SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED PART _____
Justice

0603625/2003

AMERICAN MOVIE CLASSICS
vs
TIME WARNER ENTERTAINMENT

SEQ 5

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered in memorandum for motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
JUL 08 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/8/05

HON. BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

----------X

AMERICAN MOVIE CLASSICS COMPANY,

Plaintiff,

vs.

TIME WARNER ENTERTAINMENT, L.P.,

Defendant.

----------X

TIME WARNER ENTERTAINMENT COMPANY, L.P.,

INDEX NO.: 603625/03

Counterclaim-Plaintiff,

-and-

TIME WARNER CABLE INC.,

Additional Counterclaim, Plaintiff,

vs.

AMERICAN MOVIE CLASSICS COMPANY,

Counterclaim-Defendant.

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Plaintiff-counterclaim defendant, American Movie Classics Company LLC ("AMCC" or "AMC"), moves (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment on its Amended Complaint and to dismiss the Counterclaims of defendants-counterclaim plaintiffs, Time Warner Entertainment Company, L.P. and Time Warner Cable (collectively "Time Warner"). Time Warner cross-moves for summary judgment on its Counterclaims and to dismiss AMCC's Amended Complaint. Time Warner also moves

(Motion Seq. 003), to preclude certain items of extrinsic evidence. These motions are combined for disposition.

AMCC is a nationwide cable television programming service, (Amend Compl. and Reply to Countercls. ¶ 6), and is owned by Rainbow Media Holdings, LLC ("Rainbow Media"), which is a wholly owned subsidiary of Cablevision Systems Corporation ("Cablevision"). (AMCC's response to Time Warner's 19-a Statement ¶2). Time Warner Cable Inc. owns 94% of Time Warner Entertainment Company, L.P. and both own and operate cable systems and license programming services through carriage agreements. (Id. ¶¶ 5, 6 and 26). Within the cable industry operators seek a variety of programming on their channels to attract different audiences. (Dore[1] Tr.[2] at 24-25; Griffith[3] Tr. at 17-18; Martin[4]

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1 All references to "[Name] Tr.," are to the deposition testimony submitted in connection with these motions.

2 Katherine Dore, Rainbow Media President of Entertainment Services.

3 Melani E. Griffith, former Rainbow Media Senior Vice President of Affiliate Sales for the Eastern Region.

4 Kim Martin, Rainbow Media Executive Vice President of Affiliate Sales & Marketing.

Tr. at 104; Murano[5] Tr. at 27; Costantini[6] Tr. at 102; Dressler[7] Tr. at 183). Many cable operators chose to add AMCC to their basic cable package in order to attract viewers interested in the classic films niche market. (Forrest Aff.., Ex. 9 at 1-2). In its 1993 Form 10K Annual Report, Cablevision described AMCC's programming as "a national program service featuring classic, unedited and non-colorized films from the 1930s through the 1970s". (Time Warner's 19-a Statement ¶ 46; Forrest Aff.., Ex. 15). AMCC's service in 1993 was described by its executives, at that time, as "generally made up of movies from the 1930's, '40s and '50s" and was "primarily" "older, classic black and white movies" "from the '30s, '40s '50s and some from the '60s". (Time Warner's 19-a Statement ¶ 49; McEnroe[8] Tr. at 9; O'Loughlin[9] Tr. at 16-17, 44).

Time Warner desired to add AMCC's niche programming to its cable operation and on September 1, 1993, AMCC and Time Warner entered into an affiliation agreement. ("1993 Agreement"). (Mastro Aff., Ex. A; Forrest Aff., Ex. 14). During the negotiations

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5 Mary Murano, former Rainbow Media Executive Vice President of Affiliate Sales.

6 Lynne Costantini, Time Warner Senior Vice President of Programming.

7 Fred M. Dressler, Time Warner Executive Vice President, Programming.

8 Katherine McEnroe, former AMCC Networks President.

9 Noreen O'Loughlin, former AMC Executive Vice President and General Manager.

which led to the Agreement, AMCC was represented by Catherine McEnroe of AMCC and Andrea Greenberg of Rainbow Media Holding, LLC - AMCC's parent company. Time Warner was represented by Fred Dressler and Andy Heller. AMCC was "the keeper of the drafts" and "was responsible for doing the drafting" while Time Warner negotiated changes and offered some proposed language. (McEnroe Tr. at 10-11, 22-23, 191-92; Dressler Tr. at 168-69). Under the 1993 Agreement, Time Warner was to provide carriage for AMCC's program service ("Service") and the content of such programming was set forth in paragraph 10 of the 1993 Agreement, in a provision known in the industry as the "Content Clause."

Initially, Time Warner proposed a Content Clause which would have restricted AMC's service to movies from the 1930's, 1940's and 1950's. (Mastro Aff. Ex.C. [Dressler Tr. at 168]; AMC reply memo, p. 13, n.6). However "AMC felt" that since the parties "were entering into a new long-term contract and that more recent movies than the '30s, '40s, and 50s would still be old movies" the language should allow for flexibility. (Mastro Aff. Ex.C. [Dressler Tr. at 169]; AMC reply memo, p. 13, n.6). Therefore, the Content Clause was not as limited as initially requested by Time Warner; rather, a compromise was made in which the parties agreed that during the term of the contract, AMCC would not materially change the general quantity and quality of the programming from the programming contained on the service as of the date of the contract. (Mastro Aff., Ex. A ¶ 10; Forrest Aff., Ex. 14 ¶ 10). If during the term of the contract, such a change in AMCC's service did occur, it would constitute a breach of the 1993 Agreement. (Id.). The Content Clause incorporated by reference a "representative sampling" of AMCC's programming. AMCC selected the

November 1993 program schedule to be attached as the Representative Sample, to represent the service as of the date of the contract. (McEnroe Tr. at 71).

The 1993 Agreement was set forth in a detailed letter agreement, signed by both parties. The "Service" which was to be provided by AMCC is initially introduced in the opening paragraph of the 1993 Agreement which provides:

> This letter will confirm the agreement (the 'Agreement') between TIME WARNER CABLE a division of Time Warner Entertainment Company, L.P. (collectively 'Affiliate') and AMERICAN MOVIE CLASSICS COMPANY ('AMCC') for carriage of the American Movie Classics program service (the 'Service')

The full description of the "Service" to be provided by AMCC is set forth in the "Content Clause" of the 1993 Agreement and is contained in paragraph 10, which provides in its entirety:

> 10. THE SERVICE: AMCC agrees that as of the date hereof the programming on the Service consists of classic motion picture films first released for theatrical exhibition during the 60 year period prior to the date hereof, originally produced programs regarding such films and such other related material as AMCC deems appropriate. A representative sampling of Service programming is listed in the program schedule attached hereto as Schedule VI. If at any time during the License Period the general quantity and quality of the programming on the Service materially changes from that contained on the Service as of the date hereof, Affiliate shall have the right exercisable upon ninety (90) days prior written notice to AMCC to terminate this Agreement. Affiliate acknowledges and agrees that the inclusion of advertising, sponsorship or

> promotions on the Service shall not be deemed a material change in the programming on the Service.

Paragraph 15(l) of the 1993 Agreement contains a no-waiver provision which provides:

> Except as set forth in subparagraph 15(h), this Agreement may not be amended nor any of its provisions waived except in writing signed by the parties hereto.[10]

(Mastro Aff., Ex. A, ¶¶ 10,15; Forrest Aff., Ex. 14, ¶¶ 10,15).

As noted, the Representative Sampling set forth in Schedule VI listed AMCC's programming schedule for the month of November 1993, and was provided by AMCC. The Representative Sampling showed that 93.85% of the programming consisted of movies, and 6.15% of the programming consisted of non-movie programs. (Time Warner's 19-a Statement and AMCC's response, ¶44). While the Representative Sampling does not list the dates that the movies were released, the parties have submitted stipulated data which establishes that 94.4% of the movies listed in the Representative Sample were released between the period from 1930 through 1959, and 5.1% of the movies were post-1960. (Id.; see also, Brien Aff. ¶ 12). In addition, 73.8% of the movies shown in the Representative Sampling were black and white. (Brien Aff. ¶¶ 12, 13, 15-16, Exs. B, C, E). Additionally,

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10 The exception contained in paragraph 15(h) of the 1993 Agreement is not relevant to these motions.

91% of all prime time movies were pre-1960 movies, 60.7 % were black and white, and only 9% were post-1960 movies. In 1993, the non-movie programming was approximately equally divided between "original programming" and "other related material" so that each consisted of approximately 3% of the programming. (Id.¶ 18, Ex. F).

On December 19, 2000, the parties extended the 1993 Agreement through December 31, 2008. (The "2000 Extension") (Mastro Aff., Ex. B; Forrest Aff., Ex. 15). Although certain changes were made to the 1993 Agreement, no change was made to the Content Clause. (Id.). Time Warner carries "hundreds" of "agreements with program suppliers" and did not regularly monitor the programming content of AMCC to ensure compliance with the Content Clause. (Dressler Tr. at 28-29, 133). The record does not indicate that Time Warner had any specific knowledge of any programming changes by AMCC at the date it renewed the 1993 Agreement. There is no writing by the parties which acknowledges or approves of any programming changes made or proposed by AMCC, at the time of the Extension

After the Extension, AMCC publicly decided to change the content of its programming. In a September 24, 2002 press release, it announced that it was "expanding its brand to include contemporary movies as a complement to the classics, along with an increased slate of movie-based original series, documentaries and specials." (Ex 52 at AMCC 007763). A few months earlier, in either May or June of 2002, Catherine McEnroe, then President of AMCC Networks, Josh Sapan, President of Rainbow Programming, and Kim Martin, Executive Vice President of Affiliate Sales and Marketing of Rainbow Media

met with Fred Dressler, Executive Vice President of Time Warner. (Time Warner's 19-a Statement ¶ 82; Martin Tr. at 117-22; Dressler Tr. at 142-3). At the meeting, AMCC's representatives discussed the proposed programming changes. (See, Transcript of Arg. dated, 4/15/2005 at p. 59). The record does not present, in any detail, Time Warner's response to the proposed AMCC programming changes. There is no writing in the record between the parties at or around May or June, 2002, which acknowledges or approves of any proposed or actual programming changes made by AMCC.

Nevertheless, by October, 2002, there were substantial and material changes in the AMCC programming when compared to the content set forth in the Representative Sampling attached to the 1993 Agreement, as amended in 2000. (Forrest Aff., Ex. 2; Brien Aff. ¶¶ 12, 13, 15-16, Exs. B-F). For example, pre-1960 movies dropped dramatically to 18.9% of all movies, while post-1960 movies increased to 81.1% of the movie programming. (Brien Aff. ¶ 12, Ex. B). Black and white movies decreased to 14.8% from 73.8% in November, 1993. (Brien Aff. ¶ 15, Ex. E). Prime time movies show a similar material change. In October, 2002, the pre-1960 prime time movies were only 5% of all such movies, dropping from 91% in November, 1993. (Brien Aff. ¶ 13, Ex. C). Conversely, post-1993 prime time movies increased to 95% from the 9% in the Representative sampling, while black and white movies plummeted to 1.7% from 60.7% in the Representative Sampling. (Brien Aff. ¶¶ 13, 16, Exs. C, E). In like manner, non-movie programming doubled from November, 1993 to October, 2002, increasing from approximately 6% to more than 13%. (Brien Aff. ¶ 18, Ex. F). Original programming within the non-movie category almost quadrupled from 3.19% in

November, 1993 to11.75% in October, 2002. (Id.; Forrest Aff., Ex. 2).

The record indicates that on May 20, 2003, AMCC again met with Mr. Dressler and Ms. Costantini, Senior Vice President of Programming of Time Warner. (Time Warner's 19-a Statement ¶ 83, Dressler Tr. at 145-49). At the meeting AMCC discussed the programming changes. (4/15/2005 Tr. at p. 59). Based on the presentation made by AMC, Costantini was of the view that AMCC was "moving the network in a direction other than what was stated in our contract," and that it "was very obvious to us that some of the [original programming] had nothing to do with even movies." (Time Warner's 19-a Statement ¶ 83, Constantini Tr. at 71, 78). In fact, the AMCC programming between October 1, 2002 and June 5, 2003 ("the later period") was materially different than the programming in November, 1993, as set forth in the Representative Sampling. (Forrest Aff., Ex. 2; Brien Aff. ¶¶ 12, 13, 15-16, Exs. B-F). During this later period, pre-1960 movies were only 27.9% compared to 94.4% in November, 1993, while post-1960 movies constituted 72.1% of all movies in the later period versus 5.1% in November, 1993. (Brien Aff. ¶ 12, Ex. B). Black and white movies in the later period were only 15.7% of all movies as compared to 73.8% in November, 1993. (Brien Aff. ¶ 15, Ex. E). Prime time movies showed a similar shift: while pre-1960 movies comprised 91% of all prime time movies in November, 1993, the percentage dropped to 13.6% during the later period. (Brien Aff. ¶ 13, Ex. C). Post-1960 movies increased to 86.4% of prime time movies versus 9% in November, 1993. (Id.). Finally, black and white prime time movies dropped from 60.7% in November, 1993 to only 6.9% in the later period. (Brien Aff. ¶ 16, Ex. E). Non-movie programming

doubled from approximately 6% in November, 1993 to more than 12% in the later period.(Brien Aff. ¶ 18, Ex. F).

As a result, on June 6, 2003, Mr. Dressler sent a letter ("June 6 Letter") to AMCC, which, *inter alia*, advised AMCC that they were in breach of the 1993 Agreement because AMCC's programming had materially changed in quantity and quality. (Mastro Aff., Ex. H; Forrest Aff., Ex. 83). Time Warner advised AMCC that it would terminate the agreement in 90 days unless AMCC conformed its programming to the Content Clause of the 1993 Agreement. (Id.). Time Warner also advised AMCC that in the event of a termination, Time Warner would still continue to carry the non-conforming programming according to the terms set forth in the June 6 Letter. (Id.). In a letter written by David Deitch, General Counsel and Senior Vice President of Business Affairs of Rainbow Media, dated, June 13, 2003, AMCC responded to Time Warner's June 6 letter and objected to the assertion that AMCC's programming was in violation of the Content Clause. (Mastro Aff., Ex. J; Forrest Aff., Ex. 84).

In an effort to give the parties time to resolve this dispute, Time Warner, in a letter dated July 10, 2003, withdrew its June 6, 2003 termination notice without prejudice. (Forrest Aff., Ex. 85). However, the dispute was not resolved. As a result, by letter dated September 30, 2003, Time Warner sent a second termination notice to AMCC which reinstated the notice of breach contained in the June 6 Letter. (Mastro Aff., Ex. I; Forrest Aff., Ex. 86).

On November 14, 2003, AMCC instituted this action with the filing of a Complaint which was later amended. The Amended Complaint alleges three causes of action: The First asserts that "[t]here is no basis for termination of the [1993] Agreement by Time Warner as asserted in its purported termination notices" and seeks a declaratory judgment that "Time Warner's purported termination notices are of no effect and that AMCC is entitled to continued performance of the [1993] Agreement. (Amended Complaint and Reply to Counterclaims ¶¶ 22-24). The Second alleges that "Time Warner has committed an act of anticipatory repudiation of the [1993] Agreement by stating that it will refuse to honor the Agreement's payment terms after December 29, 2003," and asks for a declaration that "Time Warner has committed a material of the entire Agreement and that AMCC may therefore exercise all rights available to it under New York law." (Id. ¶¶ 25-27). The Third alleges that "Time Warner's breach of the [1993] Agreement gives AMCC the right to recover damages in an amount that is presently not determined." (Id. ¶¶ 28-29).

Time Warner answered and set forth two counterclaims: The First alleges that "AMCC's failure to deliver a classic film service is a breach of the Agreement as amended. AMCC's dramatic recent transformation of American Movie Classics from a classic film service for which Time Warner Cable contracted, and for which it continues to pay substantial fees, into the new AMC service constitutes a material breach of the [1993] Agreement as amended." (Answer and Counterclaims ¶¶ 87-91). Time Warner seeks damages "[as] a result of AMCC's breach of contract. (Id.). The Second asserts that "[a]s a result of AMCC's transformation of its service into a new, non-classic film service, [Time

Warner] may terminate the [1993] Agreement [as amended]." It seeks "a declaration that the service being delivered is not the classic film service AMCC committed to provide under the Agreement as amended and accordingly that Time Warner Cable may terminate the Agreement." (Id. at ¶¶ 92-95).

AMCC moves for summary judgment in favor of its causes of action and dismissal of Time Warner's counterclaims. Time Warner cross-moves for summary judgment on its counterclaims and dismissal of AMCC's complaint. AMCC argues that the programming it provided, and continues to provide, is proper under the unambiguous Content Clause of the 1993 Agreement and there has been no "material change" to the programming's "general quantity and quality." AMCC further contends that, in any event, Time Warner either accepted AMCC's reading of the Content Clause or waived its right to raise the claims it now makes, in light of the 2000 Extension. Finally, AMCC argues that under the terms of the agreement Time Warner may only seek termination for a breach of the Content Clause and may not seek damages, and that Time Warner elected not to seek termination.

Time Warner cross-moves, asserting that AMCC breached the unambiguous content clause since there has been a "material change" in the programming's "general quantity and quality." It also asserts that AMCC may not pursue its claim for damages in connection with its anticipatory breach claim, since it chose to continue performing under the contract. Finally, it argues that the 2000 Extension of the 1993 Agreement did not constitute a waiver; that it is not contractually barred from seeking damages; nor, has it elected not to terminate

the Agreement.

The threshold issue concerns the interpretation of the Content Clause of the 1993 Agreement. The parties sharply disagree as to the proper interpretation of that provision. Time Warner asserts that the clause limits AMCC's programming throughout the term of the contract to the programming that AMCC actually provided at the time the contract was entered into, as set forth in the Representative Sampling. In contrast, AMCC asserts that a proper reading of the Content Clause provides greater flexibility and does not limit AMCC to the programming as of the date of the contract, as set forth in the Representative Sampling.

Under CPLR 3211(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case. (e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; See also, Bush v St. Clare's Hospital, 82 NY2d 738, 739 [1993). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (Indig v

Finkelstein, 23 NY2d 728, 729 [1968]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose. (Zuckerman v City of New York, 49 NY2d 557 [1980]). The key to summary judgment is issue-finding, rather than issue-determination, and the motion is scrutinized in the light most favorable to the opposing party.

It is well established that "the interpretation of a contract is a question of law for the court," and is properly considered in the context of a summary judgment motion. (National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assoc., 257 A.D.2d 1, 11, [1st Dept., 1999]). A contract must be interpreted so as to give "effect to the intention of the parties as expressed in the unequivocal language employed." (Wallace v. 600 Partners, Co., 86 NY 543,48 [1995][internal citations omitted]). This, of course, requires that in doing so, I should "avoid an interpretation that would leave contractual clauses meaningless" (Two Guys from Harrison-N.Y. Inc. v. S.F.R. Realty Assocs. 63 NY2d 396, 403 [1984]), rather, an interpretation should be adopted which gives "meaning to every provision of a contract" (Muzak Corporation v. Hotel Taft Corporation, 1 NY 42, 46 [1956]).

If I find the contract to be unambiguous, then "the rules governing the interpretation of ambiguous contracts do not come into play." (R/S Associates v. New York Job Development Authority 98 N.Y.2d 29, 33 [2002] citing Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995] and Breed v Insurance Co. of N. Am., 46 NY2d 351, 355 [1978]). Ambiguity is to be determined by looking within the fourcorners of the document and not to outside sources. (Estate of Stravinsky v. Schott Musik Intl. GmbH & Co., 4

A.D.3d 75, 81 [1st Dept. 2003]). "Thus, when interpreting an unambiguous contract term '[e]vidence outside the four corners of the document ... is generally inadmissible to add to or vary the writing.'" (R/S Associates 98 N.Y.2d at 33 quoting W.W.W. Assoc. v. Giancontieri, 77 NY2d 157, 162 [1990]). Similarly, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (W.W.W. Assoc., 77 NY2d at 163 quoting Intercontinental Planning v Daystrom, Inc., 24 NY2d 372, 379 [1969]). However, in interpreting a contract "[t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed" and consider "the surrounding circumstances or the apparent purpose which the parties sought to accomplish." (Estate of Stravinsky v. Schott Musik Intl. GmbH & Co., 4 A.D.3d 75, 81 [1st Dept 2003] quoting William C. Atwater & Company, Inc. v. Panama Railroad Co., 246 N.Y. 519, 524 [1927]).

Content Clause- AMCC's Allowed/Required Programming

Paragraph 10 of the 1993 Agreement, as extended in 2000,[11] concerns the "Service" which AMCC is to provide Time Warner. It consists of four sentences. The first sentence sets forth a general statement as to the Service "as of the date" of the 1993 Agreement.[12] The

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Since the terms of Paragraph 10 were not changed in the 2000 renewal, for convenience sake I will simply refer to the 1993 Agreement for the operative terms of the Content Clause.

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The full text of the first sentence is as follows:

> AMCC agrees that as of the date hereof the programming on the Service consists of classic motion picture films first

second sentence incorporates a "representative sampling of Service programming."[13] The third sentence grants Time Warner a right to terminate the Agreement "[i]f at anytime during the License Period the general quantity and quality of the programming on the Service materially changes from that ***contained on the Service as of the date hereof.***"[14] (emphasis supplied). The fourth sentence provides that the inclusion of "advertising, sponsorship or promotions on the Service shall not be deemed a material change in the programming on the Service."[15]

> released for theatrical exhibition during the 60 year period prior to the date hereof, originally produced programs regarding such films and such other related material as AMCC deems appropriate.

13 The full text of the second sentence is as follows:

> A representative sampling of Service programming is listed in the program schedule attached hereto as Schedule VI.

14 The full text of the third sentence is as follows:

> If at any time during the License Period the general quantity and quality of the programming on the Service materially changes from that contained on the Service as of the date hereof, Affiliate shall have the right exercisable upon ninety (90) days' prior written notice to AMCC to terminate this Agreement.

15 The full text of the fourth sentence is as follows:

> Affiliate acknowledges and agrees that the inclusion of advertising, sponsorship or promotions on the Service shall not be deemed a material change in the programming on the Service.

AMCC argues that the first sentence of Content Clause controls any determination as to whether a breach has taken place as defined in the third sentence. According to AMCC, the first sentence sets forth three general categories of permissible Service, all of which are subject to AMCC's broad discretion based on the last four words of the first sentence which provides "as AMCC deems appropriate". The three permissible categories, according to this argument are: First - classic motion picture films first released for theatrical exhibition during the 60 year period prior to the date hereof. Second - originally produced programs regarding such films. Third - such other related material as AMCC deems appropriate.[16] Within the first permissible category AMCC argues that any film will qualify in AMCC's sole discretion if it was a "classic" film released between the years 1933 and 1993. AMCC also contends that 1993 Agreement grants it "broad discretion" to determine if a film is a "classic", and the determination does not depend upon whether the film is "old" as long as it was released within the prescribed 60 year period even if programming places a great emphasis on films released in 1993 or thereabouts. (AMCC's Opening Brief at p. 14; see also, Id. at p. 16 "[t]he parties' agreement ultimately leaves it to AMC to determine what constitutes a "classic").

The term "classic" as used in the first sentence, according to AMCC does not mean "old" ; instead, AMCC quotes dictionaries, film critics, and other sources to show that the

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AMCC contends that the term "as AMCC deems appropriate" contained in this third category of permissible programming, gives it broad discretion for each of the three programming categories. (See AMCC's Opening Brief at p. 12.)

term "classic" means "well known", "having lasting significance or recognized worth" "high quality" and the like. Thus, as long as AMCC determined that a film was of high quality, and released in 1993 or before, it is within the first permissible category of programming set forth in the first sentence of the Content Clause. According to this argument, there is no limit on permissible films from the 1990's; indeed, if the programming consisted solely of films from the 1990's, it would qualify. AMCC further contends that the second and third categories may include, and arguably consist entirely of, post-1993 "originally produced programs regarding such [1933-1993 classic] films, and "such other related material as AMCc deems appropriate."[17] AMCC's view on the exact mixture of the three types of programming required by the Content Clause is discussed below. It does not find any limitation on the prescribed mixture based on the first sentence.

AMCC attaches little legal significance to the representative sampling incorporated into the Content Clause by virtue of the second sentence. AMCC, in its brief, contends that " [o]n its face, however, this Content Clause does not impose any ongoing obligation on AMC to show the specific programming contained in the 'representative sampling' attached to this agreement. It simply says that this attachment is a 'representative sampling of Service programming.' This attachment, then, is just that-a 'representative sampling' and not a 'benchmark' of anything." (See Opening Brief, p. 12 at n.5). Moreover, AMCC points out

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AMCC also asserts that it has discretion to show even post 1993 movies since the Agreement uses the terms "as AMCC deems appropriate," "material change," and "general quantity and quality." (Emphasis added).

that the representative sampling incorporated into the Content Clause sets forth AMCC's programming scheduled for November, 1993. Therefore, AMCC argues that it can have very little impact in deciding what the Service was "as of the date" of the September, 1993 Agreement. In spite of AMCC's view that the representative sampling incorporated into the second sentence has virtually no legal significance, as discussed below, AMCC does appear to use the representative programming to set limits on the permissible mix of classic films on the one hand, versus originally produced programs and related materials, on the other hand.

The third sentence of the Content Clause grants Time Warner the right to terminate the agreement with AMCC if "at anytime during the License Period the general quantity and quality of the programming on the Service materially changes from that contained on the Service as of the date hereof." AMCC concedes-as it must- that a "material change" in the "general quantity and quality" of the programming on the Service from the date of the Agreement could trigger a termination. (See AMCC's Opening Brief at pp. 12 & 16). Nevertheless, AMCC is very vague in presenting its view as to how one determines if a "material change" in the "general quantity and quality" of the Service has taken place. It appears that AMCC is forced to rely on the representative sampling to determine if a material change has taken place. It further appears that AMCC's view is that the first sentence regarding permissible types of programming is, in effect, limited and circumscribed by the representative sampling; however, AMCC, contends that the representative sampling can only be used to determine the overall percentage of 1933-1993 classic movies, on the one

hand, versus, on the other hand "some limited amount of 'original programming' and 'other related material.'" (AMCC's Reply Brief[18] at p. 7).

Based on an analysis of the representative sampling, AMCC contends that in both 1993 and in 2003-when Time Warner sent its termination notice- AMCC "broadcast predominantly 'classic motion picture films first released for theatrical exhibition during the 60 year period' from 1933 to 1993." (AMCC's Opening brief at p. 17). Moreover, in both 1993 and 2003, AMCC contends that more than 90% of the film title and film programming minutes "were devoted to films released 'during the 60 year period' from 1933 through 1993. Indeed, to the extent there was any divergence, in 2003, AMC showed an even greater percentage of films from that '60 year period' than it did in 1993" (footnote omitted, Id. at 17-18). Accordingly, AMCC contends that no "material change" in Service took place on which Time Warner can base its termination.[19]

Time Warner disagrees with AMCC's contextual analyses in several respects. First it argues, that AMCC does not have broad discretion to determine the scope of permissible programming, since AMCC is only granted discretion with respect to the "related material" set forth at the end of the first sentence of paragraph 10. Next, Time Warner contends that

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AMCC's Reply Brief to its Motion for Summary Judgment also contains its Opposition to Time Warner's Cross-Motion for Summary Judgment. For convenience, I will refer to this second brief submitted by AMCC as "AMCC's Reply Brief."

19

The fourth sentence of the Content Clause is not the subject of conflicting interpretations by the parties, so it is not addressed.

its termination right, set forth in the third sentence, requires a determination of "material change" in the "quantity and quality of the programming on the Service . . . from ***that contained on the Service as of the date hereof***" (emphasis supplied) based on an analysis of the representative sampling incorporated into the Agreement by virtue of the second sentence. Contrary to AMCC, Time Warner contends that the purpose of the representative sampling is to determine the mix between classic films and other permissible programming, and in addition is to be used as the benchmark in determining the mix of permissible "classic" films, and the decades within which they were released. Although Time Warner initially sought to limit permissible classic films to those originally released during the 1930's, 1940's and 1950's, in response to AMCC's request for additional flexibility, a compromise was reached as reflected in the broader language set forth in the first sentence of the Content Clause. Nevertheless, the incorporation of the representative sampling in the second sentence, and material change language of the third sentence, were designed to circumscribe the scope of the first sentence so that non-material changes to the pre-1960's classic films could be made, but substantial compliance with the representative sampling would still be required.

Time Warner demonstrates, based on an analysis of the representative sampling, that more than 94% of all the films listed on the November 1993 schedule were pre-1960 films. (Forrest Aff., Ex. 2; Brien Aff. ¶¶ 12, 13, 15-16, Exs. B-F). Approximately only 5% of such films were post-1960. (Id.). The percentage of pre-1960 films then dropped when AMCC "relaunched" its programming in October, 2002 , when only 18.9% of its films were pre-

1960, and more than 80% were post-1960 films. (Id.; Time Warner's Opening Brief pg. 21). Moreover, between October 1, 2002 and June 5, 2003 (the day before Time Warner sent its first termination notice) post-1960 films constituted more than 70% of the film programming, and less than 30% of the films shown were from the pre-1960 group. A greater disparity is demonstrated when the prime time movies shown by AMCC at these various dates are examined.[20] Time Warner also contends that material and substantial changes were made by AMCC with respect to its non-movie programming, and an even greater change took place within the category of "original" programming.[21]

It appears evident, given the plain language and meaning of the Content Clause, that the representative sampling does circumscribe the scope of the permitted programming in the first sentence of paragraph 10. Without such a conclusion, it would be impossible to determine if AMCC breached its programming obligations to Time Warner. It would also be impossible to determine if the movie versus non-movie mix materially changed absent a standard to be consulted to determine a breach. Moreover, within the scope of the permitted

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In October 2002, only 5% of such prime time movies came from the pre-1960 group, while 95% were post-1960. In addition, in the period October 1, 2002 until June 5, 2003, over 85% of such prime time moves were from the post-1960 group, while less than 15% were from the pre-1960 group. This is in contrast to November, 1993, when more than 90% of all prime time movies shown on the Service were from pre-1960 category. (Opening Brief, Time Warner, p. 21)

D There was an approximate doubling of non-movie programming between November 1993 and October 2002, and such increase was maintained between the period October 1, 2002 to June 5, 2003. In addition, "original programming" went from approximately 3% in November 1993 to 11.75% in October 2002. (Time Warner's Opening Brief, p.23).

classic film programming, it is also evident that the parties intended to provide a classic film niche for cable viewers. Although AMCC was not required to provide only pre-1960 classic films, and the parties intended to provide some flexibility for post-1960 classic films; nevertheless, the parties only intended to allow non-material deviations from the programming in effect upon the execution of the 1993 Agreement, as evidenced by the representative sampling incorporated into the Content Clause.

AMCC's reading would render the language in the third sentence "from that contained on the Service as of the date hereof" meaningless, and it is basic that provisions of a contract are not to be construed as superfluous, rather the contract should be read to give a distinct and separate meaning to each of its provisions. (E.g., Rosenblum v. New York State Workers' Compensation Bd., 309 A.D.2d 120, 125 [1st Dept., 2003]). Furthermore, the last phrase in the first sentence "as AMCC deems appropriate," only modifies the third category of programming - "such other related material." It does not grant AMCC broad discretion in all three programming categories, as AMCC contends. The first sentence was not intended to give AMCC unbridled freedom with respect to the programming; quite the contrary, it is necessary to read it in the context of the entire contract, which requires that the general quantity and quality of the programming not materially change from the programming that actually existed as of date of the 1993 contract. To suggest that the first sentence would grant AMCC additional rights, and eliminate the restrictions of the third sentence, is contrary to the plain meaning of the contractual provisions.

AMCC argues that had the parties intended to limit the programming to that of the programming as of the date of the contract, then the first sentence would have explicitly specified the limitations intended (i.e. mostly movies, of the 30-50 etc.). Thus, it contends that Time Warner's assertion that the broad language of the first sentence is limited by the latter part of the Content Clause is untenable. I need not consider whether the contract could have been more clear; rather my task is to determine whether the contract, as written, is unambiguous in that it is only susceptible to one reasonable interpretation. Here, it is clear that the broad statement of the three categories in the first sentence is limited by the following sentences in the Content Clause.

AMCC seeks to offer extrinsic evidence, including various content clauses contained in other Time Warner contracts with other programming providers aside from AMCC, in an attempt to support the argument that, had the contract intended to limit the programming, it would have said so in express and explicit terms.[22] Since I find that this contract is unambiguous, and that the contract expressly limits the programming during the term of the Agreement, to the programming that was contained on the service as of the date of the contract; the proffered extrinsic evidence may not be considered. (E.g., R/S Associates v. New York Job Development Authority 98 N.Y.2d supra, at 33). Indeed, Time Warner contracts, to which AMCC was not a party, are unrelated to this contract. Therefore, the

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22 This is the subject of Time Warner's Motion to Preclude. (Motion Seq. 003).

Motion to Preclude is Granted.[23]

AMCC argues that the emphasis placed on representative sampling is improper since it alters the Content Clause's plain meaning, citing Tri Messine Const. Co., Inc. v. Telesector Resources Group, Inc., 287 A.D.2d 558, 731 (2nd Dept., 2001), Which held that "plaintiff's view that the parties agreed to a double-rate pay structure" could not be inferred from "the price schedules attached to the subject contracts" since that would "necessarily require the . . . Court to add terms to the contracts . . . which the parties did not include." Here, however, it is not the attachment of the representative sampling that limits the programming, rather the unambiguous language employed in the contract requires that AMCC not materially change from the programming as of the date of the contract, i.e., Time Warner may terminate the Agreement if the "the general quantity and quality of the programming on the Service materially changes from that contained on the Service as of the date hereof". The programming, as of the date of the contract, is as provided in the representative

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AMCC also opposes the motion to preclude, on the ground that extrinsic evidence is admissible to ascertain whether Time Warner had an improper motive when it attempted to terminate the 1993 Agreement. Inasmuch as AMCC breached the 1993 Agreement as amended, Time Warner had the contractual right to terminate the Agreement. Therefore, its motive is irrelevant; See Big Apple Car, Inc. v. City of New York, 204 A.D.2d 109, 111 (1st Dept., 1994); See also Refinemet Int'l. Co. v. Eastbourne N.V., 815 F.Supp. 738 (S.D.N.Y., 1993); Newfield v. General Motors Corp., 84 A.D.2d 548 (2nd Dept., 1981). For this reason also, Time Warner's Motion to Preclude is Granted.

This also moots AMCC's letter requests, dated February 1 and 10, 2005, in which it sought spoliation-related discovery. After concluding that AMCC in fact breached the agreement, and that Time Warner's motivation for termination is irrelevant, AMCC's request for additional discovery to attempt to establish spoliation, is denied. (See Lane v. Fisher Park Lane Co., 276 A.D.2d 136, 138 -39 [1st Dept., 2000]).

sampling. Thus, the contract requires that AMCC not materially change from the programming as of the date of the contract, which programming was attached as the representative sampling.

The termination provision of the third sentence concerns "material changes from that contained on the Service as of the date hereof." This language requires the parties to focus on the actual programming provided on the date of the Agreement because it is not possible to determine in the abstract the permitted mix between classic film and non-classic film programming solely by reading the permissible programming provision set forth in the first sentence. A standard is required and the parties intended the representative sampling to be the standard. In like manner, a standard was intended and included with respect to determining the "classic" films permitted for the Service programming. It is obvious that AMCC portrayed itself, as of September, 1993, as a classic film channel which showed almost exclusively classic films released prior to 1960. AMCC with great fanfare announced that it was going to, and did in fact, change this programming character. In so doing, it materially changed the quantity and quality of the programming it supplied to Time Warner. Accordingly, in so doing, AMCC materially breached the Content Clause set forth in paragraph 10 of the 1993 Agreement, as extended in 2000.

Waiver/Election of Remedies

AMCC contends that, even accepting Time Warner's contractual interpretation,

AMCC is still entitled to summary judgment since Time Warner waived its rights to enforce the Content Clause. While AMCC acknowledges the explicit no-waiver clause contained in the Agreement,[24] AMCC argues that Time Warner's written renewal of the agreement in December 2000, after AMCC had already made certain programming changes, constituted a written waiver by Time Warner.[25]

"A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it." (City of New York v. State, 40 N.Y.2d 659, 669 [1976] quoting Werking v. Amity Estates, 2 N.Y.2d 43, 52 [1956]). A waiver "should not be lightly presumed." (Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 968 [1988]). The burden of proving a defense of waiver is on the party which asserts it. (City of New York, supra, 40 N.Y.2d 669; Rosenthal v. City of New York, 283 A.D.2d 156, 160 [1st Dept., 2001]). No-waiver clauses are valid and enforceable. (See, e.g. Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York, 61 N.Y.2d 442, 446 [1984]; see also Blitman Const. Corp. v. Ins. Co. of N. Am., 66 N.Y.2d 820, 822 [1985]; Goldberg v.

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¶ 15(l) of the 1993 Agreement contains an express no waiver clause which provides:

> Except as set forth in subparagraph 15(h), this Agreement may not be amended nor any of its provisions waived except in writing signed by the parties hereto.

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AMCC further contends that Time Warner's acceptance of the programming, reflects that the parties practical construction of the content clause confirms AMCC's reading of the content clause or that Time Warner accepted AMCC's interpretation of the contract.

Manhattan Mini Storage Corp., 225 A.D.2d 408, 408 [1st Dept., 1996]).

AMCC, focusing its arguments on the programming as it existed at the time of the renewal, asserts that in December 2000 it was showing fewer films from the 1930's, 1940's, and 1950's, and more post- 1960 movies. In fact, it contends that there was as much as a 30% decrease in the programming devoted to pre-1960 films compared to the programming in 1993. AMCC also contends that by the December 2000 renewal, the original programming portion of the AMCC service had grown to more than 10% of its programming, whereas it was less than 4% in 1993. AMCC acknowledges the explicit no-waiver clause and does not challenge its enforceability, but argues that when Time Warner signed a written renewal without any objection to the programming, Time Warner effectively waived, in writing, its right to claim that the programming does not conform to the Content Clause.

AMCC seeks to establish that Time Warner had knowledge of the programming changes as of the 2000 Extension as follows: First, AMCC cites a portion of Mr. Dressler's deposition in which he testified that Time Warner was performing "continuing monitoring of the service long before 2002. . ." (Dressler Tr. at 137-38). Second, AMCC argues that at the time of the 2000 Extension, Time Warner was also renegotiating contracts with other Rainbow Media services - WE and Bravo - and in fact negotiated new content clauses for WE and Bravo, but did not change AMCC's Content Clause.

AMCC, however, has not demonstrated that Time Warner had knowledge of its programming changes at the date of the 2000 Extension. Indeed, reliance on Mr. Dressler's testimony is misplaced. Viewed in context, Mr. Dressler testified that he "had no knowledge of the fact that [AMCC was] putting or could have been putting anything on other than what they were supposed to." (Id. at 28). Despite AMCC's contention to the contrary, Mr. Dressler's testimony was that Time Warner does "not have a formal monitoring process in place" and does not "have people on staff whose jobs it is to monitor compliance with the contracts" rather "[i]t is an irregular process" conducted "primarily by [his] department." (Id. 28-29). Time Warner has "hundreds, literally hundreds, of agreements with program suppliers" and it is not waiting "to catch somebody violating these contract." (Id.). "[I]t is only when something blatant happens and it's called to our attention that we sit down with the programmers" and "discuss . . . compliance." (Id.). Mr. Dressler testified that in 1997, only after "read[ing] something in Multichannel News that would indicate the possibility that AMC planned to breach the contact . . . we made an inquiry". (Id. at 133). Mr Dressler explained that "[t]his is consistent with what I've been saying all along here, which is that we don't have a team of people monitoring the performance of AMC on a daily basis, but when we read thing in the press or we get a marketing pamphlet in the mail, . . . we go check it." (Id.). Finally, Mr. Dressler testified that he "had no reason to know that [the AMC Service] wasn't anything but what it was supposed to be" "in December of 2000." (Id. 105). This testimony has not been contradicted.

AMCC further conjectures that Time Warner was aware of AMCC's programming

changes as of the Extension agreement in December 2000, since at the same time, Time Warner renegotiated the content clauses for WE and Bravo. But Time Warner's negotiations in other contracts - unrelated to AMCC- cannot impute knowledge regarding AMCC's programming at the time of the 2000 Extension. Moreover, as discussed above, the uncontroverted testimony of Mr. Dressler establishes that the programming changes were not known. Thus, AMCC has not met its burden of proving waiver, See, City of New York, supra, 40 N.Y.2d 669; Rosenthal v. City of New York, supra, 283 A.D.2d 160, which as stated, is "not . . . lightly presumed." (Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 968 [1988]). Nor has AMCC succeeded in raising a material question of fact concerning Time Warner's knowledge, if any, of AMCC's programming changes as of the date of the 2000 Extension.[26]

In light of this conclusion, AMCC's contention that the 2000 Extension constituted a writing which satisfied the "no waiver" clause provision contained in the 1993 Agreement, is rejected. AMCC cannot use the 2000 writing to establish that Time Warner waived AMCC's breach of the Content Clause, when Time Warner had no knowledge of the

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As discussed above, a party must offer factual evidence in admissible form to establish or defend the appropriateness of summary judgment. (See Zuckerman supra, 49 NY2d at 562). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Id.). Since AMCC has not raised a question of fact as to whether Time Warner knew of the programming changes at the time of the Extension, its assertion that the continued acceptance of the programming reflects the parties practical construction of the content clause and confirms AMCC's reading of the content clause, is equally unavailing, especially in light of my finding that the plain meaning of the Content Clause is at odds with AMCC's reading.

changes.

On its face, the 2000 Extension does not contemplate waiving any rights not expressly discussed in it.[27] In fact, the language of the 2000 Extension and Amendment negates AMCC's contention that it constitutes a written waiver of the Content Clause. All of the original terms of the 1993 Agreement were extended without change in a letter agreement, dated December 19, 2000, except for those terms which were amended or added in Exhibit A to the 2000 Extension. The Content Clause and the no-waiver clause were not included in Exhibit A. The 2000 Extension also provides that in the event of an inconsistency between "the terms set forth in [Exhibit A]" and the terms of the 1993 Agreement, the terms in "Exhibit A shall be controlling." Clearly then, the terms not inconsistent with those set forth in Exhibit A were neither amended nor waived by the Extension. Thus, despite AMCC's contention, the Content Clause, as well as the no-waiver

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The December 2000 Extension provides that:

> The current agreement between American Movie Classics Company and [Time Warner] (the 'AMC Agreement') is extended through December 31, 2008, . . . (emphasis added)

It further provides that:

> The AMC Agreement is amended as set forth in Exhibit A. To the extent of any inconsistency between the terms set forth therein and the terms of the AMC Agreement, the terms set forth in Exhibit A shall be controlling.
> (Emphasis added).

Exhibit A amends various provisions of the 1993 agreement and also adds some terms. However, it contains no reference to the content clause nor to ¶ 15(l), the "no-waiver"clause.

clause, were neither amended nor waived by the 2000 Extension.[28]

Lastly, AMCC argues that Time Warner is precluded from seeking damages and/or termination, since "a party that identifies a breach of contract but nonetheless elects to continue performance under the contract, rather than terminate, waives its right to money damages by not seeking them within a reasonable period of time." (AMCC's Reply Brief at p. 29, quoting, AM Cosmetics, Inc. v. Solomon, 67 F Supp.2d 312, 317 (S.D.N.Y., 1999). AMCC contends that "Time Warner must have been aware of AMC's programming trend

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AMCC also claims that Time Warner cannot seek damages because the Content Clause limits the remedy to termination of the contract. However, the contract does not limit Time Warner's remedies, rather it gives Time Warner the option to terminate. (See e.g., Rubinstein v. Rubinstein, 23 N.Y.2d 293, 297-98 [1968]). A contract will only limit the normal remedies under contract law, if the limitation is explicit, or where the parties intended to so limit. (See Papa Gino's of America, Inc. v. Plaza at Latham Associates, 135 A.D.2d 74, 76, [3rd Dept., 1988]; In re Hale Desk Co., 97 F.2d 372, 373 [C.A.2, 1938]). Here there is no such limitation. Moreover, elsewhere in the 1993 Agreement, there is a limitation not contained in the Content Clause. Section 8 of the 1993 Agreement provides that: "this right of termination shall be Affiliate's sole recourse in the event of the occurrence described in this paragraph." Thus, the drafters knew how to explicitly limit the available remedies, but did not so limit the remedies for the Content Clause.

On the other hand, AMCC concedes, that it does not have a viable claim for damages since it continued performance under the contract instead of forgoing performance and seeking damages. (Strasbourger v. Leerburger, 233 N.Y. 55, 59 [1922]). When AMCC was confronted with the attempted termination, it had to choose between two options. "It could either (1) treat the termination as an anticipatory breach, consider the agreement at an end and seek damages, or (2) ignore the anticipatory breach, continue to perform the agreement, wait to see if plaintiff would perform when required by the terms of the agreement and, if it did not do so, then bring suit on the subsequent breach." (AG Properties of Kingston, LLC v. Besicorp-Empire Development Co., LLC, 14 A.D.3d 971, 973 [3rd Dept., 2005]; Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 A.D.2d 262, 266 [1st Dept., 1995]). Therefore, as a result of AMCC's choice to continue performance, its damages claim cannot be sustained.

by 2000 yet it continued to perform and accept the benefits of the contract for another three years." Therefore, so the argument runs, because Time Warner had "actual knowledge of a breach, but elect[ed] to continue performance, [it] waive[d its] right to sue [AMCC]." (See also, Bigda v. Fischbach Corp. 898 F.Supp. 1004, 1011 -12 [S.D.N.Y., 1995]). However, AMCC did not elect its remedies in 2000, since as discussed above, AMCC has failed to establish that Time Warner elected to continue performance after "actual knowledge" of a breach. Moreover, a party claiming breach of contract is required to continue performance, if such performance mitigates damages. (See Clark Oil Trading Co. v. J. Aron & Co., 256 A.D.2d 196, 199 [1st Dept., 1998]). Therefore, Time Warner properly seeks damages and termination as a result of AMCC's breach of the Content Clause.

In its memoranda, AMCC limited its arguments regarding waiver and election of remedies to the circumstances surrounding the 2000 Extension, which arguments have been rejected above. However, during oral argument, AMCC for the first time, argued that by 2002 Time Warner had knowledge of the changes in AMCC's programming. (4/15/2005 Tr. at pp. 55-62). AMCC apparently was referencing Time Warner's papers which discussed meetings AMCC had with Time Warner in 2002 to discuss the proposed programming changes. (Time Warner's 19-a Statement ¶¶ 82 &83; Time Warner's Opening Brief pp. 14-15). At argument, AMCC also spoke about its May 10, 2002 press release, which was mentioned in Time Warner's papers as AMCC's public announcement that the AMC service was being "refreshed." (4/15/2005 Tr. at pp. 55-67). AMCC contended, at argument, that Time Warner waived its claims asserted in this action by waiting until June 6, 2003, to send

its first notice of termination. (4/15/2005 Tr. at pp. 55-62).

It is well established that belated arguments should not be considered since it is improper to raise an argument for the first time in reply papers, and even more so to raise it for the first time at argument. (See Lumbermens Mut. Cas. Co. v. Morse Shoe Co., 218 A.D.2d 624, 625 -626 [1st Dept.,1995]; Ritt by Ritt v. Lenox Hill Hosp., 182 A.D.2d 560, 562 [1st Dept., 1992]; Pinkston v. Weiss, 238 A.D.2d 393 [2nd Dept., 1997]). The information relied on by AMCC at oral argument in an attempt to establish waiver, was included by Time Warner in its opening submissions, yet no issue was made of it in AMCC's papers. (See, Time Warner's 19-a Statement ¶¶ 61, 82-83; Time Warner's Opening Brief pp. 14-15). By AMCC first raising it at Oral Argument, it effectively denied Time Warner the ability to respond, and thus it is not considered.

In any event, even considering the events of 2002, the outcome would not be altered. AMCC cannot argue that these events constituted a waiver, since AMCC recognizes and does not contest the enforcebility of the no-waiver clause. (AMCC's Reply Brief at 27 [In response to Time Warner's contention that, pursuant to the Agreement, any waiver must be in writing, AMCC counters that the 2000 agreement constituted the necessary signed writing. This argument has already been rejected. Nonetheless, AMCC concedes that a writing is necessary]). Therefore, AMCC cannot contend that a waiver occurred in 2002.

Moreover, despite the untimely nature of the argument, Time Warner briefly responded, (without the benefit of submitting affidavits or other proof), that from the time that Time Warner discovered the "proposed changes that were to be launched in . . . the third quarter of 2002 . . . [if] you look at the chronology of discussions which happened between then and June 6, 2003, [the date of the first Termination Letter] you don't see silence at all . . . What you see are references to conversations which had occurred during that time period." (4/15/2005 Tr. at p. 71, see generally pp. 70-73). (see e.g., AM Cosmetics, Inc., supra, 67 F Supp.2d at 318 ["'a party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract do not necessarily constitute a waiver of the innocent party's rights in the future,'"]). While, the record does not contain details of Time Warner's response to the proposed programming changes prior to the June 6, 2003 Letter, it was incumbent upon AMCC to raise these concerns prior to oral argument. To permit a sophisticated party such as AMCC to benefit from not raising an argument until oral argument would "protract a procedure designed 'to expedite the disposition of civil cases where no issue of material fact is presented to justify a trial' by encouraging submission of yet another set of papers, an unnecessary and unauthorized elaboration of motion practice." (Ritt by Ritt v. Lenox Hill Hosp., 182 A.D.2d supra at 562).

Accordingly, it is

ORDERED that AMCC's motion for summary judgment is denied in its entirety; and

it is further

ORDERED that Time Warner's cross-motion for summary judgment is granted as follows:

(1) summary judgment is granted on Time Warner's first counterclaim as to liability only; the issue of damages remains for trial;

(2) summary judgment is granted on Time Warner's second counterclaim, and therefore, Time Warner is entitled to a declaration that Time Warner Cable may terminate the 1993 Agreement, as Amended; and

(3) that the Amended Complaint is dismissed; and it is further

ORDERED that Time Warner's Motion to Preclude the Use of Extrinsic Evidence is granted; and it is further

ORDERED that the parties are to appear in Part 60 on July 28, 2005, at 11:30 AM, for a conference.

DATED:

7/8/05

FILED
JUL 08 2005
COUNTY CLERK'S OFFICE
NEW YORK

Enter

J.S.C.

HON. BERNARD J. FRIED