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County of Los Angeles

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST DISTRICT**

12 **COLIN HIGGINS PRODUCTIONS,**
13 **LTD.,**

14 **Plaintiff,**

15 v.

16 **PARAMOUNT PICTURES**
17 **CORPORATION, and DOES 1-100,**

18 **Defendant.**

Case No. **BC499179** (related to BC499181,
BC500040, BC499182, and BC540146)

*Assigned to the Honorable Elihu M. Berle,
Dept. 323*

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF
PARAMOUNT PICTURES
CORPORATION CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: November 7, 2016
Time: 10:00 a.m.
Dept.: 323

Action Filed: January 16, 2013
Trial Date: None

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 7, 2016, at 10:00 a.m. or as soon thereafter as the matter may be heard by the Honorable Elihu M. Berle in Department 323 of the Los Angeles Superior Court, Central Civil West Courthouse, located at 600 South Commonwealth Avenue, Los Angeles, California 90005, Plaintiffs Colin Higgins Productions, Ltd. and Michael Elias will and hereby do apply for an order of final approval of the proposed class settlement between Plaintiffs and Defendant Paramount Pictures Corporation.

This Motion is made pursuant to California Code of Civil Procedure section 382 and California Rule of Court 3.760 *et seq.* This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the declarations and other documents filed in support thereof, the pleadings and papers on file in this action, and such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: September 8, 2016

KIESEL LAW LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This class action lawsuit is centered around allegations that Defendant Paramount Pictures Corporation (“Paramount” or “Defendant”) has improperly underreported the amount of Home Video Revenues, Electronic Sell-Through (“EST”) Revenues, and Streaming Revenues¹ on Paramount motion pictures to Plaintiffs² and similarly situated profit participants. Rather than face the uncertainty inherent in litigating this case through class certification and trial, the parties engaged in settlement negotiations and reached the significant class Settlement³ that obtains substantial monetary relief for the Class Members.

The Settlement compensates the Class for a total of \$6.810 million by creating, (1) a \$3.405 million Settlement Fund, which will be used to pay Recouped⁴ Class Members, plus (2) a \$3.405 million Accounting Relief Fund, which will be used to credit the accounts of Unrecouped Class Members. In addition to such monetary relief, after the Effective Date Paramount will account to each Class Member for Streaming Revenue, and any future methods of streaming now known or hereafter created, on the basis of 100% of such revenue. All Class Members will be able to receive their benefits under the Settlement *without having to take any affirmative action*, such as filing a claim form. The Settlement will compensate Class Members for royalties allegedly owed in the past and for future royalties not yet earned. Participating Class Members will receive benefits without

¹ Home Video Revenue is revenue derived from the sale of physical copies of motion pictures (*e.g.*, Videocassettes, DVDs, Blu-Ray discs). EST Revenue is revenue derived from the sale of permanent digital copies of motion pictures (*e.g.*, through purchases on iTunes or Amazon). Streaming Revenue means revenue derived from digital streaming of motion pictures, including through services commonly known as “video-on-demand” (“VOD”) or “subscription-on-demand” (“SVOD”), where the consumer does not obtain permanent ownership of a copy of the motion picture (*e.g.*, Netflix or Hulu).

² “Plaintiffs” refers to named Plaintiffs Colin Higgins Productions, Ltd. (“CHP”) and Michael Elias (“Elias”) (collectively, “Plaintiffs”).

³ All capitalized terms herein shall have the definitions set forth in the Stipulation and Agreement of Settlement dated May 13, 2016 (“Settlement Agreement”), unless otherwise stated. The Settlement Agreement is attached to the Declaration of Jeffrey A. Koncius submitted in conjunction with this Motion (“Koncius Decl.”) as Ex. “A.”

⁴ As explained more fully *infra*, “Recouped Class Member” refers to a Class Member that has the right to participate in profits on a film under the terms of their contract. An “Unrecouped Class Member” is one that has not reached the threshold which would require such payment.

1 having to initiate expensive audits or individual lawsuits against Paramount. Participating Class
2 Members will further maintain their rights to pursue an audit or lawsuit for all claims unrelated to
3 the allegations alleged in the operative complaint.

4 The Settlement is fair, adequate and reasonable, and more than satisfies all of the criteria for
5 final approval. The Settlement Class also meets the requirements for conditional certification. Class
6 Notice, given pursuant to the Order Granting Preliminary Approval of Paramount Pictures
7 Corporation Class Action Settlement, entered June 27, 2016 (hereinafter “Preliminary Approval
8 Order”), complied with applicable law and was the best notice practicable. And, as of the date of
9 this filing, no Class Member has objected or opted out.⁵ Further, the Settlement here substantially
10 tracks the settlement approved by this Court in *Colin Higgins Productions, Ltd. v. Universal City
11 Studios, LLC*, Los Angeles Superior Court Case No. BC499180 (the “*Universal Matter*”), as well as
12 the manner of giving notice. Accordingly, Plaintiffs request that the Court grant final approval of
13 the proposed Settlement and finally certify the Settlement Class for settlement purposes.

14 **II. SUMMARY OF THE LITIGATION**

15 **A. Summary of the Claims and Defenses**

16 Plaintiffs and Class Members in this case are writers, actors, directors, producers and other
17 Profit Participants on motion pictures distributed by Paramount. Plaintiffs allege that the Profit
18 Participation Contracts they entered into require Paramount to account to and credit Class Members
19 for 100% of the gross receipts (i.e. revenues) derived by Paramount or its subsidiaries from the sale
20 of Home Video, EST, and Streaming Revenues. Plaintiffs claim that Paramount violated these
21 Profit Participation Contracts by reporting Home Video, EST, and Streaming Revenues based on
22 20% of the revenue received by its wholly owned subsidiaries, rather than on 100% of these
23 revenues as required by the contracts. Through this class action lawsuit, Plaintiffs sought to
24 compensate Class Members for the monetary shortfall resulting from Paramount’s alleged breach of
25 contract and failure to pay Home Video, EST, and Streaming Revenues based on 100% of gross
26 receipts. These core allegations formed the basis for each of Plaintiffs’ claims for: (1) Breach of

27 ⁵ As October 7, 2016, is the deadline to opt-out or object, Plaintiffs will submit supplemental papers should
28 they become necessary.

1 Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Money Had and
2 Received; (4) Declaratory Judgment; (5) Open Book Account; (6) Unfair Competition in Violation
3 of California Business Code § 17200 *et seq.*; and (7) Conversion. *See* First Amended Complaint.

4 Paramount denies Plaintiffs’ allegations and asserts defenses to class certification and the
5 merits. Paramount argues, *inter alia*, that its practice of accounting for Home Video, EST, and
6 Streaming Revenues based on amounts received from its Affiliates or subsidiaries did not violate
7 the Profit Participation Contracts, and Paramount was permitted to account to the Class Members
8 by following Paramount’s and the motion picture industry’s practice of calculating profit
9 participation based on 20% of the Home Video, EST, and Streaming Revenue received for these
10 films. Paramount further argues that payment to Class Members based on 20% of the Home Video,
11 EST, and Streaming Revenues did not damage Plaintiffs because Paramount did not charge them
12 for costs relating to the production, distribution and sale of these media that would be deductible
13 under the 100% gross receipts calculation. Paramount further contends that Class Members’ claims
14 are barred by the applicable statute of limitations or any contractually prescribed temporal
15 incontestability provision contained in the contracts between the parties. Finally, Paramount claims
16 that Plaintiffs could not certify this case as a class action due to the differences in the contracts,
17 rights and damages amongst the Class Members.

18 Plaintiffs carefully considered the strength of their claims and Paramount’s defenses before
19 entering into the Settlement Agreement.

20 **B. Procedural History and Summary of Settlement Negotiations**

21 Plaintiff CHP originally filed this class action lawsuit on January 16, 2013. On June 14,
22 2013, the Court denied Paramount’s demurrer and motion to strike the complaint. On December 17,
23 2013, Plaintiff filed its First Amended Complaint adding Michael Elias as a class representative.
24 Koncius Decl. ¶ 7. The parties then conducted extensive discovery relating to the claims of
25 Plaintiffs and Class Members in this case. Koncius Decl. ¶¶ 4-6, 8-9. The parties exchanged written
26 discovery, including multiple sets of Form and Special Interrogatories and Requests for
27 Admissions. *Id.* ¶ 8. In response, Paramount produced, and Plaintiffs reviewed, more than 37,730
28 pages of documents relating to all contracts, profit participation statements, correspondence and

1 other documents related to the named Plaintiffs’ films and a random sample of other films in the
2 putative class. *Id.* ¶ 9. Plaintiffs also reviewed discovery and documents relating to the commerce at
3 issue and the size of the Class. *Id.* Plaintiffs also deposed various Paramount employees. *Id.* ¶ 10.
4 Paramount also deposed representatives for each of the named Plaintiffs. *Id.*

5 On June 6, 2014, Paramount filed a motion for summary judgment or, in the alternative,
6 summary adjudication. Plaintiffs opposed the motion and the Court entered an order on May 18,
7 2015, denying Paramount’s Motion for Summary Judgment in its entirety and granting Paramount’s
8 Motion for Summary Adjudication as to Plaintiffs’ Seventh Cause of Action for Conversion, only.

9 On November 18, 2015, the parties participated in an all-day mediation with the Hon. Louis
10 M. Meisinger (Ret.) of ADR Services. After a day of extensive negotiations the basic terms of a
11 settlement were reached. Numerous phone conferences and correspondence then occurred and the
12 parties negotiated and agreed to the terms of the Settlement now being presented to the Court.
13 Koncius Decl. ¶ 12.

14 **III. SUMMARY OF THE SETTLEMENT**

15 **A. The Proposed Settlement Class**

16 The Settlement is entered into on behalf of the following Settlement Class:

17 All persons and entities (and their successors-in-interest, assigns, and heirs) that
18 are parties to a “Class Profit Participation Contract” (defined by the Settlement
19 Agreement as a Profit Participation Contract entered into on or before July 5,
20 1980⁶, or that includes, references, or incorporates “Standard Terms” for the
21 calculation and accounting of Profit Participation dated prior to July 5, 1980).
22 Where a person or entity is a party to one or more Profit Participation Contracts
23 that are not Class Profit Participation Contracts and one or more Profit
24 Participation Contracts that are Class Profit Participation Contracts, that person or
25 entity is a member of the Settlement Class only with regard to the Class Profit
26 Participation Contracts and not a part of the Settlement Class with regard to any
27 other Profit Participation Contracts.⁷

23 In other words, the Settlement Class consists of profit participants who entered into contracts that
24 did not contain express provisions regarding the payment of Home Video Revenue, EST Revenue
25 and/or Streaming Revenue. Further, the Class Members’ share of the Settlement is limited to those

26 _____
⁶ After this date, home video royalties started to be specifically addressed by contract.

27 ⁷ See Settlement Agreement § 2. The Settlement Agreement identifies certain parties to Class Participation
28 Contracts who are excluded from the Settlement Class. See Settlement Agreement §§ 3.1-3.4.

1 Profits Participation Contracts that do not have express provisions regarding the payment of Home
2 Video Revenue, EST Revenue and/or Streaming Revenue. Because newer Profit Participation
3 Contracts include express provisions relating to those revenues, the Settlement applies to older titles
4 and releases. After the Effective Date of the Settlement, Paramount will account to each Class
5 Member for Streaming Revenue, and any future methods of streaming now known or hereafter
6 created, on the basis of 100% of such revenue. *See* Settlement Agreement § 8.

7 The Settlement Class includes both Recouped and Unrecouped Class Members. A Recouped
8 Class Member “means a Class Member who, as of August 31, 2015, is a Profit Participant on one or
9 more motion pictures that have realized sufficient revenue to require payment of Profit Participation
10 to that Class Member under the terms of that person or entity’s Class Profit Participation Contract”
11 (i.e. they were earning profit participation from their Profit Participation Contract). *Id.* §1.22.
12 Conversely, an Unrecouped Class Member means a Class Member who, as of August 31, 2015, is a
13 Profit Participant on one or more motion pictures that have not realized sufficient revenue to require
14 payment of Profit Participation to that Class Member under the terms of that person or entity’s
15 Class Profit Participation Contract (i.e., they were not yet earning profit participation from their
16 Profit Participation Contract). *Id.* §1.36. Since it is possible for a profit participant to be considered
17 both a Recouped and Unrecouped Class Member by virtue of being party to one or more Class
18 Participation Contracts that fall into both of these categories, in such a situation, the Class Member
19 would obtain a portion of the Settlement Relief Fund as well as the Accounting Relief Fund.

20 **B. Class Relief Provided by the Settlement**

21 Similar to the *Universal Matter*, the Settlement here is crafted to provide substantial relief to
22 both Recouped and Unrecouped Class Members and fully resolve the claims at issue in this case.
23 The cash portion of the Settlement creates a Settlement Fund of \$3.405 million which will be used
24 to compensate Recouped Class Members and pay administrative and notice costs, attorneys’ fees
25 and costs, and service awards to the named Plaintiffs. The Settlement also creates an Accounting
26 Relief Fund of \$3.405 million which will be used to make accounting credits to Home Video, EST
27 and Streaming Revenues on the accounts of Unrecouped Class Members. Thus, the total value of
28

1 the Settlement Agreement is \$6.810 million.⁸

2 As set forth in detail below, the relief provided to the Class Members is significant and
3 reasonable. Absent this Settlement, Class Members would not get the benefit of any compensation
4 relating to Home Video, EST, or Streaming Revenue without first undertaking a very long and
5 expensive audit process without guarantee that they would be paid anything for such efforts. This
6 Settlement provides for such payment now. In addition, this Settlement provides that Paramount
7 will account to each Class Member for Streaming Revenue, and any future methods of streaming
8 now known or hereafter created, on the basis of 100% of such revenue.

9 **1. Monetary Relief to Recouped Class Members**

10 Recouped Class Members will receive payments from the \$3.405 million Settlement Fund
11 as follows:

12 a. Retrospective Relief: Each Recouped Class Member will receive a pro rata payment
13 from the Retrospective Relief Fund (stipulated to be 70% of the Settlement Fund Payout),
14 calculated as the ratio of the total amount of Profit Participation paid to the Recouped Class
15 Member through August 31, 2015 (numerator) to the total amount of Profit Participation paid to *all*
16 Recouped Class Members through August 31, 2015 (denominator). *See* Settlement Agreement §§
17 1.24, 1.25, 4.1.

18 b. Prospective Relief: Each Recouped Class Member will also receive a pro rata
19 payment from the Prospective Relief Fund (stipulated to be 30% of the Settlement Fund Payout),
20 calculated as the ratio of the total amount of Profit Participation paid to the Recouped Class
21 Member from January 1, 2011, through August 31, 2015 (numerator) to the total amount of Profit
22 Participation paid to *all* Recouped Class Members during the same period (denominator). *See*
23 Settlement Agreement §§ 1.17, 1.18, 4.2. This ratio represents an estimate negotiated by the parties
24 for future Profit Participation payments owed to the Class Member.

25 Although the exact amount received by each Class Member will depend on the number of
26 Class Members who remain in the Class and revenue from the films at issue, the formula can be

27 ⁸ The number of films and the amount of commerce at issue in this case is less than in the *Universal* Matter
28 which accounts for the difference between the cases in the negotiated settlement sum.

1 readily tested and applied on a pro rata basis for approval purposes. For example, as of this filing
2 there are 115⁹ Recouped Class Members (Koncius Decl. ¶ 16) which results in approximately
3 \$20,726.09 in pro rata retroactive relief ($\$3.405 \text{ million} \times 70\% \div 115 = \$20,726.09$) and
4 approximately \$8,882.61 in pro rata prospective relief ($\$3.405 \text{ million} \times 30\% \div 115 = \$8,882.61$).¹⁰

5 **2. Monetary Relief to Unrecouped Class Members**

6 In addition to the \$3.405 million Settlement Fund used to compensate Recouped Class
7 Members, the Settlement creates a \$3.405 million Accounting Relief Fund to provide credits on the
8 accounts of motion pictures associated with Unrecouped Class Members. *See* Settlement
9 Agreement § 5.1. Such accounts will receive a pro rata share of the Accounting Relief Fund,
10 calculated as the ratio of the total amount of Home Video, EST, and Streaming Revenues derived
11 by Paramount through August 31, 2015, for that motion picture (numerator) to the total amount of
12 such revenue for *all* motion pictures receiving an accounting adjustment (denominator). *See id.* As
13 there are 60 Unrecouped Class Members (Koncius Decl. ¶ 16), their pro rata credit is \$56,750.00
14 ($\$3.405 \text{ million} \div 60 = \$56,750.00$).

15 **3. Injunctive Relief to All Class Members**

16 In addition to monetary relief, the Settlement provides valuable injunctive relief to Class
17 Members going forward. Paramount “agrees that, in the absence of an existing or future agreement
18 that includes express provisions regarding the calculation of Streaming Revenue, Paramount will,
19 beginning after the Effective Date, account to each Class Member for Streaming Revenue, and any
20 future methods of streaming now known or hereafter created, on the basis of 100% of such revenue
21 received after the Effective Date in a manner otherwise consistent with the terms of each Class
22 Profit Participation Contract.” Settlement Agreement § 8.

23 _____
24 ⁹ In the Motion for Preliminary Approval the number of Recouped Class Members was indicated as 86 and
25 Unrecouped Class Members as 59. After Defendants’ further review of all participants on the pictures
26 included in the Settlement those numbers are 115 (Recouped) and 60 (Unrecouped) and it is to those
27 participants that notice was given. Devery Decl. ¶ 6. The reason for the slight increase is that the numbers
originally calculated by Defendant only included the primary/original participant on the pictures and the
numbers used for notice include those that receive participation derivatively from one of the original
participants, either as heirs, gift, or otherwise. Koncius Decl. ¶ 16.

28 ¹⁰ The pro rata calculations in this Motion are based on a Class Member’s share of the gross fund.

1 **4. Fair and Efficient Distribution of Class Relief**

2 The Settlement is designed to ensure that Class Members receive their injunctive and
3 monetary benefits in the easiest and most efficient way possible, without reversion to Paramount.
4 *See* Settlement Agreement § 1.31. Under the Settlement, Class Members who do not opt out will
5 *automatically* receive monetary or accounting relief without having to take any additional steps,
6 such as filing a claim.¹¹ *Id.* §§ 4-5. Upon receiving payment of their settlement benefits, Class
7 Members will have 180 days to cash or deposit their settlement checks. *Id.* § 4.3. The Settlement
8 calls for a second pro rata distribution to occur if Class Counsel determines that there are sufficient
9 funds to justify a second distribution in light of the administrative cost and amount of the proposed
10 distribution to the Recouped Class. As in the *Universal Matter*, the Settlement calls for a *cy pres*
11 donation to the Motion Picture & Television Fund¹² in the event that there is a balance in the
12 Accounting Relief Fund. *Id.* This limited *cy pres* distribution is solely intended as a means to
13 prevent any reversion to Paramount.

14 **C. Narrowly Tailored Release**

15 The Settlement Agreement contains a release that is limited to claims relating to the subject
16 matter of the litigation – namely, Paramount’s practice of accounting for Home Video, EST, and
17 Streaming Revenues on a 20% royalty basis. *See* Settlement Agreement §§ 1.20, 7. The Class
18 release does not include a general release or a waiver of California Civil Code section 1542 on
19 behalf of the Class Members. *Id.* Class Members who participate in the Settlement (and who are
20 therefore subject to the release) will still preserve their full rights to challenge any other accounting
21 practice, charge or any other conduct by Paramount in the past or future. *Id.* The scope of the
22 release is justified and supports granting this Motion.

23 _____
24 ¹¹ A paper claim may be sent in, however, although no such claims have been received as of the date of this
submission. Declaration of Brian Devery (“Devery Decl.”) ¶ 20.

25 ¹² The Motion Picture & Television Fund is a California non-profit public benefit corporation that provides
26 inpatient and outpatient medical care, retirement community accommodations, temporary financial
27 assistance, social services, child care, and various wellness and education programs to eligible members and
28 retirees of the entertainment industry and their families within Southern California to industry members. *See*
Motion Picture & Television Fund website, last accessed September 1, 2016:
<http://www.mptf.com/financials?tab=1>.

1 **D. Requested Attorneys’ Fees and Costs and Service Awards**

2 The Settlement allows Class Counsel to apply for an award of attorneys’ fees in an amount
3 not to exceed \$1,135,000 and costs in an amount not to exceed \$105,000. Settlement Agreement §
4 19. These attorneys’ fees and costs will be paid from the Settlement Fund. *Id.* § 1.32. The named
5 Plaintiffs will also be allowed to apply to the Court for service awards of \$10,000 each to
6 compensate them for their time and service to the Class. *Id.* § 23. As explained in the concurrently
7 filed motion, these attorney’s fees, costs and service awards are reasonable and justified.

8 **IV. PRELIMINARY SETTLEMENT APPROVAL**

9 On June 27, 2016, the Court entered its Preliminary Approval Order granting preliminary
10 approval of the proposed Settlement, directed notice to Class Members, and scheduled a hearing on
11 final approval. Notice was disseminated to the Class by mail and various other methods in
12 accordance with that Order, as set out at length *infra*. Devery Decl. ¶¶ 6-19. Pursuant to the
13 Preliminary Approval Order, Class Members have until October 7, 2016, to submit a claim, object
14 to the Settlement or exclude themselves from it. Preliminary Approval Order ¶¶ 10, 22. As of this
15 filing, no Class Members have objected or opted out. Devery Decl. ¶ 21.

16 **V. LEGAL ANALYSIS**

17 **A. The Court Should Finally Certify the Settlement Class**

18 Code of Civil Procedure section 382 authorizes the use of the class action “when the
19 question is one of a common or general interest, of many persons, or when the parties are
20 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend
21 for the benefit of all.” Certification of a class “requires proof (1) of a sufficiently numerous,
22 ascertainable class, (2) of a well-defined community of interest, and (3) that certification will
23 provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to
24 other methods. [Citations.] In turn, the “community of interest requirement embodies three factors:
25 (1) predominant common questions of law or fact; (2) class representatives with claims or defenses
26 typical of the class; and (3) class representatives who can adequately represent the class.”
27 [Citation.]” *In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009). The legal standard applicable to a
28 class certification motion is whether the plaintiff has “established ‘by a preponderance of the

1 evidence that the class action proceeding is superior to alternate means for a fair and efficient
2 adjudication of the litigation.’ [Citation.]” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th
3 319, 332 (2004). Of note, “[t]he certification question is ‘essentially a procedural one that does not
4 ask whether an action is legally or factually meritorious.’ [Citation.]” *Id.* at 326. A review of these
5 factors demonstrates that a settlement Class should be finally certified herein.

6 **1. The Settlement Class Is Sufficiently Numerous**

7 Case law indicates that 30 to 40 class members satisfy the numerosity requirement because
8 at that point, individual joinder is impractical. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926,
9 934 (1981); *Collins v. Rocha*, 7 Cal. 3d 232, 235 (1972). Here, there are at least 175 Settlement
10 Class Members which easily satisfies the numerosity requirement. *See* Devery Decl. ¶ 6.

11 **2. The Settlement Class Is Ascertainable**

12 “The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set
13 of common characteristics sufficient to allow a member of that group to identify himself as having a
14 right to recover based on the description.” *Harper v. 24 Hour Fitness, Inc.*, 167 Cal. App. 4th 966,
15 976-77 (2008) (citing *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 14
16 (2007)); *see also Sav-on Drug Stores, Inc.*, 34 Cal. 4th at 333 (“a class action is not inappropriate
17 simply because each member of the class may at some point be required to make an individual
18 showing as to his or her eligibility for recovery.”).

19 In this case, the Class Members have an ongoing relationship with Paramount as Profit
20 Participants on motion pictures. As such, the vast majority of Class Members has been identified
21 and were provided with direct mail notice. The existence of records which enables the identification
22 of individual class members (a circumstance not required or even available in every class action)
23 strongly supports a finding of ascertainability. Such a finding is further supported by the Settlement
24 Class definition which sets forth “common characteristics sufficient to allow a member of that
25 group to identify himself as having a right to recover based on the description” – *i.e.*, that he is a
26 party to a Class Profit Participation Contract. *See Harper*, 167 Cal. App. 4th at 976-77. When
27 coupled with the comprehensive notice and claims processing program, this Class definition allows
28 individual Class Members to determine their Class eligibility and exercise their rights under the

1 Settlement.

2 **3. There Is a Well-Defined Community of Interest Among the Class**

3 As stated above, the “well-defined community of interest” prong consists of three sub-
4 factors. All of those factors are satisfied here.

5 *a. Common Questions of Law and Fact Predominate*

6 The predominance requirement is satisfied when questions of law or fact common to the
7 class predominate over individual questions. Common questions may predominate even if “each
8 member of the class must prove his separate claim to a portion of any recovery by the class.”
9 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 809 (1971). While in a disputed class certification motion
10 the predominance element is extremely important, courts apply a “lesser standard of scrutiny in
11 settlement cases” where the court does not need to concentrate on whether the lawsuit is
12 manageable for a common trial. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1807 n.19
13 (1996).

14 Here, Plaintiffs have satisfied the predominance requirement for settlement purposes
15 because this lawsuit centers on common legal questions relating to whether Paramount’s practice of
16 accounting for Home Video, EST, and Streaming Revenues on a 20% royalty basis violates the
17 contracts and rights of Class Members. The Settlement resolves the parties’ dispute arising from
18 this core issue by providing all Settlement Class Members with relief concerning the alleged
19 underpayment of Home Video, EST and Streaming Revenues. The fact that each Class Member
20 will be entitled to a different amount of the recovery based on the revenues of their film(s) does not
21 defeat predominance. *See Vasquez*, 4 Cal. 3d at 809; *Sav-on*, 34 Cal. 4th at 332-33. The Settlement
22 equitably provides Class Members with a recovery that corresponds with the profits of their films
23 and revenues thereunder.

24 *b. Plaintiffs’ Claims Are Typical of the Class*

25 A class representative’s claims are typical of the class if the individual facts applicable to
26 the class representative are very similar, but not necessarily identical, to the facts that are common
27 to the class. *See Classen v. Weller*, 145 Cal. App. 3d 27, 45 (1983); *Richmond v. Dart Indus.*, 29
28 Cal. 3d 462, 470 (1981). It is sufficient that the class representative is similarly situated so that he

1 or she will be motivated to litigate on behalf of all class members. *Classen*, 145 Cal. App. 3d at 46.
2 Furthermore, “[t]he fact that the class representatives had not personally incurred all of the damages
3 suffered by each different class member” does not defeat a motion for class certification. *See*
4 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 238 (2001).

5 Here, the named Plaintiffs are Profit Participants on motion pictures distributed by
6 Paramount and members of the Settlement Class. They allege the same injury arising from the same
7 conduct by Paramount as every other member of the Settlement Class. Because their claims are
8 aligned with the Class Members, Plaintiffs were motivated to obtain the best possible settlement not
9 only on behalf of themselves, but on behalf of the entire Settlement Class. Therefore, Plaintiffs’
10 claims are typical of the Class Members.

11 *c. Plaintiffs and their Counsel Are Adequate Representatives*

12 “Class status may be denied [on the basis of adequacy of representation] only if antagonism
13 of such a substantial degree is shown that the purpose of class certification would be defeated if the
14 motion were granted.” *Richmond*, 29 Cal. 3d at 472; *see also Hicks v. Kaufman & Broad Home*
15 *Corp.*, 89 Cal. App. 4th 908, 925-26 (2001). There are two components of the adequacy
16 requirement: (1) adequacy of the proposed class representative; and (2) adequacy of proposed class
17 counsel. Plaintiffs and Class Counsel satisfy both of these requirements.

18 Plaintiffs have no antagonism or conflicts of interest with the proposed Class. Koncius Decl.
19 ¶ 30. Plaintiffs’ claims are identical to the claims of the other Class Members and arise from the
20 same conduct by Paramount. Plaintiffs have embraced their responsibilities as class representatives
21 by actively participating in the case, including responding to written discovery and producing
22 documents, preparing for and attending depositions, and engaging in the settlement process.
23 Further, Plaintiffs are represented by qualified and competent counsel who have the experience and
24 resources necessary to vigorously pursue this action. *See* Koncius Decl. ¶ 28; Declaration of Neville
25 L. Johnson (“Johnson Decl.”) ¶¶ 12-14; Declaration of Daniel L. Warshaw (“Warshaw Decl.”) ¶¶
26 22-28; Declaration of Raymond P. Boucher (“Boucher Decl.”) ¶¶ 17-25. The knowledge and
27 experience of Class Counsel were essential in ensuring that the Class Members’ interests were
28 protected in this case.

1 4. **A Class Action Will Provide Substantial Benefits to the Litigants and**
2 **the Courts and Is the Superior Method for Adjudicating the Claims**

3 A class action is the only economically realistic method for the fair and efficient
4 adjudication of this case since the effort required to bring an individual suit is high compared to the
5 relatively small amount of recovery. Absent a class action, Plaintiffs and the Class will not have
6 received the compensation alleged to be due them unless they undertook an expensive and lengthy
7 audit process. *See, Linder v. Thrifty Oil*, 23 Cal. 4th 429, 445 (2000) (the court should weigh the
8 advantages and disadvantages of an individual action against the burdens and benefits of a class
9 action); *see also, Vasquez*, 4 Cal. 3d at 808 (“Individual actions by each of the defrauded consumers
10 is often impracticable because the amount of individual recovery would be insufficient to justify
11 bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful
12 conduct.”).

13 As for superiority, the court looks to: “(1) [t]he interest of each member in controlling his or
14 her own case personally; (2) [t]he difficulties, if any, that are likely to be encountered in managing a
15 class action; (3) [t]he nature and extent of any litigation by individual class members already in
16 progress involving the same controversy; [and] (4) [t]he desirability of consolidating all claims in a
17 single action before a single court.” *Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th 110, 121
18 (2003) (citation omitted). While there are numerous benefits to this case proceeding as a class
19 action, there are no countervailing interests by individuals to proceed on their own and, indeed,
20 those who wished to do so have the opportunity to opt out.

21 This case is ideally suited for class adjudication because it allows Profit Participants to
22 obtain relief from Paramount’s alleged failure to properly account for Home Video, EST, and
23 Streaming Revenues without incurring significant out-of-pocket costs associated with individual
24 audits and lawsuits. For most Class Members, the amount at issue relating to Home Video, EST,
25 and Streaming Revenues is outweighed by the tens of thousands of dollars necessary to conduct an
26 individual audit or litigate an individually filed lawsuit. As a result, most Class Members would not
27 have had the resources or financial incentive to pursue these claims against Paramount on an
28 individual basis. The class action procedure is also the superior method of adjudicating this case

1 because it alleviates the heavy burden on the Court that would arise from individual adjudication of
2 the home video royalty issue. The Settlement eliminates the risk of duplicative lawsuits and ensures
3 that the Class Members’ claims are resolved in the most efficient and cost-effective way possible.
4 For all of these reasons, this case should be certified as a class for settlement purposes.

5 **B. The Proposed Settlement Meets the Standards for Final Approval**

6 A settlement of a class action requires approval of the Court after a hearing. Cal. R. Ct.
7 3.769(a). Rule 3.769(g) states that “[b]efore final approval, the court must conduct an inquiry into
8 the fairness of the proposed settlement.” Cal. R. Ct. 3.769(g). To be approved, a class action
9 settlement must be “fair, adequate, and reasonable” and fall within the “range of approval.” *Dunk*,
10 48 Cal. App. 4th at 1801-02. The determinations of whether a settlement should be approved
11 requires, “basic information about the nature and magnitude of the claims in question and the basis
12 for concluding that the consideration being paid for the release of those claims represents a
13 reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008);
14 *Clark v. American Residential Serv. LLC*, 175 Cal. App. 4th 785, 790, 802-03 (2009).

15 In evaluating a settlement’s fairness, courts consider factors such as the strength of the
16 plaintiffs’ claims, the risk and expense of further litigation, the risk of maintaining class action
17 status through trial, the amount offered in settlement, the extent of discovery completed, the
18 experience and views of counsel and the presence of a government participant.¹³ *Clark*, 175 Cal.
19 App. 4th at 799; *Dunk*, 48 Cal. App. 4th at 1801. However, “[t]he list of factors is not exclusive and
20 the court is free to engage in a balancing and weighing of factors depending on the circumstances of
21 each case.” *Wershba*, 91 Cal. App. 4th at 245.

22 Additionally, a presumption of fairness is created where, like here, the settlement has been
23 “reached through arm’s-length bargaining,” the “investigation and discovery are sufficient to allow
24 counsel and the court to act intelligently”, and “counsel is experienced in similar litigation.”
25 *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010); *Dunk*, 48 Cal. App. 4th at
26 1802; *Wershba*, 91 Cal. App. 4th at 245. The Court’s analysis of a settlement should be conducted

27 _____
28 ¹³ This factor is inapplicable here.

1 in light of the favorable view of settling disputes by California courts. *See, e.g., Stambaugh v.*
2 *Superior Court*, 62 Cal. App. 3d 231, 236 (1976). Indeed, this is particularly so in class actions
3 where substantial resources will be conserved by avoiding litigation: “In reviewing the fairness of a
4 class action settlement, “[d]ue regard’ ... ‘should be given to what is otherwise a private
5 consensual agreement between the parties. The inquiry “must be limited to the extent necessary to
6 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
7 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
8 reasonable and adequate to all concerned.” [Citation.] ...” *Cellphone*, 186 Cal. App. 4th at 1389.

9 **1. The Settlement Is Subject to a Presumption of Fairness**

10 The Settlement is subject to a presumption of fairness because it is the product of protracted
11 mediation and arm’s length negotiations with the assistance of Judge Meisinger. *See Dunk*, 48 Cal.
12 App. 4th at 1802. Plaintiffs and their counsel advocated vigorously on behalf of the Class Members
13 during each phase of these negotiations in order to negotiate a settlement that provides adequate
14 relief and is in the best interest of the Class Members. *See Koncius Decl.* ¶¶ 4-15, 31. The
15 negotiations between the parties resulted in a settlement that is the product of genuine give and take
16 and justified by the facts of this case. *See id.*

17 **2. The Strength of Plaintiffs’ Case Compared to the Risk, Expense,**
18 **Complexity, and Likely Duration of Further Litigation**

19 While Plaintiffs were able to defeat Paramount’s demurrer, motion to strike, and motion for
20 summary judgment, there was no guarantee that Plaintiffs would prevail on the merits of their
21 claims. Indeed, as set forth above, Paramount asserted numerous factual and legal defenses, that
22 these defenses would defeat Plaintiffs’ motion for class certification and claims on the merits, or
23 severely limit Plaintiffs’ damages in this case. Although Plaintiffs were confident that they could
24 certify a class and prevail at trial, there was no way to guarantee either of these outcomes. This is
25 particularly true since this is a novel and difficult class action that involves complex issues without
26 precedent. Even if Plaintiffs had prevailed at trial, Paramount would likely appeal, leading to
27 further expense, delay, and uncertainty. Thus, further adjudication of this case carried significant
28 risks to Plaintiffs and Class Members and the Settlement eliminates this possibility that Class

1 Members might not recover anything at all. By obtaining a settlement that provides millions of
2 dollars in relief to absent Class Members, the Plaintiffs have secured a guaranteed victory for the
3 Class Members without further delay.

4 **3. The Risk of Maintaining Class Action Status Through Trial**

5 Plaintiffs submit that this case can be certified as a class action, as set out above, and
6 maintain class action status through trial. However, Plaintiffs recognize that Paramount intended to
7 zealously oppose class certification. Paramount would have further raised numerous defenses and
8 attempted to defeat or severely limit Plaintiffs' claims through summary judgment and trial. Even if
9 Plaintiffs prevailed at trial, Paramount would have likely appealed the Court's class certification
10 decision and judgment at trial. While Plaintiffs are confident that this action can be properly
11 maintained as a class action, these risks of maintaining class action status through trial weigh in
12 favor of final approval.

13 **4. The Amount Offered in Settlement**

14 The Settlement provides substantial relief to Class Members to compensate them for
15 Paramount's alleged policy of wrongly accounting for Home Video, EST, and Streaming Revenues
16 on a 20% royalty basis. Under the Settlement, Recouped Class Members will receive monetary
17 payments from the \$3.405 million Settlement Fund that will compensate them for past and future
18 Home Video, EST, and Streaming Revenues earned on their titles. Unrecouped Class Members will
19 receive the benefit of accounting adjustments from the \$3.405 million Accounting Relief Fund
20 which should cause some of them to be fully recouped (such that they could be owed profits in the
21 future) or, at the very least, closer to being fully recouped. In addition, after the Effective Date of
22 the Settlement Paramount will account to each Class Member for Streaming Revenue, and any
23 future methods of streaming now known or hereafter created, on the basis of 100% of such revenue.

24 In exchange for this relief, Class Members will release their claims relating to Paramount's
25 accounting of Home Video, EST, and Streaming Revenues. Class Members agree to accounting on
26 such revenues on a 20% royalty basis going forward but, as mentioned above, Paramount will
27 account to Plaintiffs on Streaming Revenue, and any future methods of streaming now known or
28 hereafter created, on the basis of 100% of such revenue after the Effective Date of the Settlement.

1 The amount and relief offered in settlement is a significant recovery for the Class.

2 **5. The Extent of Discovery Completed**

3 Before entering into the Settlement the parties conducted significant discovery. They
4 exchanged written discovery, including multiple sets of Form and Special Interrogatories and
5 Requests for Admissions. *See* Koncius Decl. ¶ 8. They also exchanged and reviewed documents
6 relating to Plaintiffs’ films at issue in this case. *Id.* ¶ 9. Pursuant to orders of the Court, Paramount
7 produced the contracts, Profit Participation statements, correspondence and other documents
8 relating to a random *Pioneer* sample of films that fell within Plaintiffs’ class definition. *Id.*
9 Plaintiffs also reviewed discovery and documents regarding the commerce at issue and size of the
10 Class and took depositions of Paramount employees. *Id.* ¶¶ 9-10. This discovery ensured that
11 Plaintiffs entered into the Settlement with a sound understanding of the issues and risks involved,
12 and helped Plaintiffs achieve the best result for the Class.

13 **6. The Experience and Views of Counsel**

14 Plaintiffs and Class Members are represented by counsel who have vast experience in class
15 action, complex, and entertainment litigation, have negotiated numerous other substantial
16 settlements, and have the ability to litigate this case on a class-wide basis if a fair settlement were
17 not offered. *See* Koncius Decl. ¶¶ 27-28; Johnson Decl. ¶¶ 12-14; Warshaw Decl. ¶¶ 22-28;
18 Boucher Decl. ¶¶ 17-25. Significantly, they are also Class Counsel in four other related cases
19 pending before this Court involving identical factual and legal issues, which helped inform the
20 settlement negotiations in this case. *See* Koncius Decl. ¶ 27. In addition, Class Counsel previously
21 negotiated the similarly constructed settlement approved by this Court, and were appointed class
22 counsel, in the *Universal* Matter. *Id.* Class Counsel were satisfied with this Settlement only after
23 extensive negotiations and thorough investigation into the factual and legal issues raised in this
24 case. *See id.* ¶¶ 4-15. As a result, Class Counsel views the Settlement favorably. *See* Koncius Decl.
25 ¶ 31; Johnson Decl. ¶ 15; Warshaw Decl. ¶ 30; Boucher Decl. ¶ 26.

26 **C. The Reaction of the Class Members to the Settlement**

27 As set out below, 157 notices were mailed to Class Members and none have opted out or
28 objected. Thus, the reaction of the Class to the Settlement has been solidly favorable. If there are

1 any objections to the Settlement, Plaintiffs will file an appropriate response.

2 **D. Undistributed Monies Should Be Distributed to the *Cy Pres* Recipient**

3 Pursuant to Section 4.3 of the Settlement Agreement *cy pres* distribution will only occur in
4 the event that the amount of stale checks remaining after distribution of the Settlement to Class
5 Members does not justify the administrative cost of a second distribution. *See* Settlement
6 Agreement § 4.3. As in the settlement in the *Universal* Matter, the parties have agreed that the *cy*
7 *pres* recipient of this limited fund shall be the Motion Picture & Television Fund. *Id.* When
8 evaluating a *cy pres* distribution of the remainder of class action proceeds a court must “consider
9 whether the proposed *cy pres* distribution is useful in fulfilling the purposes of the underlying cause
10 of action.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 722 (2006). Here, the proposed
11 limited *cy pres* distribution to the Motion Picture & Television Fund fulfills the purpose of the
12 lawsuit because it directly benefits the interests of individuals involved in the film industry by
13 providing, for example, health care services, retirement residences, financial aid to offset care and
14 living expenses, social services and charitable assistance programs. *See* Koncius Decl. ¶ 14.
15 Further, none of the firms has an interest or involvement in the governance or work of the *cy pres*
16 recipient. *Id.*; Warshaw Decl. ¶ 31; Johnson Decl. ¶ 16; Boucher Decl. ¶ 28. Moreover, the funds
17 will allow the *cy pres* recipient to continue its work in a time of shrinking budgets. Accordingly, as
18 it did in the *Universal* Matter, this Court should approve the *cy pres* distribution here. *State of*
19 *California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472 (1986); *In re Microsoft I-V Cases*, 135 Cal.
20 App. 4th at 722; *Nachshin v. AOL, Inc.*, 663 F.3d 1034, 1038-41 (9th Cir. 2011); *Dennis v. Kellogg*
21 *Co.*, 697 F.3d 858, 865 (9th Cir. 2012); Cal. Civ. Proc. Code § 384.

22 **E. Appropriate Individual, and Other, Notice Was Given to the Class Pursuant to**
23 **the Preliminary Approval Order**

24 Pursuant to this Court’s Preliminary Approval Order, Class Members received proper notice
25 of the pendency of this action and the Settlement so that they have had an adequate opportunity to
26 object or exclude themselves. Devery Decl. ¶¶ 6-21. The comprehensive notice program satisfied
27 the requirements of Rules of Court 3.766 and 3.769 and was designed to ensure Class Members
28 received the best notice practicable (Cal. R. Ct. 3.766(e)). So too, the Notice itself was informative

1 and satisfied all necessary requirements.

2 Pursuant to the Preliminary Approval Order, Angeion Group (“Angeion”), an experienced
3 class action administrator, was retained to disseminate the Notice approved by this Court and did so
4 in the manner prescribed by this Court. *See generally*, Devery Decl. Here, and as explained below,
5 notice was disseminated by: (1) direct notice by First Class Mail to individual Class Members; (2) a
6 dedicated website; (3) Publication Notice in widely circulated motion picture print and online
7 publications; (4) E-Newsletters from motion picture publications; (5) advertisements in social
8 media platforms such as Facebook, Twitter and LinkedIn; and, (6) a press release to all major media
9 outlets. The specifics of that notice program follows.

10 On June 28, 2016, Angeion received an Excel spreadsheet from Defendant’s Counsel
11 containing lists of Recouped and Unrecouped Class Members. Devery Decl. ¶ 6. After removing
12 duplicate and invalid address records, there were 115 Recouped, and 60 Unrecouped, Class
13 Member records available to send direct mail notice. *Id.* On August 8, 2016, Angeion caused the
14 Notice to be mailed to those addresses. *Id.* ¶ 7. Since mailing the Notice, 15 were returned as
15 undeliverable and a skip trace search was performed in an attempt to find a current address. *Id.* ¶
16 19. Updated addresses were found for some and 4 Notices were remailed. *Id.* Angeion also
17 established a toll-free telephone number, 844-312-5233, that Class Members can call and listen to
18 Frequently Asked Questions and request a Claim Form to be mailed to them. *Id.* ¶ 13.

19 To ensure that the notice program was robust and complete, on August 8, 2016, Angeion
20 established the settlement website www.ParamountHomeVideoSettlement.com. *Id.* ¶ 14. The
21 website contains general information about the Settlement, Court documents, and important dates
22 and deadlines pertinent to this matter. *See id.* The website also contains a “Contact Us” link
23 whereby Class Members can contact Angeion by email to update their address or submit additional
24 questions regarding the settlement. *See id.* A copy of the Notice and Claim Form available on the
25 website are attached as Exhibits B and E, respectively, to Mr. Devery’s Declaration. A copy of this
26 Motion and the Motion for Attorneys’ Fees, Costs and Service Awards, will be available on the
27 website after they are filed.

28 Angeion caused the Summary Notice to be published in the August 9, 2016, and August 19,

1 2016, editions of *Hollywood Reporter* and *Daily Variety*, respectively. Devery Decl. ¶ 8. And it
2 issued a press release through Business Wire on August 9, 2016. *Id.* Banners were also run in
3 *Variety* “Breaking News Alert” on August 8, 2016; *Hollywood Reporter* “E Newsletter” on August
4 8, 2016; and *The Wrap* “First Take” newsletter from August 8, 2016, through August 12, 2016.
5 Devery Decl. ¶ 9, Ex. “D.” Facebook, Twitter, and LinkedIn advertisements began on August 8,
6 2016. *Id.* ¶ 10. The publication notice provided notice to the few Class Members whose contact
7 information was no longer maintained by Paramount.

8 The Rules of Court and case law provide trial courts with, ““virtually complete discretion as
9 to the manner of giving notice to class members.”” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 57
10 (2008) (quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135,
11 1164 (2000)); Cal. R. Ct. 3.766(c). Here, the Court should find that the notice program, ““fairly
12 apprise[d] the prospective members of the class of the terms of the proposed settlement and of the
13 options that [were] open to them in connection with [the] proceedings.”” *Cellphone*, 186 Cal. App.
14 4th at 1393 (quoting *7-Eleven*, 85 Cal. App. 4th at 1164). Further, the notice program here more
15 than satisfied its purpose which “is the protection of the integrity of the class action process, one of
16 the functions of which is to prevent burdening the courts with multiple claims where one will do.”
17 *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 745-46 (2009); *see also, Wershba*, 91
18 Cal. App. 4th at 252. Finally, the Notice was content-neutral and clearly set out the terms of the
19 Settlement, and complied with all standards of fairness, completeness and neutrality. *See Cho*, 177
20 Cal. App. 4th at 745-46; *see also, Wershba*, 91 Cal. App. 4th at 252.

21 **VI. CONCLUSION**

22 For the reasons stated above, Plaintiffs respectfully submit that the Settlement is fair,
23 reasonable and in the best interests of the Class and should be approved, and the Court should enter
24 Final Judgment.

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