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May 20, 2109 VIA NYSCEF

The Honorable Joel M. Cohen
Supreme Court of the State of New York
60 Centre Street, Room 222
New York, NY 10007

Re: Darabont v. AMC Network Entertainment, LLC (Index No. 650251/2018)

Dear Justice Cohen:

We write, pursuant to Commercial Division Rule 14, to request a conference to address improper and obstructive deposition conduct by Plaintiffs' counsel. At the recent depositions of Frank Darabont, Bob Getman (Darabont's lawyer), and Elaine Douglas (Plaintiffs' auditor), Plaintiffs' lead counsel, Dale Kinsella (admitted *pro hac vice*), repeatedly violated New York law by improperly instructing not to answer, coaching, and interrupting, including by insulting defense counsel. Pursuant to Rule 14, defense counsel repeatedly told Kinsella that unless he followed the rules, Defendants would bring his misconduct to this Court's attention. Kinsella refused, and his conduct has been so outrageous that we are unable to proceed with depositions without court intervention. Defendants respectfully request that the Court (a) direct these witnesses to reappear to answer questions that were improperly blocked, and (b) instruct Kinsella to conduct himself in accordance with this Court's rules at all future depositions.

Background. This is the second of two lawsuits (consolidated for trial) regarding Darabont's and CAA's financial participation in the *The Walking Dead*'s Modified Adjusted Gross Receipts ("MAGR"). The central dispute is the extent to which AMC's written MAGR definition governs Plaintiffs' MAGR participation. The 2010 contract provides that "MAGR shall be defined, computed and paid by [AMC] in accordance with AMC's MAGR definition (which shall be furnished to [Darabont])…." Dkt. 58 § 13(d)(ii). Defendants contend that AMC "computed and paid" Plaintiffs' MAGR participation (totaling many millions of dollars) in accordance with the written MAGR definition it furnished to Darabont.

Plaintiffs' position regarding whether AMC's MAGR definition controls has been inconsistent. In the 2013 Action, Plaintiffs say the imputed license fee in the MAGR definition is a "sham" and the definition is without force and effect. 2013 Action, Dkt. 219 ¶¶ 7, 39. But now, Plaintiffs admit that AMC's MAGR definition is "incorporated by reference ***into***" and "is intrinsic to" the 2010 agreement. Dkt. 669 at 10, 11. At the recent depositions, defense counsel attempted to focus on this inconsistency, with questions regarding the contract negotiations and the parties' intent and motivations. Kinsella obstructed this and other relevant lines of questioning.

The reason for Kinsella's obstruction is clear: Defendants have struck a raw nerve by exposing fundamental flaws in Plaintiffs' case. Kinsella does not want Defendants to probe his clients' contradictory positions on the MAGR definition. Even more, he does not want Defendants to expose the egregious conflict of interest between Darabont and his agents at CAA. The dirty

secret in Hollywood is that talent agents often sell their clients down the river in exchange for bigger packaging fees for themselves. That is the subject of a pending lawsuit by the Writer's Guild of America ("WGA"), of which Darabont is a member, against CAA and other talent agencies. That is what happened here, and Kinsella wants to shut down this inquiry.

When agents were paid a portion of their clients' earnings, they were incentivized to maximize their clients' pay. But agents like CAA now get packaging fees directly from TV studios, and thus are incentivized to maximize their own fees. Not only do agencies negotiate their packaging fees at the same time they negotiate their clients' agreements, they often secure for themselves, without disclosing to their clients, better payment terms—including terms that reduce the show's MAGR and, in turn, their clients' participation. The WGA highlighted CAA's conflict of interest with Darabont as the prime example of this illegal practice. *See* WGA, *"No Conflict, No Interest,"* Mar. 12, 2019, at 8-10. Defendants contend that as a direct result of that conflict, CAA failed to secure for Darabont all of the contractual protections he wanted and that CAA told him it had obtained. For example, Darabont testified that [redacted]. *See* Ex. A, at 127:4-129:25. But when Darabont's representatives asked for that standard, AMC rejected it. *See* 2013 Action, Dkt. 399 at 3, 16. Defendants have reason to believe that Plaintiffs' claims may be based on Darabont's misunderstanding of the rights his representatives secured for him—a misunderstanding created and/or advanced by CAA to hide their conflict of interest.

Improper Conduct. Defendants' two senior lawyers have practiced for a collective 68+ years and have never seen deposition conduct as obstructive as Kinsella's. The attached deposition excerpts (Exs. A-C) and video clips (Ex. D) provide the full picture of Kinsella's misconduct.[1]

Instructions Not to Answer. Kinsella instructed three witnesses not to answer over 65 times (highlighted in yellow in Exs. A-C). He blocked questions on key subjects, including the meaning of disputed contract terms, *see, e.g.*, Ex. C at 123:24-124:3 (instructing Getman not to answer when asked if "the absence of a reference to good faith negotiations in Paragraph (d) two was a mistake"), and the circumstances surrounding CAA's negotiation of Darabont's MAGR participation, *see, e.g.*, Ex. A at 192:23-193:10 (same, when Darabont was asked, "Were you aware in 2010 before you signed your agreement that CAA was negotiating for itself a packaging fee that was based on a share of profits paid to CAA before you got paid as an off-the-top deduction?"). Kinsella stated that such questions were "plainly improper under 221.2." *See, e.g.*, Ex. A at 195:18-23. New York law is clear, however, that an attorney can instruct a witness not to answer on grounds other than privilege or court limitation ***only*** when the question "is plainly improper ***and*** would, if answered, ***cause significant prejudice***." Rule 221.2.(iii) (emphasis added). Where Kinsella instructed on questions as "plainly improper," he did not even say that his clients' answers would "cause significant prejudice." "Merely characterizing the question as improper when the instruction is made, without more, is insufficient to satisfy … Rule 221.2(iii)." *Friedman v. Fayenson*, 41 Misc.3d 1236(A), at *7 (Sup. Ct. N.Y. Cty. 2013); *see also White v. Martins*, 100 A.D.2d 805 (1st Dep't 1984) (attorneys are "not . . . to direct the witness not to answer questions objected to when there will be no substantial prejudice in permitting the question to be answered"). Kinsella ignored this requirement because no

[1] Like Kinsella, Defendants' counsel have at times stated the basis for their objections during depositions. That conduct is not the subject of this letter, which is focused on Kinsella's instructions not to answer, coaching, and insults that have impeded Defendants' counsel's ability to complete depositions of key witnesses in this case.

significant prejudice would have resulted from these questions.

Kinsella also instructed Getman not to answer questions regarding his understanding of terms in the contract at issue based on an unsupported interpretation of California work product doctrine, and refused to drop the objections unless defense counsel agreed on the record to waive work product objections for Defendants' lead negotiator, Roger Arar. *See* Ex. C at 93:6-94:4. But the parties already agreed to a deposition protocol. When a dispute regarding work product objections arose in the 2013 Action, the parties stipulated to rules for depositions going forward, which included application of New York work product doctrine. Ex. E. That is why when Kinsella's partners pursued similar questions during the recent 2018 Action depositions of Defendants' contract negotiations, Arar and Janowitz, Defendants did not object and permitted the witnesses to answer. Kinsella appears to believe that he can disregard the parties' stipulation in the 2018 branch of the consolidated case. Similarly, although Plaintiffs' accounting claims are based on an audit report they submitted to AMC pre-suit—thus waiving any privilege—Kinsella would not permit Douglas, the auditor and the report's author, to answer questions regarding her communications with counsel about the report. Ex. B at 139:6-19.

Coaching. Kinsella has repeatedly interrupted the depositions to coach witnesses in violation of Uniform Rule 221.1(b), which provides that "[e]very objection shall be stated succinctly and framed so as not to suggest an answer to the deponent" and that counsel "shall not make statements of comments that interfere with the questioning." At one point, Kinsella interrupted questioning on the contract to whisper to Darabont and then refused to state the reason for the communication, in violation of Rule 221.3. *See* Ex. A at 62:22-63:21; 65:12-66:11. Most times, however, Kinsella coached audibly. *See e.g.*, *id.* at 78:6-21; 103:24-104:1; Ex. B at 66:6-14; 156:7-13; Ex. C at 136:1-14. This conduct is highlighted in blue in Exs. A-C.

Misc. Interruptions and Insults. Kinsella repeatedly interrupts depositions with unprofessional commentary, including disparaging comments about defense counsel. *See, e.g.*, Ex. A at 65:7-10 ("You seriously do like to hear yourself talk."); Ex. C at 165:20-23 ("don't get dragged down into the gutter of nonsense questions by Mr. Snyder"). This is highlighted in purple in Exs. A-C.

The First Department has made clear that improper deposition conduct like Kinsella's will not be tolerated. *See Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307, 309-10 (1st Dep't 2003) (ordering continued depositions with special referee supervision upon finding that "counsel's attitude toward [opposing] counsel was sardonic and unprofessional" and that counsel's "ordering his clients not to respond during depositions to questioning in areas which counsel unilaterally deemed to be irrelevant . . . effectively thwarted plaintiffs' efforts to depose defendants"); *Rapoport v. Cambridge Dev., LLC*, 51 A.D.3d 530, 531 (1st Dep't 2008) (ordering same where "plaintiff's attorney repeatedly obstructed defendant's attorney's examination of plaintiff by unilaterally restricting defense counsel's line of questioning"). Defendants endured Kinsella's obstruction for three depositions in the hope it would subside. It has not. Defendants cannot be expected to proceed with depositions in the face of such obstructive conduct, and thus have postponed offensive depositions until the Court provides guidance. Defendants are not seeking sanctions at this time—although they are warranted. Defendants ask that the Court re-open the three depositions Kinsella defended and instruct him to comply with the rules. If he fails to do so, Defendants would request that his *pro hac vice* admission be revoked and that all remaining depositions take place in New York under the supervision of a special referee.

Respectfully,

/s/ Orin Snyder

Orin Snyder

Enclosures

cc: Counsel of Record (*via NYSCEF*)