven are decided in favor of Defendants; and

2. This case proceeds to a full trial on the merits based on the contract interpretations so decided in this trial;

Dated: July 22, 2020

Daniel J. Buckley
Judge of the Superior Court