SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 1

BC672124
ROBERT KIRKMAN ET AL VS AMC FILM HOLDINGS LLC ET AL

April 6, 2022
10:29 AM

Judge: Honorable Daniel J. Buckley
Judicial Assistant: I. Arellanes
Courtroom Assistant: E. Munoz

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 04/01/2022 for Hearing on Motion for Summary Adjudication, now rules as follows:

Background

On August 14, 2017, Plaintiffs filed this contract action related to the television shows The Walking Dead, Fear the Walking Dead, and Talking Dead. On July 22, 2020, the Court issued a Statement of Decision after a court trial on seven disputes regarding contract interpretation. The Court ruled in favor of Defendants on all seven issues.

On July 27, 2021, the Court issued an order on Defendants' demurrer to the third amended complaint.

Defendants now move for summary adjudication as to the entirety of Plaintiffs' first cause of action for breach of the implied covenant of good faith and fair dealing and the fourth cause of action for inducing breach of contract. Defendants also move for summary adjudication as to "those parts of Plaintiffs' Second Cause of Action that are based on Plaintiffs' allegations in paragraphs 66(a), 66(b), 66(c), 66(e), 67, 68(b), 68(c) (regarding the alleged "marketing fee"), 70(a), 86(a), 86(b), 86(c), 86(d), 87, 88(b), 88(c), 88(d), and 90(a) of the TAC."

In reply, Defendants' counsel states "Defendants withdraw their Motion solely with respect to Plaintiffs' causes of action specifically based on the allegations in paragraphs 66(b), 86(c), and 70(a) of the Third Amended Complaint ("TAC") relating to alleged international television distribution fees concerning The Walking Dead and Fear The Walking Dead, and alleged production bible variances relating to The Walking Dead. See AMC's Mot. at 19:6-12; 23:9-12; AMC's Response to Pls.' Separate Statement ¶¶ 215, 216, 228-230." Samplin Reply Decl. ¶ 4

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The Court took the matter under submission. After further consideration of the briefs, cases, and oral argument, the Court stays with its tentative ruling.

Defendants' Non-Compliant Separate Statement and Improper Reply Separate Statement

Defendants' separate statement fails to comply with several sections of California Rules of Court, rule 3.1350. Defendants' separate statement does not comply with Rule 3.1350(b): "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." Defendants' separate statement does not comply with the formatting requirements of Rule 3.1350(f) and 3.1350(h), which require separate enumeration of the causes of action to be adjudicated as well as the cited evidence to be under the undisputed fact solely on the left side of the page.

The court does not consider Defendants' improper response to Plaintiffs' opposing separate statement. See e.g. Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243, 252 (2009) ("The deficiencies carried over to the reply papers, which included a 297–page reply separate statement. There is no provision in the statute for this."); San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A., 102 Cal. App. 4th 308, 313 (2002) ("While the code provides for reply papers, it makes no allowance for . . . filing a supplemental separate statement. (§ 437c, subd. (b).) This is consistent with the requirement supporting papers and the separate statement be served with the original motion. (§ 437c, subd. (a).).").
The Court shall reach the merits of the motion. Truong v. Glasser, 181 Cal. App. 4th 102, 118 (2009) ("the court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory."). However, Defendants' counsel is expected to fully comply with the California Rules of Court in all further proceedings.

Plaintiffs' Evidentiary Objections in Opposition

Each of Plaintiffs' objections are OVERRULED.

Defendants' Evidentiary Objections in Reply

Objections Nos. 2, 24, 28, 29, 32, and 34-39 are SUSTAINED. Objections Nos. 1, and 3-9 are OVERRULED.

Defendants' remaining objections to the purported expert declarations submitted by Plaintiffs are immaterial to the Court's disposition of the motion. Code Civ. Proc. § 437c(q).
Request for Judicial Notice

Plaintiffs request the Court take judicial notice of five documents from New York State Court case Darabont v. AMC Network Index No. 654328/2013 pursuant to Evidence Code section 452(d). Of these documents, only Exhibits A and E bear a file stamp from the New York action. Accordingly, these are the only documents properly subject to judicial notice pursuant to Evidence Code section 452(d) as a record of a court of any state of the United States. Deposition transcripts and other documents produced in discovery do not become court records unless they are filed with the court. Plaintiffs have failed to provide a sufficient basis for the Court to take judicial notice of these documents.

Defendants object to the taking of judicial notice of prior testimony of Marci Wiseman, Exhibit A. On summary judgment, the Court may properly take judicial notice of, and rely upon, testimony from other proceedings. See Sweetwater Union High School Dist. v. Gilbane Building Co., 6 Cal. 5th 931, 942 (2019) ("statutes allowing consideration of some statements in resolving pretrial motions provide an exception to the hearsay rule for purposes of the motion."); Code Civ. Proc. § 437c(b).

Accordingly, the request for judicial notice is GRANTED as to Exhibit A and E only.

Summary Adjudication

A. Legal Standard

A party may move for summary judgment "if it is contended that the action has no merit or that there is no defense to the action or proceeding." Civ. Proc. Code § 437c(a). A party may also move for summary adjudication of a single cause of action, affirmative defense, claim for damages, or issue of duty. Civ. Proc. Code § 437c(f)(1). "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." Code Civ. Proc. § 437c(p)(1).

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 850 (2001). However, once the movant has shown that a cause of action has no merit or defense, the burden of production shifts to the opponent to show that a triable issue of material fact exists as to that cause of action. Id. at 850-53.

Until the movant meets this evidentiary burden, the opponent has no burden to present evidence showing a triable issue of fact. Hawkins v. Wilton, 144 Cal. App. 4th 936, 940 (2006) (citing Duckett v. Pistoresi Ambulance Service, Inc., 19 Cal. App. 4th 1525, 1533 (1993)). However, if the opponent does not present sufficient evidence when required, then summary judgment in favor of the movant is appropriate. Aguilar, supra, 25 Cal. 4th at 849. "A party opposing summary judgment may be able to demonstrate the existence of a triable issue of material fact through the moving party's own evidence or witnesses." Fisher v. Gibson, 90 Cal. App. 4th 275, 286 (2001).

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

The Third Amended Complaint alleges "AMC acted in bad faith by waiting until after The Walking Dead was already a success to reverse engineer a MAGR definition that AMC knew was guaranteed to result in no or negligible profit participations at best. . . and thereby deny Plaintiffs the benefit of AMC's promise to pay contingent compensation." TAC ¶ 97.

a. Applicable Law

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002). "Within every contract is an implied covenant of good faith and fair dealing. [Citation] This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. [Citation] For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513, 513–514 (N.Y. App. Div. 1999).

The implied covenant prevents parties with unilateral contractual authority from abusing that

authority. See e.g. Lonner v. Simon Property Group, Inc., 57 A.D.3d 100, 109 (N.Y. App. Div. 2008) ("Even were the defendant entitled to charge dormancy fees, it is still precluded under the implied covenant of good faith and fair dealing from setting such fees at grossly excessive amounts."); Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 302 (N.Y. App. Div. 2003) ("even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract."). Duration Mun. Fund, L.P. v. J.P. Morgan Securities Inc., 25 Misc.3d 1203(A) (N.Y. Sup. Ct. 2009) ("New York courts have repeatedly affirmed that a party may be in breach of an implied duty of good faith and fair dealing, even if it is not in breach of its express contractual obligations, when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denied or to deprive the other party of the fruit of its bargain."); In Touch Concepts, Inc. v. Cellco Partnership (S.D.N.Y. 2013) 949 F.Supp.2d 447, 467 ("But New York cases have expanded the use of the implied covenant of good faith in a manner other than as a gap-filler. For example, it is used to cabin some contractual rights, holding that a contractual right affording discretion may not be exercised in bad faith—arbitrarily, irrationally, or malevolently.").

b. There Are No Triable Issues of Material Fact as to Defendants' Lack of Good Faith

"MAGR is generally calculated pursuant to the MAGR definition of the entertainment company that is calculating and paying MAGR . . ., and is generally a formula for adding up all of the revenues from distributing the show and subtracting all of the production and distribution costs, which includes fees kept by the studio as a percentage of each revenue stream." Samplin Decl. Ex. X, Reinhardt Decl. ¶ 8. The agreements expressly state that Plaintiffs' contingent compensation would be a percentage of MAGR, which "shall be defined" in accordance with the "standard definition thereof" used by AMC on the series. Samplin Decl. Ex. D at § 4(d)(ii); Ex. E at § 11(b); Ex. G at § 4(d)(ii); Ex. I at § 7(c); Ex. M at § 3(b).

Wiseman states it is not true that AMC reverse engineered a MAGR definition and crafted it to prevent Plaintiffs from receiving profits. Wiseman Decl. ¶ 8. Rather, Wiseman states, AMC "set out to create a MAGR definition (and the imputed license fee therein) for the calculation and payment of profit participation that was in line with similarly situated companies in the television and distribution marketplace," ibid., and " selected an imputed license fee that would put AMC in a competitive market position and allow AMC to sign deals with profit participants on television shows it would produce and distribute." Id. ¶ 9. Wiseman and those involved in creating the MAGR term relied upon an email from their outside counsel, Roger Arar, to determine the imputed license fee, "AMC ILF," for use in MAGR. Id. ¶ 10, Ex. 1. The imputed

license fee was set at "65% of production costs (capped at $3 million for a pilot episode and $1.45 million for one hour episodes of a television series' first season)" on December 28, 2010, which was within the range of the imputed license fees reported by Arar. Id. ¶¶ 10-11. AMC's goal was to have a MAGR definition that was "competitive with similarly situated companies in the television marketplace." Id. ¶ 10.

AMC's final MAGR definition was circulated in February and March of 2011 to Plaintiffs, except Mazzarra who became a profit participant in 2012. Id. ¶¶ 6, 12, Ex. 3; Samplin Decl. Ex. Y Arar Decl. ¶¶ 63, 99, Samplin Decl. Ex. M. Wiseman also testifies the spreadsheet relied upon by Plaintiffs, TAC ¶ 55, did not contain a MAGR calculation until April of 2011, well after the MAGR definition was finalized and sent to Plaintiffs. Wiseman Decl. ¶¶ 14-16, Ex. 7-8.

In the first trial, Arar testified "[t]he definition that was sent in 2011 was the result of an intensive process between our law firm and many stakeholders inside of A.M.C. to come up with an appropriate market-comparable MAGR definition and that is the definition that they used then and here we are 10 years later and they still use it." Samplin Decl. Ex. DD at 206:4-10. Arar further testified he'd done dozens of other deals where profit participants accepted AMC's MAGR term and the MAGR term is the standard definition for everyone. Id. at 206:11-20. Defendants provide agreements containing substantially the same imputed license fee and standard MAGR term. Samplin Decl. Ex. GG-OOO. While "[f]or most shows, MAGR never becomes positive," Plaintiffs have received positive MAGR participation after it was revised. Samplin Decl. Ex. X, Reinhart Decl. ¶¶ 37-38. In opposition, Plaintiffs provide the declaration of Christina Fung, who reviewed agreements between AMC, its affiliates and profit participants for other projects. Fung Decl. ¶ 3. While Fung's declaration highlights purported differences between the reviewed agreements and Plaintiffs' agreements, there are sufficient and consistent similarities, particularly in the imputed license fee, that no reasonable trier of fact would conclude, by comparing the agreements, that Defendants created an idiosyncratic MAGR term or imputed license fee to deprive Plaintiffs of the benefit of their bargain or that Defendants acted arbitrarily, irrationally, or malevolently.

Based upon the evidence provided, Defendants met their initial burden to show they did not act in bad faith in crafting the MAGR definition or the imputed license fee and Plaintiffs received the benefit of their bargain, i.e. application of AMC's standard MAGR definition. "[A]s plaintiffs received all the promised benefits under the [contract], there is no common law cause of action for breach of an implied covenant of good faith and fair dealing." Caplan v. Unimax Holdings Corp., 188 A.D.2d 325, 325 (N.Y. App. Div. 1992).

In opposition, Plaintiffs contend there are "five separate categories of evidence independently establish that AMC acted in bad faith." Opp. at 11:4. The Court agrees with Defendants that none of these categories of evidence are sufficient to raise a triable issue of fact that Defendants deprived Plaintiffs of the benefit of their bargain or acted arbitrarily, irrationally, or malevolently such that a reasonable jury could find their conduct breached of implied covenant of good faith and fair dealing.

First, Plaintiffs argue the MAGR term itself evidences bad faith and the "MAGR definition deprived Plaintiffs of the benefit of AMC's promise to pay contingent compensation. Opp. at 12:17-13:20. Plaintiffs cite, without explanation or analysis, Wallace v. Merrill Lynch Capital Services, Inc., 10 Misc.3d 1062(A), 2005 WL 3487809, (N.Y. Sup. Ct. 2005), a ruling on a motion to dismiss, in which the court stated:

TXU's argument for breach of the implied covenant is based, at least in part, on Merrill Lynch's attempt to set-off a debt of over $20,100,000 with bonds having a market value of $3,500,000. Even if Merrill Lynch had a right to set-off their debt with an obligation of equal value, it presents a question of fact as to whether attempting to set-off the debt with distressed securities was either in bad faith or a "willful or negligent disregard of the rights of" TXU under the Agreement, a question of fact that should not be decided on a motion to dismiss.

Id. Plaintiffs contend the original MAGR term "would have resulted in a MAGR deficit of $170,855,144" and therefore Plaintiffs were deprived of any contingent compensation. Opp. at 12:21.

However, the question is not whether the MAGR term ultimately proved unprofitable. Plaintiffs' first cause of action in the Third Amended Complaint is based upon creation and application of the MAGR definition in 2011. TAC ¶¶ 94-97. "The requirement of good faith and fair dealing, though always incumbent upon contracting parties, cannot, however, be turned into a vehicle for the wholesale supplying of terms to an agreement that a disappointed party might, in retrospect, have inserted." Tuttle v. W. T. Grant Co., 5 A.D.2d 370, 374 (N.Y. App. Div. 1958) revd. on other grounds 6 N.Y.2d 754, 186 N.Y.S.2d 655, 159 N.E.2d 202). Plaintiffs' own expert acknowledged "[i]t is not uncommon for an imputed license fee to be set at 65 percent of the cost of production for the first few seasons, to be capped at a certain dollar amount, or even to be subject to a five percent increase year over year." Younger Decl. ¶ 28. Accordingly, Plaintiffs' evidence supports, rather than refutes, Defendants' showing that the MAGR definition was not specifically and malevolently crafted to deny Plaintiffs' the benefits of their contracts. As argued by Defendants in reply, much of Plaintiffs' argument related to the implied covenant claim is

based upon the unsupported assumption that a benefit of their bargain was a positive MAGR, always resulting in contingent compensation, for each year. Reply at 9:10-10:2. Plaintiffs do not cite any contractual language supporting this assumption and Plaintiffs agreed to be bound by Defendants' MAGR term. Vanlex Stores, Inc. v. BFP 300 Madison II, LLC, 66 A.D.3d 580, 581 (N.Y. App. Div. 2009) ("the implied covenant of good faith and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing."); Berzin v. W.P. Carey & Co., Inc., 293 A.D.2d 320, 321 (N.Y. App. Div. 2002) ("The covenant of good faith and fair dealing cannot negate defendant's express right.").

Plaintiffs second contention is that Defendants shifted value out of AMC Film Holdings to AMC Network to avoid profit participation obligations by self-producing the show and adopted the imputed license fee. Mot. at 13:21-16:1. Plaintiffs note Defendants chose to self-produce The Walking Dead to avoid having to negotiate with a studio over a license fee. However, the parties' agreements discussed MAGR under both scenarios, see e.g. Samplin Decl. Ex. D, Ex. E § 11(b), and Defendants had the contractual right to self-produce the show. "Defendants did not violate the implied covenant of good faith and fair dealing 'by acting in [their] own self-interest consistent with [their] rights under a contract." DeBlasio v. Merrill Lynch & Co., Inc., 2009 WL 2242605, at *38 (S.D.N.Y., July 27, 2009, No. 07CIV318RJS). Moreover, Plaintiffs' offered expert testified it is "an acceptable and widely engaged in practice" for networks not to negotiate a license fee with its own affiliated entity. Younger Decl. ¶ 22. As noted above, Plaintiffs' offered expert also acknowledged the imputed license fee used by Defendants did not contain "uncommon" terms. Younger Decl. ¶ 28. Plaintiffs contend Defendants "ignored the practice of similarly situated cable networks" and "skipp[ed] several obvious comparators" when setting the imputed license fee. Opp. at 14:25-15:17. Plaintiffs' reliance upon the Younger declaration to suggest Defendants' analysis or market decision should have been different does not create a triable issue of fact. "[T]o the extent plaintiffs' breach of covenant claim is that AMC acted in bad faith by designing a MAGR definition that did not conform to certain industry customs, this claim improperly seeks to impose obligations on AMC beyond the express terms of the parties' agreement." Darabont v. AMC Network Entertainment LLC, 193 A.D.3d 500 (N.Y. App. Div. 2021).

Plaintiffs' third contention is Defendants' conduct prior to finalizing the MAGR definition raises an inference of bad faith. Opp. at 16:7-18:16. Plaintiffs rely upon a March 8, 2011 and March 10, 2011 spreadsheet that included a "MAGR Model" calculating MAGR based upon known information as of February 2011. Pltfs. Ex. 10-11. The spreadsheets indicated a negative MAGR and acknowledged they were based upon incomplete information. Ibid. The Court agrees with Defendants that these spreadsheets do not raise a triable issue of fact. There is no basis to

conclude Defendants were required by any express or implied term to ensure MAGR was positive in the first season. MAGR is typically negative after the first season, Def. Reply Ex. 4 at 77:23-78:7, as recognized in a legal treatise. Def. Reply Ex. 2 at 12. Additionally, Defendants first distributed the imputed license fee associated with the show on December 28, 2010, Wiseman Decl. ¶ 10, and the MAGR definition on February 22, 2011. Wiseman Decl. Ex. 3. Plaintiffs do not provide any evidence indicating these terms were changed prior to their distribution to Plaintiffs directly and do not cite any legal authority demonstrating Defendants were required to change these terms. No reasonable inference of bad faith can be made from Defendants' subsequent use of these spreadsheets.

Plaintiffs' fourth contention is that Defendants conduct after finalizing the terms raises an inference of intentional bad faith. Opp. at 18:17-19:28. Superficially, Plaintiffs note Defendants revised and improved the MAGR definition over time. Plaintiffs do not cite any relevant authority supporting their contention that offering an improved MAGR term demonstrates or reasonably leads to an inference of bad faith. Plaintiffs cite Anderson v. State of New York, Office of Court Admin. of Unified Court System, 614 F.Supp.2d 404, 430 (S.D.N.Y. 2009), in which the court found "a material question of fact as to whether plaintiff has shown a causal connection between her protected speech and her discharge" in ruling on a motion for summary judgment to a First Amendment retaliation claim, citing a four month gap between a protected complaint and the adverse employment action. Plaintiffs cite Lake v. Town of Southold, 189 A.D.3d 1588, 1594, (N.Y. App. Div. 2020), another employment case, finding "a triable issue of fact as to whether his job performance was satisfactory and whether the Town's proffered explanation of poor performance was pretextual." Plaintiffs cite Hammond v. Bradley, 2008 WL 1340653, at *1 (W.D.N.Y., Apr. 9, 2008, No. 06-CV-6365L), which is a federal ruling denying a motion for judgment on the pleadings as moot because "Plaintiff . . . disavows any intention to plead a substantive due process claim" and only alleged the filing of a false misbehavior report to show consciousness of guilt. Plaintiff cites State Farm Mutual Automobile Insurance Company v. Fayda, 2015 WL 7871037, at *4 (S.D.N.Y., Dec. 3, 2015, No. 14CIV9792WHPJCF), a discovery order that permitted discovery based upon the argument that "evidence of complex financial transactions that may have been used to conceal assets or income . . . could be used to show consciousness of guilt [and] consciousness of guilt, in turn, could be used to establish the Kiner Defendants' intent to defraud (an element of a fraud claim under New York law."

The cases cited in Plaintiffs' footnote 5 are similarly inapposite. Gandhi v. New York State Unified Court System, 2021 WL 4404235, at *8 (N.D.N.Y., Sept. 27, 2021, No. 01:20-CV-0120 (LEK) (First Amendment retaliation claim adequately pled because temporal proximity between termination and grievance sufficient to show improper intent); Stajic v. City of New York, 214

F.Supp.3d 230, 235 (S.D.N.Y. 2016) (same at summary judgment); Anemone v. Metropolitan Transp. Authority 2008 WL 1956284, at *9-10 (S.D.N.Y., May 2, 2008, No. 05 CIV. 3170 (LAP)) ("Plaintiff's theory of this case is fairly straightforward: because he went to The New York Times on March 28 in an exercise of his First Amendment right to expose corruption at the MTA and the decision to suspend and then terminate him followed shortly thereafter, a reasonable jury could infer that he suffered an adverse employment decision because of his protected speech to The Times."). Plaintiffs do not cite any authority demonstrating these cases have any bearing on their contractual breach of the implied covenant of good faith and fair dealing claim.

Finally, Plaintiffs contend Defendants "acted irrationally, arbitrarily, and with reckless disregard for Plaintiffs' rights." Opp. at 20:1-21:14. "Conduct which reaches the level of reckless disregard may be sufficient to evidence a breach of the implied covenant of good faith, but only if it is severe enough to warrant an inference that the party acted in bad faith or intended to do harm." Keene Corp. v. Bogan, 1990 WL 1864, at *15 (S.D.N.Y., Jan. 11, 1990, No. 88 CIV. 0217 (MBM)). Plaintiffs' evidence does not raise a triable issue of fact. Plaintiffs contend "AMC has acknowledged it had an obligation to pay profit participation to Plaintiffs." Opp. at 20:8-9 citing SDF 171. Then, taking this fact as established, Plaintiffs contend Defendants did not ensure Plaintiffs would receive a positive MAGR payment. Opp. at 20:9-21:14. However, the cited testimonial evidence establishes only that Plaintiffs were profit participants, who would receive compensation consistent with the terms of their agreement. Pltfs. Ex. 118, Wiseman Depo. at 352:9-356:22. Plaintiffs contend Defendants should have arrived at a different MAGR term based upon "obvious comparators," or by asking for additional information from Arar. However, Plaintiffs cannot base their claim upon market or industry customs. Darabont, supra, 193 A.D.3d 500.

Based upon the facts and evidence before the Court, the Court finds no triable issues of material fact as to Plaintiffs' first cause of action for breach of the implied covenant of good faith and fair dealing. Accordingly, summary adjudication is GRANTED as to the first cause of action.

c. The Court Previously Rejected Defendants Arguments Based Upon the Prior Statement of Decision

Defendants contend Plaintiffs claim alternatively must fail because the Court's prior statement of decision found the MAGR definition was binding, as a matter of contract interpretation, and any trial would require the trier of fact to assess damages based upon a newly crafted MAGR definition. Mot. at 14:13-15:18. The Court previously rejected this argument in connection with

the demurrer to the Third Amended Complaint. New York law permits Plaintiffs' claim and therefore Defendants' alternative argument does not provide a separate basis for summary adjudication. As stated in Richbell Information Services, Inc. v. Jupiter Partners, L.P.:

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

309 A.D.2d 288, 302 (N.Y. App. Div. 2003).

d. The Implied Covenant Claim is Not Impermissibly Duplicative

Defendants also argue the implied covenant claim is impermissibly duplicative. Mot. at 15:19-16:15. MBIA Ins. Corp. v. Merrill Lynch, 81 A.D.3d 419, 419–420 ("The cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action and is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (N.Y. App. Div. 2011). Defendants argue "[i]n their interrogatory responses, Plaintiffs have conflated their damages theory for breach of the implied covenant with their damages theory for breach-of-contract—confirming that they are seeking the same damages for both. See SUF ¶ 59; Ex. EE (claiming that interrogatories asking about Plaintiffs' implied covenant damages are "duplicative" of interrogatories asking about Plaintiffs' breach-of-contract damages)." Mot. at 16:6-10. In their recent interrogatory responses, Plaintiffs responded to an "identify and describe all damages" interrogatory regarding AMC's breach of the implied covenant by objecting that the interrogatory was duplicative of special interrogatories 16 and 17, propounded in 2018, which requested Plaintiffs to identify all damages suffered by reason of the matters alleged in the complaint. SUF 59, Samplin Decl. Ex. R, EE.

In opposition, Plaintiffs contend their breach of the implied covenant claim is an alternative to, not a duplication of, the prior breach of contract claim which was affected by the Court's

statement of decision on contract interpretation issues. Opp. at 23:4-25:1. The Court agrees. New York courts have declined to dismiss breach of the implied covenant claims where a similar contract claim was dismissed. See Punch Fashion, LLC v. Merchant Factors Corp. 180 A.D.3d 520, 523 (N.Y. App. Div. 2020) ("Since we have dismissed the part of the third cause of action that alleges breach of contract, the portion of the third cause of action that alleges breach of the implied covenant cannot be dismissed as duplicative."). "Claims for breach of good faith and fair dealing are not duplicative when claims . . . are not predicated on contractual terms that form the basis of the breach of contract claim." MBIA Ins. Co. v. GMAC Mortg. LLC, 30 Misc.3d 856, 865 (N.Y. Sup. Ct. 2010).

Defendants' reliance upon cases involving the statute of limitations and joint pleading is unpersuasive. Austin v. Gould, 137 A.D.3d 495, 496 (N.Y. App. Div. 2016); Smile Train, Inc. v. Ferris Consulting Corp., 117 A.D.3d 629, 630 (N.Y. App. Div. 2014) ("It would be anomalous if plaintiff's contract claim were subject to a three-month statute of limitations but its claim for breach of the implied covenant were not."). While Plaintiffs' claim for breach of the implied covenant and their contract claims "involve some overlap, they consist of distinct, non-duplicative independent claims." Dialcom, LLC v. AT & T Corp., 20 Misc.3d 1111(A) (N.Y. Sup. Ct. 2008). Plaintiffs' implied covenant claim is based upon Defendants' exercise of its, now established, contractual right to set the MAGR term. The breach of contract claimed involved different facts and legal duties. The Court does not find Plaintiffs' claim impermissibly duplicative such that summary adjudication would be proper on this alternative ground.

C. Inducing Breach of Contract – Fourth Cause of Action

a. Applicable Law

The Third Amended Complaint alleges Defendant AMC Networks, Inc. induced AMC Film Holdings to breach its contracts with Plaintiffs. TAC ¶¶ 109-115. The claim is based upon both the breach of the implied covenant as well as the alleged breach of the contractual terms. Ibid.

The existence of a choice of law clause in the parties' contract is insufficient to establish the applicability of New York law to this claim. Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc., 414 F.3d 325, 335 (2d Cir. 2005) ("Under New York law, then, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract, even when the contract also includes a broader forum-selection clause."). In its July 27, 2021 ruling on Defendants' demurrer, the Court determined that California law applied to Plaintiffs' tort claim.

Under California law, "[t]he elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990). "To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action." Reeves v. Hanlon, 33 Cal. 4th 1140, 1148 (2004).

"[T]he tort cause of action for interference with a contract does not lie against a party to the contract." Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 514 (1994). However, "the California courts have not recognized a corporate owner's absolute privilege to interfere with its subsidiary's contract." Asahi Kasei Pharma Corp. v. Actelion Ltd., 222 Cal. App. 4th 945, 962 (2013).

b. There is No Triable Issue of Fact as to Agency

Defendants contend the acts supporting Plaintiffs' fourth cause of action were taken by agents of AMC Film Holdings and therefore the fourth cause of action fails. Mot. at 16:16-17:14 citing Applied Equipment, supra, 7 Cal. 4th at 514. "[A] defendant who is not a party to the contract or an agent of a party to the contract is not immune from liability for intentional interference with contract by virtue of having an economic or social interest in the contract." Caliber Paving Company, Inc. v. Rexford Industrial Realty and Management, Inc., 54 Cal. App. 5th 175, 187 (2020). "It is also well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." Shoemaker v. Myers, 52 Cal. 3d 1, 24 (1990). See also Mintz v. Blue Cross of California, 172 Cal. App. 4th 1594, 1606 (2009) ("The only question is whether the representative of a contracting party may be held liable for the substantive tort of interfering with the contract. The cases answer that question in the negative.").

Defendants rely upon paragraph seven of Marci Wiseman's declaration in support of their agency argument, which provides:

AMC's rights and obligations under the profit participation contracts for the Series were assigned to AMC Film Holdings ("AMCFH"), an indirect, wholly-owned subsidiary of AMC.

That meant that AMCFH was responsible for creating the MAGR definition and paying contingent compensation to the Series' profit participants. As I understood it, AMCFH was an entity with no employees and whose function was to hold intellectual property rights. As such, various executives were authorized by senior management to act on behalf of AMCFH, including myself. Thus, I understood I was acting on behalf of AMCFH when coordinating the creation of the standard MAGR definition that would be used by AMCFH in its deals with profit participants.

Wiseman Decl. ¶ 7. In opposition, Plaintiffs contend Defendants failed meet their burden of production as to the issue of agency. Opp. at 26:11-27:4. The Court disagrees and finds the evidence sufficient to establish an agency relationship between AMC Networks employees and AMCFH, such that Plaintiffs cannot prevail on their interference claim.

Wiseman attests she worked as the Senior Vice President of Business Affairs for AMC Networks before becoming the Executive in Charge of Owned Content and Strategy toward the end of 2013. Wiseman Decl. ¶ 1. From the end of 2014 through May 2015, Wiseman served in a consulting role. Ibid. Wiseman was authorized along with others to act on behalf of AMCFH. Id. ¶ 7. It is undisputed AMCFH is solely a holding company for AMC Networks and does not have any employees of its own. Ibid. Samplin Decl. Ex. X Reinhardt Decl. ¶ 17, Pltfs. Sep. Stmt. Fact 37.

"Because a corporation is a legal fiction, it cannot act but through the agency of natural persons." Presbyterian Camp & Conference Centers, Inc. v. Superior Court, 12 Cal. 5th 493, 515 (2021). In their opposing separate statement, Plaintiffs note there was no delineation between the AMC entities, which is consistent with Defendants' arguments and the organization of their businesses. Because AMCFH did not have any employees of its own and was a wholly owned subsidiary, AMC Networks' employees served as AMCFH's agents as part of their duties. Pltfs. Ex. 121 Reinhardt Depo at 102:7-105:10; Ex. 128 Davis Depo at 30:19-23; Ex. 126 Stillerman Depo at 104:3- 105:8; Ex. 125 Stein Depo. at 20:25-21:9; Ex. 118 Wiseman Depo. at 391:20-392:1.

Plaintiffs contend "under California law, a parent company is not immune from suit for tortious interfering with its subsidiary's contracts." Opp. at 27:8-10 citing Asahi, supra, 222 Cal. App. 4th at 962-963. However, Asahi stands for the proposition that an ownership interest alone is insufficient to avoid liability. Id. at 964 ("Actelion, by virtue of its ownership interest, is not automatically immune from liability for tortious interference with the License Agreement."). The court affirmed that liability only may only attach to "one who is not a party to the contract or an agent of a party to the contract." Id. at 963–964.

Finally, Plaintiffs contend there is a factual dispute regarding whether certain employees were agents of AMCFH because "they held employment contracts with other AMC entities." Opp. at 27:15-17. The Court does not find their employment contracts inconsistent with Defendants' agency arguments and Plaintiffs do not cite any relevant authority supporting their contention. The undisputed facts indicate the individuals charged with interfering with Plaintiffs' contracts were AMC entity employees acting as agents of AMCFH. Plaintiffs cite Center for Healthcare Education and Research, Inc. v. International Congress for Joint Reconstruction, Inc., 57 Cal.App.5th 1108, 1128 (2020) and Fowler v. Varian Associates, Inc., 196 Cal. App. 3d 34, 41 (1987), which stand for the proposition that an agent has a duty of loyalty to its principal, which the Court does not find materially relevant to the issues presented. Plaintiffs also cite Nguyen v. Scott, 206 Cal. App. 3d 725, 733–734 (1988), which involved the sufficiency of dual agency allegations on demurrer for purposes of real estate transaction and does not aid Plaintiffs. Id. at 732 ("The complaint's allegations of dual agency are legal conclusions that should be disregarded in considering the sufficiency of the demurrer. [Citation] Other allegations rebut any inference that appellants authorized Scott to represent them or that they acquiesced to or ratified his activity in soliciting purchase offers from third parties."). Plaintiffs have not demonstrated AMC and AMCFH had divergent interests, where AMCFH is a wholly owned holding company. Plaintiffs have not demonstrated a legal basis for concluding the agency relationship between AMC, its employees, and AMFCH is insufficient to fall within the established rule that agents cannot be liable for interference with the contracts of their principals. Plaintiffs failed to raise a triable issue of fact.

Summary adjudication is GRANTED as to the fourth cause of action.

D. Breach of Contract – Second Cause of Action

a. Defendants' Motion as to the Second Cause of Action is Procedurally Improper

The second cause of action for breach of contract in the Third Amended Complaint alleges Defendants breached its contracts with Plaintiffs by not calculating their contingent compensation consistent with their agreement and the MAGR terms by withholding revenue and improperly charging costs. TAC ¶¶ 101-102. The miscalculations were allegedly discovered during Plaintiffs' audit. TAC ¶ 65. These audit claims are separate from the breach of the implied covenant claim and apply AMC's MAGR term as written.

In opposition, Plaintiffs argue "AMC's motion for summary adjudication on only portions of

Plaintiffs' breach of contract claim is procedurally improper and must be denied on those grounds." Opp. at 28:25-29:4. The Court agrees.

Pursuant to Code of Civil Procedure section 437c(f)(1), "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." The only statutory provision that allows a motion for partial summary adjudication is Code of Civil Procedure section 437c(t), which requires a strict process not followed here. Code Civ. Proc. § 437(c)(t) ("Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision."). Plaintiffs' second cause of action is based upon the failure to pay the correct amount of contingent compensation. Defendants cannot, via a motion for summary adjudication, partially adjudicate each portion of the claimed compensation owed. DeCastro West Chodorow & Burns, Inc. v. Superior Court, 47 Cal. App. 4th 410, 422 (1996) ("We conclude that Code of Civil Procedure section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action.").

As stated in Defendants' Notice of Motion, Defendants only seek to summarily adjudicate portions of the second case of action for breach of contract: "AMC moves for summary adjudication on the grounds that there is no merit to the following causes of action and/or issues: . . . those parts of Plaintiffs' Second Cause of Action that are based on Plaintiffs' allegations in paragraphs 66(a), 66(b), 66(c), 66(e), 67, 68(b), 68(c) (regarding the alleged "marketing fee"), 70(a), 86(a), 86(b), 86(c), 86(d), 87, 88(b), 88(c), 88(d), and 90(a) of the TAC." Defendants admit they "are not moving for summary adjudication on all the audit claims raised in the Third Amended Complaint." Mot. at 4 n.2. Specifically, Defendants' motion does not address "Kirkman's claim that he is entitled to certain revenue associated with bobble-head dolls; Plaintiffs' claims that AMC
excluded electronic sell-through distribution revenue; and Plaintiffs' claims that AMC did not adequately substantiate various distribution charges and production costs." Ibid.

The Court cannot grant summary adjudication as to these limited issues. See Belio v. Panorama Optics, Inc., 33 Cal. App. 4th 1096, 1102–1103 (1995) ("Panorama's motion was not directed at the first cause of action in its entirety. Panorama solely sought summary adjudication of one issue within the first cause of action, namely, that Belio's request for dissolution under section 1800, subdivision (b)(3), was without merit. Panorama's papers expressly declined to address Belio's alternative section 1800, subdivision (b)(5), ground. Because Panorama merely sought

summary adjudication as to a single issue within a cause of action, rather than as to an entire cause of action, the motion was procedurally infirm and should have been denied.").

In reply, Defendants cite Lilienthal & Fowler v. Superior Court, 12 Cal.App.4th 1848, (1993), which does not aid Defendants here. Other courts have questioned whether Lilienthal still applies after subsequent amendments to the summary adjudication statute. Bagley v. TRW, Inc., 73 Cal. App. 4th 1092, 1095 n.2 (1999) ("We question whether Lilienthal properly construed subdivision (f)(1) of section 437c."). The court in Lilienthal rested its determination to permit summary adjudication of a portion of a cause of action on the following facts: "plaintiffs seek to recover damages based on two separate and distinct obligations. Each obligation creates a separate and distinct claim. The first obligation relates to legal services performed on the Murillo matter, and the second obligation relates to legal services performed on the Barton matter. There is no dispute that the two matters have no relation to each other and involve legal services performed at different times, with different and distinct obligations, and distinct and separate alleged damages. Under California law, the allegations relating to the Murillo and Barton matters involve two separate and distinct causes of action regardless of how pled in the complaint." Lilienthal, supra, 12 Cal. App. 4th at 1854.

Defendants also cite Silva v. See's Candy Shops, Inc., 7 Cal. App. 5th 235, 257 (2016) disapproved on other grounds by Donohue v. AMN Services, LLC, 11 Cal. 5th 58, 77 (2021). However, Silva does not aid Defendants either. The complaint in Silva involved pleading separate theories of liability under the Labor Code within a single cause of action: "[i]n this case, Silva's individual claims alleging that she did not receive required meal and rest breaks and payments or was not reimbursed for business expenses were separate theories from her claim that See's Candy employees did not receive full compensation based on the application of the rounding and grace-period policies." Nothing in Silva permits summary adjudication of component parts of Plaintiffs' breach of contract claims. Similarly, Defendants cite Aryeh v. Canon Business Solutions, Inc., 55 Cal. 4th 1185, 1199 (2013), which involved the continuous accrual of the statute of limitations in connection with a recurring obligation and has no application here.

In Crouse v. Brobeck, Phleger & Harrison 67 Cal. App. 4th 1509 (1998), the court found Lilienthal did not apply where "a cause of action for malpractice alleges a single injury, the fact that the attorney's course of conduct involved discrete negligent acts or omissions does not create separate causes of action with a separate statute of limitations for each act or omission. . . . in Lilienthal, separate statutes of limitations ran on different claims for malpractice because the claims arose from different services provided at different times involving separate and distinct

unrelated transactions." Crouse, supra, 67 Cal. App. 4th at 1526 n.2. Plaintiffs' breach of contract claims in this action, which involve the same parties, same contracts, and same damages based upon the calculation of compensation owed, are not akin to the entirely unrelated malpractice claims in Lilienthal.

Defendants' motion for partial summary adjudication of the breach of contract cause of action is DENIED.

Conclusion

Defendants' Motion for Summary Adjudication is GRANTED in part. Summary adjudication is GRANTED as to the first cause of action for breach of the implied covenant of good faith and fair dealing and the fourth cause of action for inducing breach of contract.

Summary adjudication is DENIED as to the second cause of action for breach of contract.

The Judicial Assistant hereby gives notice.

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