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

13 STANLEY DONEN FILMS, INC.,

14 Plaintiff,

15 vs.

16 TWENTIETH CENTURY FOX FILM  
CORPORATION, and DOES 1-100,

17 Defendants.  
18  
19  
20

CONFIRMED COPY  
ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

FEB 02 2018

Sherri R. Carter, Executive Officer/Clerk  
By: Maria Aguirre, Deputy

Case No. BC499181 (related to BC499179,  
BC499180, BC499182, BC500040)

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

**CLASS ACTION**

**NOTICE OF MOTION AND MOTION  
FOR FINAL APPROVAL OF  
TWENTIETH CENTURY FOX FILM  
CORPORATION CLASS ACTION  
SETTLEMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: April 9, 2018  
Time: 11:00 a.m.  
Dept.: 323

Action Filed: January 16, 2013  
Trial Date: None

KIESEL LAW LLP  
Attorneys at Law  
Beverly Hills, California

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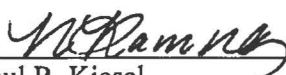
**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on April 9, 2018, at 11:00 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, Plaintiff Concourse Productions, Inc. ("Plaintiff") will and hereby does apply for an order of final approval of the proposed class action settlement between Plaintiff and Defendant Twentieth Century Fox Film 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 of Motion and Motion for Final Approval of Class Action Settlement, the attached Memorandum of Points and Authorities, the declarations and other documents filed in support thereof, the pleading and papers on file in this action, and such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: February 2, 2018

**KIESEL LAW LLP**

  
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Paul R. Kiesel  
Jeffrey A. Koncius  
Nicole Ramirez

*Attorneys for Plaintiffs and the Class*  
*(Additional Counsel Listed Below)*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This class action lawsuit alleges that Defendant Twentieth Century Fox Film Corporation (“Fox” or “Defendant”) has underreported the amount of Home Video Revenue and Electronic Sell-Through (“EST”) Revenue<sup>1</sup> to Plaintiff Concourse Productions, Inc. (“Concourse” or “Plaintiff”) 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 Settlement<sup>2</sup> that obtains substantial monetary relief for the Class Members.

The Settlement compensates the Class for a total of \$12.6 million by creating (1) an \$11.5 million Recouped Settlement Fund, which will be used to compensate Recouped<sup>3</sup> Class Members, and (2) a \$1.1 million Unrecouped Settlement Fund, which will be used to compensate Unrecouped Class Members. In addition to such monetary relief, after the Effective Date, Fox will continue to account to each Class Member for Streaming Revenue,<sup>4</sup> and any future methods of streaming now known or hereafter created, on the basis of 100% of such revenue. Participating Class Members will receive these benefits without having to initiate expensive audits or individual lawsuits against Fox, and will further maintain any rights they have to pursue an audit or lawsuit for claims unrelated to the allegations alleged in this lawsuit.

As shown in this Motion, the Settlement is fair, adequate and reasonable, and more than

<sup>1</sup> Home Video Revenue is revenue derived from the sale of physical copies of motion pictures (e.g. Videocassettes, DVDs, Blu-Ray discs). Settlement Agreement § 1.11. EST Revenue is revenue derived from the sale of permanent digital copies of motion pictures (e.g. through purchases on iTunes or Amazon). *Id.* § 1.10.

<sup>2</sup> Unless otherwise stated, all capitalized terms herein shall have the definitions set forth in the Stipulation and Agreement of Settlement dated September 22, 2017 (“Settlement Agreement”), attached as Exhibit A to the supporting Declaration of Jeffrey A. Koncius (“Koncius Decl.”).

<sup>3</sup> As explained more fully *infra*, “Recouped Class Member” refers to a Class Member that is a Profit Participant on one or more Class Films that have realized sufficient revenue to require payment of Profit Participation to that Class Member under the terms of that person or entity’s Class Profit Participation Contract, as such terms are defined in the Settlement Agreement. An “Unrecouped Class Member” is one that has not reached the threshold which would require such payment.

<sup>4</sup> Streaming Revenue is 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). *See* Settlement Agreement § 1.10.

1 satisfies all of the criteria for final approval. The Settlement Class further meets the requirements  
2 for class certification. Class Notice, given pursuant to the Order Granting Preliminary Approval of  
3 Class Action Settlement, entered November 16, 2017 (hereinafter “Preliminary Approval Order”),  
4 complied with applicable law and is the best notice practicable. Accordingly, Plaintiff requests that  
5 the Court grant final approval and finally certify the Settlement Class.

6 **II. SUMMARY OF THE LITIGATION**

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

8 Plaintiff and Class Members are writers, actors, directors, producers and other Profit  
9 Participants on certain motion pictures distributed by Fox. Plaintiff alleges that the Profit  
10 Participation Contracts require Fox to account to and credit Class Members for 100% of the gross  
11 receipts (i.e. revenues) derived by Fox or its subsidiaries from the sale of Home Video and EST  
12 Revenues. Plaintiff claims that Fox violated these Profit Participation Contracts by reporting Home  
13 Video and EST Revenues based on 20% of the revenue received by its wholly owned subsidiaries,  
14 rather than on 100% of these revenues allegedly required by the contracts. Through this class action  
15 lawsuit, Plaintiff sought to compel Fox to compensate Class Members for the monetary shortfall  
16 resulting from Fox’s alleged breach of contract and failure to pay Home Video and EST Revenues  
17 based on 100% of gross receipts. These core allegations formed the basis for each of Plaintiff’s  
18 Class Allegations for: (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and  
19 Fair Dealing; (3) Money Had and Received; (4) Declaratory Judgment; (5) Open Book Account; (6)  
20 Unfair Competition in Violation of California Business and Professions Code section 17200 *et seq.*;  
21 and (7) Conversion.<sup>5</sup> See First Amended Complaint.

22 Fox denies Plaintiff’s allegations and asserts defenses to class certification and the merits.  
23 Fox argues, *inter alia*, that its practice of accounting for Home Video and EST Revenues based on  
24 amounts received from its affiliates or subsidiaries did not violate the Profit Participation Contracts,  
25 and Fox is permitted to account to the Class Members by following Fox’s and the motion picture  
26 industry’s practice of calculating profit participation based on approximately 20% of the Home

27 \_\_\_\_\_  
28 <sup>5</sup> As discussed below, the Court dismissed the Conversion claim.



1 Video and EST Revenue received for these films. Fox further argues that payment based on 20% of  
2 the Home Video and EST Revenue did not damage Plaintiff and Class Members because Fox did  
3 not charge them for costs relating to the production, distribution and sale of these media that would  
4 be deductible under the 100% gross receipts calculation. Fox contends that the Unrecouped Class  
5 Members have not suffered damages because their movies did not generate sufficient revenues,  
6 when considered with the relevant costs, to allow them to obtain profit participation payments. Fox  
7 contends that Class Members' claims are barred by the applicable statute of limitations or any  
8 contractually prescribed temporal incontestability provision contained in the contracts between the  
9 parties. Finally, Fox claims that Plaintiff could not certify this case as a class action.

10 Plaintiff carefully considered the strength of the Class Members' claims and Fox's defenses  
11 before entering into the Settlement Agreement.

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

13 Plaintiff Stanley Donen Inc. filed this class action lawsuit on January 16, 2013. On June 14,  
14 2013, the Court denied Fox's demurrer and motion to strike the complaint. The operative First  
15 Amended Complaint, filed on November 26, 2013, substituted Concourse Productions, Inc. as the  
16 named Plaintiff and class representative.

17 On June 6, 2014, Fox filed a motion for summary adjudication as to Plaintiff's conversion  
18 cause of action, and summary judgment as to the entire action on the ground that Plaintiff was not  
19 injured because its film, *The Rose*, had not reached net profits and was unrecouped. On December  
20 17, 2014, the Court denied Fox's motion for summary judgment and found that Plaintiff had  
21 standing to pursue its claims based on allegations that Fox failed to accurately account for and  
22 credit Home Video Revenues on *The Rose*. The Court granted summary adjudication as to  
23 Plaintiff's conversion cause of action.

24 Prior to beginning settlement negotiations, the parties conducted discovery relating to the  
25 claims of Plaintiff and Class Members in this case. *See* Koncius Decl. ¶¶ 6-7. The parties  
26 exchanged written discovery, including multiple sets of Form Interrogatories, Special  
27 Interrogatories and Requests for Admissions. *Id.* Fox produced more than 22,000 pages of  
28 documents relating to all contracts, profit participation statements, correspondence and other

1 documents related to the named Plaintiff's films and a random sample of other films in the putative  
2 class. *Id.* Fox further disclosed information regarding the revenues for the Class Films and profit  
3 participation paid to Class Members during the class period. *Id.* Fox and Plaintiff deposed the  
4 person most qualified from the opposing party regarding various relevant topics. *Id.*

5 The settlement negotiations between the parties took place during the course of more than a  
6 year and involved multiple mediations and negotiation sessions. *See* Koncius Decl. ¶ 8. The parties  
7 attended an initial full day mediation with the Honorable Carl J. West (Ret.) on June 8, 2016, which  
8 resulted in an impasse. *Id.* After this initial mediation session, the parties engaged in further  
9 bilateral settlement discussions and exchanged further information regarding their claims, defenses,  
10 and damages at issue in the case. *Id.* These further discussions led to an agreement to attend a  
11 further mediation session with the Honorable Terry B. Friedman (Ret.) on May 2, 2017. *Id.* During  
12 this second mediation, the parties were able to reach an agreement on the material terms of the  
13 Settlement. *Id.* The parties then negotiated the final Settlement Agreement and related documents,  
14 which was finalized on September 22, 2017. *Id.*; *see also* Settlement Agreement.

15 **III. SUMMARY OF THE SETTLEMENT**

16 **A. The Proposed Settlement Class**

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

18 All persons and entities (and their successors-in-interest, assigns,  
19 and heirs) that are parties to a Class Profit Participation Contract.  
20 Where a person or entity is a party to one or more Profit  
21 Participation Contracts that are not Class Profit Participation  
22 Contracts and one or more Profit Participation Contracts that are  
23 Class Profit Participation Contracts, that person or entity is a  
24 member of the Settlement Class only with regard to the Class Profit  
25 Participation Contracts and not a part of the Settlement Class with  
26 regard to any other Profit Participation Contracts.<sup>6</sup>

23 The Settlement Agreement further defines a "Class Profit Participation Contract" as "a Profit  
24 Participation Contract using form definitions drafted by Fox before May 31, 1989, that do[es] not  
25 state an express percentage of Home Video Revenue and/or Electronic Sell-Through Revenue to  
26 use in calculating a Profit Participation." Settlement Agreement § 1.7.

27 \_\_\_\_\_  
28 <sup>6</sup> *See* Settlement Agreement § 2.

1 In other words, the Settlement Class consists of profit participants who entered into  
2 contracts that did not contain express provisions regarding the percentage upon which Fox would  
3 account for Home Video Revenue and/or EST Revenue. Because newer Profit Participation  
4 Contracts include provisions prescribing express percentages of Home Video Revenue and/or EST  
5 Revenue, the Settlement Agreement applies to older Profit Participation Contracts using form  
6 definitions drafted by Fox before May 31, 1989.

7 The Settlement Class includes both Recouped and Unrecouped Class Members. A Recouped  
8 Class Member means “a Class Member who, as of December 31, 2016, is a Profit Participant on  
9 one or more Class Films that have realized sufficient revenue to require payment of Profit  
10 Participation to that Class Member under the terms of that person or entity’s Class Profit  
11 Participation Contract and would have been entitled to payment of additional Profit Participation if  
12 Home Video Revenue or Electronic Sell-Through Revenue had been calculated based on more than  
13 20% of Home Video Revenue or Electronic Sell-Through Revenue, as alleged by Plaintiff.”  
14 Settlement Agreement § 1.25. An Unrecouped Class Member means “a Class Member who, as of  
15 December 31, 2016, is a Profit Participant on at least one Class Participation Contract on a Class  
16 Film that has not realized sufficient revenue to require payment of Profit Participation to that Class  
17 Member under the terms of that person or entity’s Class Profit Participation Contract.” *Id.* § 1.39.

18 It is possible for a profit participant to be considered both a Recouped and an Unrecouped  
19 Class Member if they are a party to both recouped and unrecouped Class Profit Participation  
20 Contracts. In such a situation, the Class Member would obtain a portion of the Recouped and  
21 Unrecouped Settlement Funds.

22 **B. Class Relief Provided by the Settlement Agreement**

23 The Settlement is crafted to provide substantial relief to both Recouped and Unrecouped  
24 Class Members and fully resolve the claims in this case. The Settlement provides a total of \$12.6  
25 million in monetary relief which is comprised of the \$11.5 million Recouped Settlement Fund and  
26 the \$1.1 million Unrecouped Settlement Fund. This monetary relief will be used to compensate  
27 Class Members and pay administrative and notice costs, attorneys’ fees and costs, and an  
28 enhancement award to the named Plaintiff. Absent this Settlement, Class Members would not get

1 the benefit of any compensation relating to Home Video or EST revenue without first undertaking a  
2 very long and expensive audit process without guarantee that they would be paid anything for such  
3 efforts. This Settlement provides for such payment now. In addition, the Settlement provides that  
4 Fox will continue to account to Class Members for Class Profit Participation Contracts for  
5 Streaming Revenue, and any future methods of streaming now known or hereafter created, on the  
6 basis of 100% of such revenue. *See* Settlement Agreement § 1.10.

7 **1. Relief to Recouped Class Members**

8 Recouped Class Members will receive payments from the \$11.5 million Recouped  
9 Settlement Fund as follows:

10 a. Retrospective Relief: Each Recouped Class Member will receive a payment from  
11 the Retrospective Relief Fund (stipulated to be 70% of the Settlement Fund Payout), calculated as  
12 the ratio of the total amount of Profit Participation paid or payable to the Recouped Class Member  
13 pursuant to one or more Class Profit Participation Contracts through December 31, 2016  
14 (numerator), to the total amount of Profit Participation paid to all Recouped Class Members  
15 pursuant to one or more Class Profit Participation Contracts through December 31, 2016  
16 (denominator). *See* Settlement Agreement § 4.1.

17 b. Prospective Relief: Each Recouped Class Member will also receive payment from  
18 the Prospective Relief Fund (stipulated to be 30% of the Settlement Fund Payout), calculated as the  
19 ratio of the total amount of Profit Participation paid or payable to the Recouped Class Member  
20 pursuant to one or more Class Profit Participation Contracts from January 1, 2009, through  
21 December 31, 2016 (numerator) to the total amount of Profit Participation paid or payable to all  
22 Recouped Class Members pursuant to one or more Class Profit Participation Contracts during the  
23 same period (denominator). Settlement Agreement § 4.2. This ratio represents an estimate  
24 negotiated by the parties for future Profit Participation payments owed to the Class Member.

25 Though the exact amount received by each Class Member depends on the number of eligible  
26 participants and the revenue from films at issue, the formula is known and has been successfully  
27 utilized to calculate settlement proceeds in the related *Universal* and *Paramount* actions.

28

1                   **2. Relief to Unrecouped Class Members**

2           The Settlement also creates a \$1.1 million Unrecouped Settlement Fund to allow  
3 Unrecouped Class Members to make settlement claims and obtain monetary relief for Fox’s alleged  
4 improper payment and calculation of Home Video and EST Revenues. *See* Settlement Agreement §  
5 5.1. The Unrecouped Settlement Fund is less than the Recouped Settlement Fund because these  
6 individuals were participants on films with no guarantee that they would ever reach net profits and  
7 earn any profit participation, especially considering the age of the films at issue. The Unrecouped  
8 Settlement Fund allows Unrecouped Class Members to obtain a guaranteed monetary recovery for  
9 their participation on films that had not yet reached profits and may not reach net profits in the  
10 future.

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

12           In addition to monetary relief, the Settlement provides valuable injunctive relief to Class  
13 Members. Fox “agrees that, in the absence of an existing or future agreement that includes express  
14 provisions regarding the calculation of the Profit Participant’s Profit Participation with regard to  
15 revenue received by Fox and Affiliates from Streaming a motion picture (“Streaming Revenue”),  
16 Fox has accounted and will continue to account to each Class Member for Streaming Revenue on  
17 the basis of 100% of such revenue received by Fox and Affiliates.” Settlement Agreement § 1.9.

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

19           The Settlement Agreement is designed to ensure that the Class Members receive their  
20 benefits in the easiest and most efficient way possible, without reversion to Fox. Recouped Class  
21 Members have (by definition) already received profit participation from Fox and Fox generally is  
22 currently accounting to them on their titles. Since Fox has accurate profit participation information  
23 for these participants who are receiving regular accounting statements, the Settlement provides  
24 monetary relief to such Recouped Class Members who do not opt out from the Settlement and they  
25 do not have to file a claim. Settlement Agreement §§ 4.3, 4.4. As set forth above, the Recouped  
26 Settlement Fund will be equitably distributed to Recouped Class Members, in proportion to the  
27 revenues earned on their titles (i.e. higher earning profit participants receive more money).

28

1 Unrecouped Class Members are (by definition) not being accounted to nor earning profit  
2 participation from Fox. Unlike the Recouped Class Members, the identity and address of the  
3 Unrecouped Class Members is not independently discernable because these persons and entities  
4 have not been receiving profit participation payments. Due to the age of the films at issue, a number  
5 of the original profit participants on unrecouped Class Films have passed away (in the case of  
6 individuals), ceased to exist or changed names (in the case of companies), or transferred their  
7 interests. Thus, an automatic distribution of the Unrecouped Settlement Fund would not be feasible.  
8 Accordingly, the Settlement calls for Unrecouped Class Members to submit a claim in order to  
9 obtain payment from the Unrecouped Settlement Fund. *See* Settlement Agreement § 5.1. Once valid  
10 claims by Unrecouped Class Members submitted on or before March 2, 2018, are tabulated,<sup>7</sup> the  
11 amount recovered by each Unrecouped Class Member will be determined based on the total Home  
12 Video Revenue and Electronic Sell-Through Revenue of their film relative to other titles, and any  
13 other valid claims by Unrecouped Class Members on the same film. *Id.* §§ 5.2, 5.3. This evidence  
14 based plan of distribution for the Unrecouped Settlement Fund is equitable and was crafted based  
15 on available sales and revenue data available on these motion pictures.

16 In the event there are unclaimed funds, efforts will be made to distribute the residue to Class  
17 Members via a second distribution. If a second distribution is not justified in light of the  
18 administrative costs, the Settlement calls for the residue to be donated in accordance with the  
19 procedures set forth in Code of Civil Procedure section 384: (1) 25% to the State Treasury for  
20 deposit in the Trial Court Improvement and Modernization Fund; (2) 25% to the State Treasury for  
21 deposit into the Equal Access Fund of the Judicial Branch; and (3) 50% to the Motion Picture &  
22 Television Fund. Settlement Agreement § 4.4. The Motion Picture & Television Fund is a nonprofit  
23 that supports projects that will benefit Class Members, that donation will further the objectives and  
24 purposes of this class action, and will promote the law consistent with the objectives and purposes  
25 of this class action. *Id.* This limited *cy pres* distribution is solely intended as a means to prevent any  
26 reversion of unclaimed funds to Fox.

27 \_\_\_\_\_  
28 <sup>7</sup> A declaration will be submitted in advance of the Final Fairness Hearing.

1           **C.     Narrowly Tailored Release**

2           The Settlement Agreement contains a release that is limited to claims relating to the subject  
3 matter of the litigation—namely, Fox’s practice of accounting for Home Video and EST Revenue  
4 on a percentage royalty basis. *See* Settlement Agreement §§ 1.22, 7. The class release does not  
5 include a general release or a waiver of Civil Code section 1542 on behalf of the Class Members.  
6 *Id.* Class Members who participate in the Settlement (and who are therefore subject to the release)  
7 will still preserve any rights they have to challenge any other accounting practice, charge or any  
8 other conduct by Fox unrelated to the claims in this lawsuit, in the past or future. *Id.* The scope of  
9 the release is justified and supports granting this Motion.

10           **D.     Requested Attorneys’ Fees and Costs and Enhancement Awards**

11           The Settlement Agreement allows Class Counsel to apply to the Court for an award of  
12 attorneys’ fees in an amount not to exceed one-third of the Recouped and Unrecouped Settlement  
13 Funds and verified costs in an amount not to exceed \$105,000. Settlement Agreement § 20. Plaintiff  
14 is also able to apply to the Court for an enhancement award of \$10,000, designed to compensate it  
15 for its time and service to the Class. *Id.* § 24. These attorneys’ fees and costs will be paid  
16 proportionally from the Recouped and Unrecouped Settlement Funds. *Id.* §§ 1.26, 20. As explained  
17 in the concurrently filed motion, these attorneys’ fees, costs and enhancement awards are  
18 reasonable and justified.

19           **IV.    PRELIMINARY SETTLEMENT APPROVAL**

20           On November 16, 2017, the Court entered its Preliminary Approval Order granting  
21 preliminary approval of the proposed Settlement, directed notice to Class Members, and scheduled  
22 a hearing on final approval. Notice was disseminated to the Class by mail and various other  
23 methods in accordance with that Order, as set out at length *infra*. *See also*, Devery Decl. ¶¶ 5-18.  
24 Pursuant to the Order, Class Members have until March 2, 2018, to submit a claim, object to the  
25 Settlement or exclude themselves. Preliminary Approval Order ¶¶ 10, 23. As of the date of this  
26 filing, no Class Members have objected or opted out. Devery Decl. ¶ 20.

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1 **V. LEGAL ANALYSIS**

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

3 Code of Civil Procedure section 382 authorizes the use of the class action “when the  
4 question is one of a common or general interest, of many persons, or when the parties are  
5 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend  
6 for the benefit of all.” Certification of a class “requires proof (1) of a sufficiently numerous,  
7 ascertainable class, (2) of a well-defined community of interest, and (3) that certification will  
8 provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to  
9 other methods. [Citations.] In turn, the ‘community of interest requirement embodies three factors:  
10 (1) predominant common questions of law or fact; (2) class representatives with claims or defenses  
11 typical of the class; and (3) class representatives who can adequately represent the class.’  
12 [Citation].” *In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009). The legal standard applicable to a  
13 class certification motion is whether the plaintiff has “established ‘by a preponderance of the  
14 evidence that the class action proceeding is superior to alternate means for a fair and efficient  
15 adjudication of the litigation.’ [Citation].” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th  
16 319, 332 (2004). Of note, “[t]he certification question is ‘essentially a procedural one that does not  
17 ask whether an action is legally or factually meritorious.’ [Citation].” *Id.* at 326. A review of these  
18 factors demonstrates that a settlement class should be finally certified herein.

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

20 Case law indicates that 30 to 40 class members satisfy the numerosity requirement because  
21 at that point, individual joinder is impractical. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926,  
22 934 (1981); *Collins v. Rocha*, 7 Cal. 3d 232, 235 (1972). Here, there are hundreds of Settlement  
23 Class Members which satisfies the numerosity requirement. *See* Devery Decl. ¶ 6.

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

25 “The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set  
26 of common characteristics sufficient to allow a member of that group to identify himself as having a  
27 right to recover based on the description.” *Harper v. 24 Hour Fitness, Inc.*, 167 Cal. App. 4th 966,  
28 977 (2008) (citing *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 14 (2007));



1 *see also Sav-on Drug Stores, Inc.*, 34 Cal. 4th at 333 (stating “a class action is not inappropriate  
2 simply because each member of the class may at some point be required to make an individual  
3 showing as to his or her eligibility for recovery.”).

4 In this case, Class Members have a direct contractual relationship with Fox as Profit  
5 Participants on motion pictures. As such, a substantial portion of Class Members have been  
6 identified and are being provided with direct mail notice of the Settlement. The existence of records  
7 which enables the identification of individual class members (a circumstance not required or even  
8 available in every class action) strongly supports a finding of ascertainability.

9 Further, the Settlement Class definition sets forth “common characteristics sufficient to  
10 allow a member of that group to identify himself as having a right to recover based on the  
11 description” – *i.e.* that they are a party to a Class Profit Participation Contract. *See Harper*, 167 Cal.  
12 App. 4th at 976-77. When coupled with the comprehensive notice and claims processing program  
13 under the Settlement, this Class definition allows individual Class Members to determine their  
14 eligibility and exercise their rights under the Settlement.

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

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

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

19 The predominance requirement is satisfied when questions of law or fact common to the  
20 class predominate over individual questions. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).  
21 Common questions may predominate even if each member of the class must individually prove  
22 their damages or eligibility for recovery. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th  
23 1004, 1022 (2012); *see also Sav-on*, 34 Cal. 4th at 333. While in a disputed class certification  
24 motion the predominance element is important, courts apply a “lesser standard of scrutiny for  
25 settlement cases” where the court does not need to concentrate on whether the lawsuit is  
26 manageable for trial. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1807 n.19 (1996).

27 Here, Plaintiff has satisfied the predominance requirement for settlement purposes because  
28 this lawsuit centers on common legal questions relating to whether Fox’s practice of accounting for

1 Home Video and EST Revenues on a 20% royalty basis violates the rights of Class Members. The  
2 Settlement resolves the parties' dispute arising from this core issue by providing all Settlement  
3 Class Members with relief concerning the alleged underpayment of Home Video and EST  
4 Revenues. The fact that each Class Member will be entitled to a different amount of the recovery  
5 based on the revenues of their film(s) does not defeat predominance. *See Brinker*, 53 Cal. 4th at  
6 1022; *Sav-on*, 34 Cal. 4th at 332-33. The Settlement equitably provides Class Members with a  
7 recovery that corresponds with the profits and revenues of their films.

8 *b. Plaintiffs' Claims Are Typical of the Class*

9 A class representative's claims are typical of the class if the individual facts applicable to  
10 the class representative are very similar, but not necessarily identical, to the facts that are common  
11 to the class. *See Classen v. Weller*, 145 Cal. App. 3d 27, 45 (1983); *Richmond v. Dart Indus.*, 29  
12 Cal. 3d 462, 470 (1981). It is sufficient that the class representative is similarly situated so that he  
13 or she will be motivated to litigate on behalf of all class members. *Classen*, 145 Cal. App. 3d at 46.  
14 Furthermore, "[t]he fact that the class representatives had not personally incurred all of the damages  
15 suffered by each different class member" does not defeat a motion for class certification. *See*  
16 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 238 (2001).

17 Here, the named Plaintiff and members of the Settlement Class are all Profit Participants on  
18 class motion pictures distributed by Fox. Plaintiff alleges the same injury arising from the same  
19 conduct as every other Settlement Class member. Because its claims are aligned with the Class  
20 Members, Plaintiff was motivated to obtain the best possible settlement not only on behalf of itself,  
21 but on behalf of the entire Settlement Class. Therefore, Plaintiff's claims are typical.

22 *c. Plaintiff and its Counsel Are Adequate Representatives*

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

1 Plaintiff has no antagonism or conflicts of interest with the proposed Class. Koncius Decl. ¶  
2 11. Plaintiff’s claims are identical to the claims of the other Class Members and arise from the same  
3 conduct by Fox. Plaintiff has embraced its responsibilities as class representative by actively  
4 participating in the case, including responding to written discovery and producing documents,  
5 preparing for and attending depositions, and engaging in the settlement process. Further, Plaintiff is  
6 represented by qualified and competent counsel who have the experience and resources necessary to  
7 vigorously pursue this action. *See* Koncius Decl. ¶¶ 22, 24; Declaration of Neville L. Johnson  
8 (“Johnson Decl.”) ¶¶ 3-5; Declaration of Daniel L. Warshaw (“Warshaw Decl.”) ¶¶ 26-31;  
9 Declaration of Raymond P. Boucher (“Boucher Decl.”) ¶¶ 17-25. The knowledge and experience of  
10 Class Counsel were essential in ensuring that the Class Members’ interests were protected.

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

13 A class action is the only economically realistic method for the fair and efficient  
14 adjudication of this case since the effort required to bring an individual suit is high compared to the  
15 relatively small amount of recovery. Absent a class action, Plaintiff and the Class will not have  
16 received the compensation alleged to be due them unless they undertook an expensive and lengthy  
17 audit process. *See Linder*, 23 Cal. 4th at 445 (holding that the court should weigh the advantages  
18 and disadvantages of an individual action against the burdens and benefits of a class action); *see*  
19 *also Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971) (stating “individual actions . . . is often  
20 impracticable because the amount of individual recovery would be insufficient to justify bringing a  
21 separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct.”).

22 As for superiority, the court looks to: “(1) [t]he interest of each member in controlling his  
23 or her own case personally; (2) [t]he difficulties, if any, that are likely to be encountered in  
24 managing a class action; (3) [t]he nature and extent of any litigation by individual class members  
25 already in progress involving the same controversy; and (4) [t]he desirability of consolidating all  
26 claims in a single action before a single court.” *Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th  
27 110, 121 (2003) (citation omitted). While there are numerous benefits to this case proceeding as a  
28 class action, there are no countervailing interests by individuals to proceed on their own and,

1 indeed, those who wished to do so have the opportunity to opt out.

2 This case is ideally suited for class adjudication because the class action device allows Profit  
3 Participants to obtain relief from Fox’s alleged failure to properly account for Home Video and  
4 EST Revenues without incurring significant out-of-pocket costs associated with individual audits  
5 and lawsuits and there is nothing to be gained in controlling their own case personally. For most  
6 Class Members the amount at issue relating to Home Video and EST Revenues is outweighed by  
7 the tens of thousands of dollars necessary to conduct an individual audit or litigate an individual  
8 lawsuit. Most Class Members would not have had the resources or financial incentive to pursue  
9 these claims against Fox on an individual basis. The class action device alleviates the heavy burden  
10 on the Court that would arise from individual adjudication of the issue. The Settlement also  
11 eliminates the substantial risk of multiple duplicative lawsuits and ensures that the Class Members’  
12 claims are resolved in the most efficient and cost-effective way.

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

14 A settlement of a class action requires approval of the Court after a hearing. Cal. R. Ct.  
15 3.769(a). Rule 3.769(g) states that “[b]efore final approval, the court must conduct an inquiry into  
16 the fairness of the proposed settlement.” Cal. R. Ct. 3.769(g). To be approved, a class action  
17 settlement must be “fair, adequate, and reasonable” and fall within the range of approval. *Dunk*, 48  
18 Cal. App. 4th at 1801-02. The determinations of whether a settlement should be approved requires,  
19 “basic information about the nature and magnitude of the claims in question and the basis for  
20 concluding that the consideration being paid for the release of those claims represents a reasonable  
21 compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008); *Dunk v. Ford*  
22 *Motor Company*, 48 Cal. App. 4th 1794, 1802 (1996); *Clark v. American Residential Serv. LLC*,  
23 175 Cal. App. 4th 785, 790, 802-03 (2009).

24 In evaluating a settlement’s fairness, courts consider factors such as the strength of the  
25 plaintiffs’ claims, the risk and expense of further litigation, the risk of maintaining class action  
26 status through trial, the amount offered in settlement, the extent of discovery completed, the  
27  
28

1 experience and views of counsel and the presence of a government participant.<sup>8</sup> *Clark*, 175 Cal.  
2 App. 4th at 799; *Dunk*, 48 Cal. App. 4th at 1801. However, “[t]he list of factors is not exclusive and  
3 the court is free to engage in a balancing and weighing of factors depending on the circumstances of  
4 each case.” *Wershba*, 91 Cal. App. 4th at 245.

5 Additionally, a presumption of fairness is created where, like here, the settlement has been  
6 “reached through arm’s-length bargaining,” the “investigation and discovery are sufficient to allow  
7 counsel and the court to act intelligently,” and “counsel is experienced in similar litigation.”  
8 *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010); *Dunk*, 48 Cal. App. 4th at  
9 1802; *Wershba*, 91 Cal. App. 4th at 245. The Court’s analysis of a settlement should be conducted  
10 in light of the favorable view of settling disputes by California courts. *See, e.g., Stambaugh v.*  
11 *Superior Court*, 62 Cal. App. 3d 231, 236 (1976). Indeed, this is particularly so in class actions  
12 where substantial resources will be conserved by avoiding litigation:

13 In reviewing the fairness of a class action settlement, “[d]ue  
14 regard’... ‘should be given to what is otherwise a private consensual  
15 agreement between the parties. The inquiry “‘must be limited to the  
16 extent necessary to reach a reasoned judgment that the agreement is  
not the product of fraud or overreaching by, or collusion between,  
the negotiating parties, and that the settlement, taken as a whole, is  
fair, reasonable and adequate to all concerned.’ [Citation.] ...

17 *Cellphone*, 186 Cal. App. 4th at 1389.

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

19 The Settlement is subject to a presumption of fairness because it is the product of protracted  
20 mediation and arm’s length negotiations with the assistance of the Honorable Carl J. West (Ret.)  
21 and the Honorable Terry B. Friedman (Ret.). *See Dunk*, 48 Cal. App. 4th at 1802. Plaintiff and its  
22 counsel advocated vigorously on behalf of the Class Members during each phase of these  
23 negotiations in order to negotiate a settlement that provides adequate relief and is in the best interest  
24 of Class Members. *See Koncius Decl.* ¶¶ 4, 8. The negotiations between the parties resulted in a  
25 settlement that is the product of genuine give and take and justified by the facts of this case. *See id.*

26  
27  
28 <sup>8</sup> This factor is inapplicable here.



1 incentive fees and costs, that will compensate them for past and future Home Video and EST  
2 Revenues earned on their titles. Participating Unrecouped Class Members will receive the benefit  
3 of the \$1.1 million Unrecouped Settlement fund, less applicable attorneys' fees, incentive fees and  
4 costs, which ensures that they receive cash payments for their work on films that were not in profit  
5 and for which there was otherwise no guarantee of recovery. In exchange for this relief, Settlement  
6 Class Members will release their claims relating to Fox's accounting of Home Video and EST  
7 Revenues, and agree to accounting on such revenues on a 20% royalty basis going forward. The  
8 amount offered in settlement is a significant recovery for the Class in light of the risks of further  
9 litigation and Fox's likely defenses.

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

11 As explained above, before entering into the Settlement Agreement, the parties conducted  
12 significant discovery and exchanged factual information. *See* Koncius Decl. ¶¶ 6-7. This discovery  
13 formed the basis for the parties' settlement negotiations, and ensured that Plaintiff entered into the  
14 Settlement with a sound understanding of the issues and risks involved, and helped Plaintiff  
15 achieve the best result for the Class.

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

17 Plaintiff and Class Members are represented in this case by counsel who have vast  
18 experience in class action, complex, and entertainment litigation, have negotiated numerous other  
19 substantial settlements, and have the ability to litigate this case on a class-wide basis if a fair  
20 settlement were not offered. *See* Warshaw Decl. ¶¶ 26-31; Johnson Decl., ¶¶ 3-5; Koncius Decl., ¶  
21 24; Boucher Decl., ¶¶ 17-25. Significantly, they are also Class Counsel in related cases pending  
22 before this Court against other major movie studios involving identical factual and legal issues,  
23 which helped inform the settlement negotiations in this case. *See* Warshaw Decl. ¶ 25. Class  
24 Counsel were satisfied with the Settlement Agreement only after extensive negotiations and  
25 thorough investigation into the factual and legal issues raised in this case. *See id.* ¶¶ 4-10. Based  
26 upon their experience in class action cases, Class Counsel views the Settlement Agreement  
27 favorably. *See* Warshaw Decl. ¶ 34; Johnson Decl. ¶ 9; Koncius Decl. ¶ 25; Boucher Decl. ¶ 26.

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

2           As set out below, 1,156 notices were mailed to Class Members and none have opted out or  
3 objected. Thus, the reaction of the Class to the Settlement has been solidly favorable. If there are  
4 any objections to the Settlement, Plaintiff will file an appropriate response.

5           **D.       Undistributed Monies Should Be Distributed *Cy Pres***

6           Pursuant to Section 4.4 of the Settlement Agreement *cy pres* distribution will only occur in  
7 the event that the amount of stale checks remaining after distribution of the Settlement to Class  
8 Members does not justify the administrative cost of a second distribution. As set forth above, such  
9 distribution will comply with California Code of Civil Procedure section 384(b)(3)(A) and  
10 (b)(3)(B). Settlement Agreement § 4.4. When evaluating a *cy pres* distribution of the remainder of  
11 class action proceeds a court must “consider whether the proposed *cy pres* distribution is useful in  
12 fulfilling the purposes of the underlying cause of action.” *In re Microsoft I-V Cases*, 135 Cal. App.  
13 4th 706, 722 (2006). Here, the proposed limited *cy pres* distribution to the Motion Picture &  
14 Television Fund (the same fund the Court approved in the *Universal* and *Paramount* Matters)  
15 fulfills the purpose of the lawsuit because it directly benefits the interests of individuals involved in  
16 the film industry by providing, for example, health care services, retirement residences, financial  
17 aid to offset care and living expenses, social services and charitable assistance programs. *See*  
18 *Koncius Decl.* ¶ 13. Further, none of the firms has an interest or involvement in the governance or  
19 work of the *cy pres* recipient. *Id.*; *Warshaw Decl.* ¶ 12; *Johnson Decl.* ¶ 9; *Boucher Decl.* ¶ 28.  
20 Moreover, the funds will allow the *cy pres* recipient to continue its work in a time of shrinking  
21 budgets. Accordingly, as it did in the *Universal* and *Paramount* Matters, this Court should approve  
22 the *cy pres* distribution here. *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472 (1986);  
23 *In re Microsoft I-V Cases*, 135 Cal. App. 4th at 722; *Nachshin v. AOL, Inc.*, 663 F.3d 1034, 1038-  
24 41 (9th Cir. 2011); *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); Cal. Civ. Proc. Code  
25 § 384.

26           **E.       Appropriate Notice Was Given to the Class Pursuant to the Preliminary**  
27                           **Approval Order**

28           Pursuant to this Court’s Preliminary Approval Order, Class Members received proper notice



1 of the pendency of this action and the Settlement so that they have had an adequate opportunity to  
2 file claims, object or exclude themselves. Devery Decl. ¶¶ 5-18. The comprehensive notice program  
3 satisfied the requirements of Rules of Court 3.766 and 3.769 and was designed to ensure Class  
4 Members received the best notice practicable. Cal. R. Ct. 3.766(e). So too, the Notice itself was  
5 informative and satisfied all necessary requirements.

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

14 On December 1, 2017, Angeion received an Excel spreadsheet from Defendant’s Counsel  
15 containing lists of Recouped and Unrecouped Class Members. Devery Decl. ¶ 4. After removing  
16 duplicate and invalid address records, there were 401 Recouped, and 755 Unrecouped, Class  
17 Member records available to send direct mail notice. *Id.* On December 15, 2017, Angeion caused  
18 the Notice to be mailed to those addresses. *Id.* ¶ 5. Since mailing the Notice, 106 were returned as  
19 undeliverable. *Id.* ¶ 18. A skip trace search was performed for 105 of these records to find a current  
20 address. *Id.*<sup>9</sup> Updated addresses were found for some and 35 Notices were remailed. *Id.* Angeion  
21 also established a toll-free telephone number, (844) 611-5265, that Class Members can call and  
22 listen to Frequently Asked Questions and request a Claim Form to be mailed to them. *Id.* ¶ 12.

23 To ensure that the notice program was robust and complete, on December 15, 2017,  
24 Angeion established the settlement website [www.FoxHomeVideoSettlement.com](http://www.FoxHomeVideoSettlement.com). *Id.* ¶ 13. The  
25 website contains general information about the Settlement, Court documents, and important dates  
26 and deadlines pertinent to this matter. *See id.* The website also contains a “Contact Us” page

27 <sup>9</sup> One undeliverable notice was not subjected to a skip trace because a claim had been filed for that record  
28 prior to the date of the skip trace.

1 whereby Class Members can contact Angeion by email to update their address or submit additional  
2 questions regarding the settlement. *See id.* A copy of this Motion and the Motion for Attorneys’  
3 Fees, Costs and Service Awards, will be available on the website after they are filed.

4         Angeion caused the Summary Notice to be published on December 18, 2017, in *The*  
5 *Hollywood Reporter* and *Variety*. Devery Decl. ¶ 7. It also issued a press release through Business  
6 Wire on December 15, 2017. *Id.* ¶ 6. Banner advertisements were run in *Variety* “Breaking News  
7 Alert” and *The Hollywood Reporter* “E Newsletter,” on December 18, 2017. Additionally, Angeion  
8 caused said banner ad to run on *The Wrap* from December 18, 2017, through December 22, 2017.  
9 *Id.* ¶ 9, Ex. “D.” Facebook, Twitter, and LinkedIn advertisements began on December 15, 2017. *Id.*  
10 ¶ 10.

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

24 **VI. CONCLUSION**

25         For the reasons stated above, Plaintiff respectfully submits that the Settlement is fair,  
26 reasonable and in the best interests of the Class and should be approved, and the Court should  
27 enter Final Judgment.

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DATED: February 2, 2018

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