

BEFORE THE WRITERS GUILD OF AMERICA, WEST, INC. – PRODUCERS

ARBITRATION TRIBUNAL

IMPARTIAL ARBITRATOR KENNETH A. PEREA

In the Matter of Arbitration)	
)	
Between)	
)	
WRITERS GUILD OF AMERICA, WEST, INC.)	IMPARTIAL ARBITRATOR’S
)	
Complainant,)	FINDINGS
)	
vs.)	AND
)	
NETFLIX ENTERTAINMENT, LLC, NETFLIX US, LLC, NETFLIX INTERNATIONAL, LLC AND STORYBUILDERS, LLC)	AWARD
)	
Respondents.)	
)	
Re: <i>Bird Box</i>)	WGAW Claim No. 19-CL-0094
MBA New Media Reuse Sideletter,)	
<u>Paragraph 3.a.</u>)	

The above-entitled matter is conducted pursuant to the provisions of Writers Guild of America Theatrical and Television Basic Agreement (“the 2017 MBA”), effective May 2, 2017, and continuing to and including May 1, 2020, between Alliance of Motion Picture and Television Producers, Inc. (“AMPTP”), Writers Guild of America, West, Inc. (“WGAW”) and Writers Guild of America, East, Inc. The parties agree the matters at issue are properly submitted for final and binding adjudication before The Writers Guild of America, West, Inc. – Producers Arbitration Tribunal, Impartial Arbitrator Kenneth A. Perea.

I. THE HEARING

The hearing in the above-entitled matter began in person on February 10, 2020, at the offices of WGAW, 7000 West Third Street, Los Angeles, CA, and by agreement of the parties resumed via Zoom for the remainder of the proceedings conducted on January 22, February 8,

March 26, April 9, May 7, and June 10, 2021. Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. A verbatim transcript of the proceedings was prepared by Vicki A. Saber, CSR, RPR, CRR, CCRR and CLR, Bayside Reporting Company. The matter was submitted upon simultaneous, electronically filed and exchanged post-hearing Closing and Reply Briefs. Screenwriter Eric Heisserer (“Screenwriter Heisserer”), was fully and fairly represented by WGAW throughout the proceedings.

II. THE APPEARANCES

Screenwriter Heisserer and WGAW were represented throughout the proceedings by Melissa S. Arbiter, attorney at law and Assistant Director, Legal Services, and Katherine Shannon Christovich, Assistant General Counsel, WGAW, 7000 West Third Street, Los Angeles, CA 90048. The appearance on behalf of Respondents, Netflix Entertainment, LLC, Netflix US, LLC, Netflix International, LLC and Storybuilders, LLC (collectively “Netflix”) was made by Mark A. Wasserman, attorney at law, Mitchell, Silberberg & Knupp, LLP, 2049 Century Park East, 18th Floor, Los Angeles, CA 90067-3120.

III. THE MATTERS AT ISSUE

The issues presented for adjudication in the above-entitled proceedings may be stated in the following terms:

1. Under the terms of the 2017 MBA SIDELETTER ON EXHIBITION OF MOTION PICTURES TRANSMITTED VIA NEW MEDIA, Paragraph 3.a., “Accountable Receipts,” are additional residuals, including interest thereon, owed by Respondents Netflix Entertainment, LLC, Netflix US, LLC, Netflix International LLC and Storybuilders, LLC to Screenwriter Heisserer in connection with the theatrical motion picture project entitled *Bird Box*?
2. If so, what shall the appropriate remedy be?

IV. THE FINDINGS OF FACT

A. Background

Claimant WGAW represents approximately 10,000 professional writers who create literary content for theatrical motion picture, television, news, documentary, animation, and digital media projects. WGAW's members work exclusively for companies who are signatory to the 2017 MBA between itself and Alliance of Motion Picture and Television Producers, Inc. ("AMPTP").

Respondent Netflix operates an online Subscription Video on Demand ("SVOD") platform ("Netflix's platform") for which subscribers pay a monthly fee to access its library of content. Content available on Netflix's platform consists of both projects produced by Storybuilders, LLC, its affiliated production arm, as well as those it has paid a license fee for global distribution rights from independent third-party producers in arm's length transactions.

As of 2017, Netflix's platform was available in over 200 global markets and territories comprising every major country in the world except China, Syria and North Korea.

Netflix has branded content in which it has acquired "first-window" exhibition rights as "Netflix Original[s]." In the case of feature films within its library of content, a "Netflix Original" identifies programming which is either licensed or produced by Netflix for primary exhibition on its platform. "Netflix Original" films are thus made for the theatrical marketplace and typically have limited or no theatrical releases before transitioning to Netflix's platform, where they remain exclusively for its subscribers' viewing.¹

On its production side, through affiliated production company Storybuilders, Netflix produces content intended for first-window exhibition on its platform. To attract high-level, A-list talent who prefer the prestige associated with theatrical motion pictures over long-form

¹ To date the only exceptions are *Roma*, which had a limited home video release after receiving an Academy Award nomination and *Marriage Story* which was licensed to a third-party distributor in China, one of the three territories in the world where Netflix is unavailable.

projects made for SVOD, Storybuilders began producing projects made for initial theatrical market distribution in addition to licensing global distribution rights for theatrical films produced by independent third-party producers. To guarantee exclusivity, Netflix pays fair market value when licensing global exploitation rights in theatrical motion pictures from third-party producers in arm's length transactions.

Because its business model focuses on content exclusive to its platform, Netflix opted to produce and license global exploitation rights in theatrical films, on the premise such films will have little or no theatrical distribution. Limited theatrical release of its produced films before transitioning them to Netflix's platform where they remain exclusively enhances the prestige of its platform and attracts high-level, A-list talent interested in potential nomination for Oscar and Golden Globe awards.

B. Screenwriter Heisserer and *Bird Box*

On July 7, 2013, WGAW member in good standing Screenwriter Heisserer entered into a writing services agreement with Universal Pictures, a division of MBA signatory Universal City Studios ("Universal"), to write a first-draft screenplay, as well as perform optional rewrite and Polish services, on a theatrical motion picture entitled *Bird Box*.²

Both Storybuilders and Netflix Entertainment, LLC are signatories to the 2017 MBA. During the term of the 2017 MBA, Storybuilders, LLC employed Heisserer to perform additional writing services on *Bird Box* and acquired Universal's rights and 2017 MBA obligations, including payment of residuals owed in connection with *Bird Box*.³ After acquiring rights to the

² *Bird Box* is a psychological thriller about a mother and her two young children who, due to an ominous and unseen force driving people to suicide, desperately flee their home blindfolded, to seek safety by navigating a small open rowboat down a twisted and treacherous river. *Bird Box* stars Academy Award Actress Sandra Bullock and Academy Award-nominated Actor John Malkovich. *Bird Box* was directed by Emmy Award-winning Director Susan Bier and written by Credited Writer and Academy Award-nominated Screenwriter Heisserer.

³ Storybuilders LLC, Netflix's production arm, is signatory to the 2017 MBA by virtue of a Letter of Adherence. Netflix Entertainment, LLC guaranteed Storybuilders, LLC's 2017 MBA performance obligations. On June 5, 2017, Storybuilders, LLC employed Heisserer to perform additional writing services in connection with *Bird Box*. On September 28, 2017, Storybuilders, LLC assumed all rights and obligations to *Bird Box* from Universal pursuant to a Literary Material Assumption Agreement. On October 26, 2017, and November 29, 2018, respectively, Storybuilders,

literary material for *Bird Box*, Storybuilders, LLC produced the theatrical motion picture, and assigned distribution rights to Netflix US, LLC for its domestic distribution, and Netflix International LLC, for its foreign distribution. Netflix accordingly possesses global exploitation/distribution rights to *Bird Box* in all reuse markets and territories.

On June 7, 2018, Netflix submitted Notice of Tentative Writing Credit for *Bird Box*. On September 20, 2018, WGAW determined writing credit for *Bird Box* to be as follows:

Screenplay by Eric Heisserer

Screenwriter Heisserer is accordingly the sole “Credited Writer” entitled to residuals for *Bird Box* under the 2017 MBA.

On December 14, 2018, Netflix initiated limited release of *Bird Box* in 18 theaters before transitioning it to its platform seven days later on December 21, 2018, where it has remained exclusively available to Netflix subscribers and has never been released in any other reuse markets since becoming available only on its platform.

C. WGAW’s Investigation Concerning Birdbox

Through its investigation, WGAW became aware Netflix was paying residuals on all self-produced “Netflix Original” theatrical motion pictures, including *Bird Box*, based on a flat \$6 million, across-the-board, imputed license fee, regardless of a theatrical motion picture’s actual production cost. WGAW furthermore learned Netflix was paying residuals due on the above-mentioned \$6 million imputed license fee over a ten-year period. Believing Netflix’s foregoing practice for computing imputed license fees violated the 2017 MBA’s SIDELETTER ON EXHIBITION OF MOTION PICTURES TRANSMITTED VIA NEW MEDIA (“the 2017 MBA New Media Sideletter”), at Paragraph 3.a., “Accountable Receipts,” on December 16, 2019, WGAW initiated its subject Claim No. 19-CL-0094 upon Screenwriter Heisserer’s behalf

LLC entered into Literary Material Assumption Agreements with co-Respondents Netflix US, LLC and Netflix International, LLC.

seeking all unpaid residuals and interest thereon due him pursuant to Netflix's exploitation of *Bird Box* on its platform.

WGAW's Claim No. 19-CL-0094 was thereafter processed pursuant to the 2017 MBA and ultimately submitted for final and binding adjudication before The Writers Guild of America, West, Inc. – Producers Arbitration Tribunal.⁴

V. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 10 – GRIEVANCE AND ARBITRATION

...

B. LIMITATION OF MATTERS SUBJECT TO GRIEVANCE AND ARBITRATION

...

2. . . Neither the grievance committee nor the arbitrator shall have the power or jurisdiction to reform, amend or extend the express terms and provisions of this Basic Agreement or any employment agreement, loan-out agreement or purchase agreement.

...

ARTICLE 15 – TELEVISION EXHIBITION

A. THEATRICAL

...

3. Payment

...

f. Time and Manner of Payment

...

If the Company shall fail to make any payment provided for in this Article 15.A. to be made to the writer when and as the same becomes due and payable, it shall bear interest at the rate of one and one-half percent (1.5%)

⁴As of the first day of arbitration proceedings on February 10, 2020, Netflix had paid Screenwriter Heisserer total residuals in the amount of \$391,481 in connection with its exploitation of *Bird Box*.

per month on the unpaid balance thereof commencing to accrue on the earlier of: (a) seven (7) days after notice in writing to Company from the Guild of such delinquency, or (b) sixty (60) days after such payment becomes due and payable.

SIDELETTER ON EXHIBITION OF MOTION PICTURES
TRANSMITTED VIA NEW MEDIA

As of May 2, 2001
Revised as of November 1, 2004
Revised as of February 13, 2008
Revised as of May 2, 2011
Revised as of May 2, 2014
Revised as of May 2, 2017

...

2.a.

[I]f the Company should desire to stream a theatrical motion picture . . . then the Company shall pay residuals at the rate of 1.2% of Company's accountable receipts. . .

...

3. "Accountable Receipts"

a. Definition

...

When the "accountable receipts" derived from new media exploitation are received from a related or affiliated entity that acts as the exhibitor/retailer of Such Picture, then the accountable receipts received by the Company from the licensing of such rights shall be measured by the exhibitor/retailer's payments to unrelated and unaffiliated entities in arm's length transactions for comparable pictures or, if none, the amounts received by the Company from unrelated and unaffiliated exhibitors/retailers in arm's length transactions for comparable pictures, or, if none, a comparable exhibitor/retailer's payments to comparable unrelated and unaffiliated entities in arm's length transactions for comparable pictures.

...

VI. THE PARTIES' CONTENTIONS

A. WGAW'S Contentions

This is a claim in which Netflix flouted the express language of the 2017 MBA in order to deprive residuals due to Screenwriter Heisserer, the Credited Writer of the theatrical motion picture entitled *Bird Box*, which debuted in theaters for one week before transitioning to Netflix's platform on December 21, 2018, where it has remained exclusively for subscribers' viewing since.

Because Netflix is both the producer and distributor of *Bird Box*, the 2017 MBA, at Paragraph 3.a. of its 2017 MBA New Media Sideletter, requires Netflix to impute a license fee for *Bird Box* based on its "payments to unrelated and unaffiliated entities in arm's length transactions for comparable pictures."⁵ After imputing a license fee, Netflix is required, under the foregoing 2017 MBA provisions, to allocate the imputed fee across the global distribution markets in which it has a right to exploit *Bird Box* in a "fair and reasonable manner," consistent with the proportionate revenue Netflix could expect to earn from each market utilizing historical sales for comparable pictures. Once the license fee has been imputed and allocated across each distribution market, residuals are paid at the 2017 MBA rate of 1.2%⁶ of "Producer's gross" or "accountable receipts," for each reuse market, except for the theatrical market for which no residuals are due.

Despite the unequivocal language in the 2017 MBA requiring Netflix to impute a license fee for *Bird Box* based on its "payments . . . in arm's length transactions . . . for comparable pictures," Netflix's main witness and former in-house labor counsel conceded at arbitration that

⁵ Netflix acquired rights to Screenwriter Heisserer's screenplay for *Bird Box* and retained him to perform additional writing services in connection with *Bird Box* during the term of the 2017 MBA. Thus, the 2017 MBA is the governing MBA in this matter and all references to the MBA herein are to the 2017 MBA.

⁶ The residuals rate for reuse of a theatrical motion picture on home video or DVD is 1.5% of Producer's gross for the first one million dollars in sales and 1.8% thereafter. For simplicity, WGAW calculated residuals at 1.2% of Producer's gross.

“Netflix has not argue[d] that we should look at comparable pictures” in imputing a license fee for *Bird Box*. Yet, that is expressly what the 2017 MBA instructs Netflix to do.

Instead, like the principal characters in *Bird Box*, who must blindfold themselves to escape from seeing an unpleasant reality, Netflix disregarded its 2017 MBA obligations and wove a residuals formula out of whole cloth. Using an arbitrary “one size fits all” approach for all its self-produced theatrical content, Netflix initially imputed the license fee for *Bird Box* at only \$6 million for purposes of calculating residuals and altogether ignored the 2017 MBA requirement of allocating the license fee across reuse markets in a “fair and reasonable manner.” *Bird Box*’s budget was approximately \$71 million, so the imputed license fee for Netflix’s valuable exclusive global reuse rights in the film was capped at just 9% of its budget, as if *Bird Box* was a total failure and financial loss, rather than the global sensation it is.

Realizing it could not mount a good faith argument that its “one size fits all” residuals formula complied with the 2017 MBA, Netflix decided to revalue the license fee for *Bird Box* in the middle of the arbitration proceedings. Netflix now argues that the license fee for *Bird Box* should be set at the film’s net budget, and that it should be permitted to allocate 21% of the “net budget” imputed license fee to the theatrical market where no residuals are due, and only pay residuals on 79% of the film’s net budget, consistent with its special deal with SAG-AFTRA (“Netflix/SAG-AFTRA Special Deal”). Netflix’s own witnesses, however, admit the Netflix/SAG-AFTRA Special Deal is not binding on WGAW; is not being used industry-wide; and is not based on comparable pictures. Most importantly, the Netflix/SAG-AFTRA Special Deal is out-of-line with budget to license fee ratios Netflix typically pays for comparable pictures in arm’s length transactions.

WGAW examined the budgets and license fees Netflix paid for all “Netflix Original” theatrical motion pictures in which Netflix licensed and/or acquired global distribution rights (or distribution rights in most of the world) from unrelated and unaffiliated third-parties in

arm's length transactions like the rights Netflix has in *Bird Box*. As WGAW's Exhibit 33C shows, it is unequivocal that when Netflix licenses global distribution rights in theatrical motion picture content, Netflix consistently pays a license fee which exceeds the feature film's budget. Out of 41 comparable pictures ("GEX 33C Comparable Pictures") with a known budget in which Netflix licensed global exploitation rights in arm's length transactions, on average Netflix paid a license fee that was 132% of the films' gross budget or 143% of its net budget.

Not only is Netflix undervaluing the imputed license fee for *Bird Box* when compared to the standard required by the 2017 MBA, but it is also allocating an increased portion of the license fee to the theatrical market compared to its arm's length comparable pictures, which only serves to reduce the residuals owed to Screenwriter Heisserer, the Credited Writer of *Bird Box*. As mentioned above, Netflix is now allocating 21% of *Bird Box*'s net budget to the theatrical market for which no residuals are due. In contrast, Netflix allocated only 10% of the license fees to the theatrical market for the 41 GEX 33C Comparable Pictures. *Bird Box* is no more of a theatrical picture than the GEX 33C Comparable Pictures, and in some cases, was released in fewer theaters. There is no basis to allocate more to the theatrical market for *Bird Box* than Netflix did for its comparable arm's length feature films.

Moreover, while Netflix has argued that it should not have to pay residuals on *Bird Box* for markets it has not yet exploited, that is exactly what it did for the GEX 33C Comparable Pictures. And, even if it had not, *Bird Box* has been available globally to more than 200 million subscribers for almost three years making the unexploited markets this late in the earnings life cycle of the film of marginal value today. Netflix itself provided information during the arbitration proceedings substantiating this fact: it attempted to license *Bird Box* off-platform several months ago but was unsuccessful in doing so.

In summary, Netflix failed to impute and allocate the license fee for *Bird Box* in accordance with the 2017 MBA. As set forth on the WGAW's Schedule of Residuals and Interest,

WGAW seeks an award from the Impartial Arbitrator requiring Netflix to impute the license fee for *Bird Box* at 130% of its gross budget which is in line with the average budget to license fee ratio for the GEX 33C Comparable Pictures, in the amount of \$92,023,549.⁷ WGAW also requests the Impartial Arbitrator determine that a “fair and reasonable allocation” of the imputed license fee for *Bird Box* is 10% to the theatrical market in which no residuals are due, 82.5% to SVOD and 2.5% to each of the three unexploited markets of pay tv, home video, and television (including both free tv and basic cable), for a total of 90% to the residuals producing markets, consistent with the allocations Netflix used in paying residuals on the GEX 33C comparable pictures. Netflix should furthermore be required to pay residuals at the 2017 MBA’s rate of 1.2% of 90% of the imputed license fee, less residuals paid to date on a gross budget basis, along with corresponding interest at the 2017 MBA rate of 1.5% per month, which as of today’s date comes to \$384,220 on a gross budget basis, for a grand total of \$986,593, with interest continuing to accrue on the balance of unpaid residuals until paid in full.⁸

B. Netflix’s Contentions

The hearing in the instant case consumed seven days of testimony, featured multiple witnesses (including experts) and dozens of voluminous exhibits. But the underlying issue in dispute is readily understood and not subject to the myriad tangents WGAW tried to incorporate into these proceedings. The question is simply stated as follows: what is the imputed license fee for the exhibition of the motion picture *Bird Box* on the Netflix streaming platform? And the answer to that question is governed by the express language of the 2017 MBA New Media Sideletter, Paragraph 3.a., which states:

When the “accountable receipts” derived from new media exploitation are received from a related or affiliated entity that acts as the exhibitor/retailer of Such Picture, then the accountable

⁷ WGAW provided testimony that it would also accept an imputed license fee for *Bird Box* at 130% of *Bird Box*’s net budget, which comes to \$89,098,549.

⁸ Residuals at the 2017 MBA rate of 1.2% on 90% of the imputed license fee on a net budget basis comes to \$570,783. As of today’s date, interest at the 2017 MBA rate of 1.5% per month comes to \$369,514, for a grand total of \$940,297 on a net budget basis, with interest on the unpaid residuals continuing to accrue until paid in full.

receipts received by the Company from the licensing of such rights *shall be measured by the exhibitor/retailer's payments to unrelated and unaffiliated entities in arm's length transactions for comparable pictures* or, if none, the amounts received by the Company from unrelated and unaffiliated exhibitors/retailers in arm's length transactions for comparable pictures, or, if none, a comparable exhibitor/retailer's payments to comparable unrelated and unaffiliated entities in arm's length transactions for comparable pictures. (Emphasis added.)

In this case, the motion picture *Bird Box* was both produced and exhibited by Netflix-affiliated companies. Hence, the producer and the exhibitor in this case are “affiliated entities” and the exhibitor did not pay a specific arm's length license fee to the producer for the right to exhibit the motion picture in new media. In order to ascertain the imputed license fee for the new media exhibition of the motion picture *Bird Box*, the 2017 MBA New Media Sideletter instructs the parties to examine how much money the exhibitor/retailer (here, Netflix) paid to unrelated and unaffiliated entities in arm's length transactions for comparable pictures.

In this case, Netflix showed that it calculated *Bird Box's* imputed license fee according to the same formula it negotiated with the Screen Actors Guild (“SAG-AFTRA”) for “affiliated entity” motion pictures. In other words, as the producer of *Bird Box*, Netflix paid residuals to Screenwriter Heisserer according to the same imputed license formula pursuant to which it paid SAG-AFTRA represented actors and other Guild talent. Pursuant to that negotiated formula (described immediately below), the imputed license fee for *Bird Box* was \$54,372,407.

Netflix acted more than reasonably in calculating *Bird Box's* imputed license fee at this level. The Netflix/SAG-AFTRA Memorandum of Agreement addresses the exact same issue of calculating an imputed license fee that Netflix and WGAW contest in this case. Most significantly, the underlying SAG-AFTRA and WGAW New Media Agreements contain the same definition of imputed license fees. When Netflix and SAG-AFTRA negotiated an overall formula for imputed license fees, they agreed that imputed license fees for Netflix-produced motion pictures would consist of 100% of the net production budget until the production budget

exceeded \$30 million. At that threshold, any portion of the production budget that exceeded \$30 million would not count 100% toward the imputed license fee, but would instead step down in specified increments.

Like an arm's length deal between a third-party producer and Netflix, the Netflix/SAG-AFTRA Memorandum of Agreement has the objective hallmarks of a fully and fairly negotiated deal. And most significantly for our purposes, as described immediately below, it is a deal that objectively reflects the "exhibitor/retailer's payments to unrelated and unaffiliated entities in arm's length transactions for comparable pictures"

Specifically, Dr. Paul White ("Dr. White") testified in detail that the weighted average of license fees as a percentage of production budget paid by Netflix to license third-party productions for exhibition on the New Media platform decreased as the production budget increased. In only one case -- years after *Bird Box* was produced -- did a motion picture with a production budget in excess of \$30 million receive a license fee that was at least 130% of the production budget, which is the extreme result advocated by WGAW in this case.⁹ To the contrary, Netflix typically paid third-party license fees for such high-budget productions that roughly matched the Netflix/ SAG-AFTRA Memorandum of Agreement formula.

In this case, WGAW appears to claim that *Bird Box* turned out to be very valuable to Netflix and accordingly the imputed license fee should be calculated at a higher rate than the other high-budget motion pictures Netflix licensed from third parties. For this reason, WGAW sought to introduce exhibits that commented on the overall popularity of *Bird Box* and the alleged contribution of *Bird Box* to Netflix's bottom line. This, however, is an improper method

⁹ WGAW submitted several versions of its Exhibit No. 33, featuring third-party motion pictures licensed by Netflix in arm's length transactions it contended were "comparable" to *Bird Box*. No matter what version of the exhibit was used, and no matter whether that exhibit featured the motion pictures' "gross budget" (which were the only numbers WGAW used in its initial set of exhibits) or their "net budget" (which excludes tax credits and became WGAW's preferred numbers later in the case), the objective statistical analysis of those figures showed the same thing: as the budgets for the allegedly comparable motion pictures became higher, the license fee as a percentage of the budget trended lower.

of calculation that has no support in the 2017 MBA and would lead to untold practical mischief if placed into practice.

Specifically, the 2017 MBA New Media Sideletter does not instruct the parties to determine how much “value” the exhibitor derived from the motion picture with the benefit of hindsight. Hence, the 2017 MBA New Media Sideletter does not suggest that motion pictures which turn out to be successful over the long run result in larger imputed license fees than motion pictures that turn out to be less successful. Rather, as WGAW’s own residuals experts testified, the imputed license fee is determined at the time of initial release of the motion picture to theatres, not months or years later: (“Q. In the case of *Bird Box*, when would the imputed licensing become part of the producer’s gross? A. On the date of the release to theatrical market.”); (“Q. At what point in time would the license for *Bird Box* be imputed . . .? A. As I understand it, the Guild’s [WGAW’s] practice is to impute the license fee at the release date, and so that’s when, you know, the costs are known, so presumably the imputed license fee is known.”) At this point of initial release to theatres, without the benefit of hindsight and at least one week before the motion picture has even appeared on the Netflix platform, it is impossible to know whether the motion picture will be an SVOD “success,” according to whatever unspecified criteria WGAW may posit.

Moreover, any system that imputes a higher license fee for “successful” motion pictures and a lower license fee for “unsuccessful” ones will have one highly undesirable practical result: every self-produced motion picture could result in a *Bird Box*-type arbitration with multiple days of hearing, dueling expert witnesses and voluminous briefs from Company and WGAW counsel. Every screenwriter would insist on a higher imputed license fee if his or her motion picture was “successful” according to one criterion or another. And every employer would insist on a lower imputed residual if the motion picture turned out to be less “successful.” This would be an impossible system to administer and invite countless disputes between the parties.

Indeed, such an arguable system would run contrary to the residuals system set forth in the MBA, which requires reporting “accountable receipts” at the end of the applicable quarter.

By contrast, the system under which Netflix in this case calculated and paid the residuals for *Bird Box* treats all comparable motion pictures according to the same standards. It accurately reflects the license fees Netflix actually pays to third-party producers for motion pictures with comparable budgets. The company has implemented a fair and practical method of determining imputed license fees for self-produced motion pictures. In contrast, WGAW’s preferred method of determining imputed license fees – a simple arithmetic average of license fee to production budget ratios – did not even gain the endorsement of WGAW’s own expert witness, Dr. Richard Garrett (“Dr. Garrett”):

Q. Is the simple arithmetic average contained in exhibit – Guild Exhibit 33C, in your expert opinion, the appropriate basis on which to impute a license fee for BIRD BOX? . . .

A. I don’t have an opinion, no.

One additional note should be made at this point. WGAW’s counsel and witnesses in this case frequently referred to Netflix’s calculation of imputed license fees for self-produced motion pictures as a form of “self-dealing.” This pejorative phrase appears nowhere in the 2017 MBA and misleadingly implies Netflix has acted wrongfully, as in a breach of fiduciary duty owed to a legal beneficiary. (<https://www.merriam-webster.com/dictionary/self-dealing>.) This insinuation is prejudicial and completely unwarranted. The parties collectively bargained about the valuation of license fees produced and exhibited by affiliated entities. Companies are instructed by the 2017 MBA to objectively calculate an imputed license fee for self-produced motion pictures by reference to their payment of license fees to third parties for the new media exhibition of comparable motion pictures. That is exactly what Netflix did in this case and this provides a compelling reason to deny WGAW’s at issue grievance.

VII. DISCUSSION AND CONCLUSIONS

A. Introduction

The above-entitled matter concerns the 2017 MBA's New Media Sideletter, Paragraph 3.a., which specifies the agreed upon formula for calculating "accountable receipts" and thus residuals due screenwriters when a theatrical motion picture is both produced and distributed by the same Company.

The 2017 MBA New Media Sideletter, Paragraph 3.a. provides in pertinent part as follows:

. . . the accountable receipts received by the Company from the licensing of such rights *shall be measured by the exhibitor/retailer's payments to unrelated and unaffiliated entities in arm's length transactions for comparable pictures . . .* (Emphasis added.)

B. Application of the Netflix/SAG-AFTRA Memorandum of Agreement to the Present Dispute Between Netflix and WGAW

Netflix seeks application to the present dispute of a formula agreed upon between itself and SAG-AFTRA in a Memorandum of Agreement ("Netflix/SAG-AFTRA MOA") specifying terms for calculating residuals owed screen actors represented by SAG-AFTRA under similar circumstances.

WGAW, however, objects to the foregoing application, noting the 2017 MBA's New Media Sideletter, Paragraph 3.a. between itself and Netflix fails to contain the same terms as agreed upon in the Netflix/SAG-AFTRA MOA utilized for purposes of determining residuals due screen actors.

Whatever the merits of the agreed upon method for residuals calculation contained in the Netflix/SAG-AFTRA MOA, the agreed upon formula between the parties to the present dispute, Netflix and WGAW, as are set forth in their 2017 MBA's New Media Sideletter, Paragraph 3.a., must be applied on its own terms, independently from the language of Netflix/SAG-AFTRA MOA when adjudicating the subject dispute between WGAW and Netflix,

unless the 2017 MBA provides otherwise or there is an industry-wide practice consistent with the Netflix/SAG-AFTRA MOA.

The Impartial Arbitrator's jurisdiction in this regard, as firmly set forth in the 2017 MBA's Article 10.B.2, provides an arbitrator has no power or jurisdiction to "reform, amend or extend the express terms and provisions" of the 2017 MBA. To apply the substance of the Netflix/SAG-AFTRA MOA, to which WGAW is *not* a party, and which provides for (a) an imputed license fee consisting of 100% of the production budget up to \$30 million and a declining percentage of the production budget above \$30 million thereafter, (b) residuals calculated based on 90% of the imputed license fee figure with 10% allocated to the residuals-free theatrical release for the first \$30 million of imputed license fee, (c) additional \$10 million increments of the imputed license fee subject to theatrical allocations smaller than 10%, and (d) residuals payment covering all exhibition on Netflix for 20 years, when such terms are clearly absent from the 2017 MBA's New Media Sideletter, Paragraph 3.a. and are furthermore not reflected in an industry-wide practice, would effectively require the Impartial Arbitrator to amend the parties' 2017 MBA in clear violation of its expressed terms as found in its Article 10.B.2. quoted above.

Based upon the foregoing, the Impartial Arbitrator concludes the substance of the Netflix/SAG-AFTRA MOA is not controlling regarding the issues presented in the above-entitled dispute concerning what residuals are owed to Screenwriter Heisserer in conjunction with *Bird Box* pursuant to the 2017 MBA's New Media Sideletter, Paragraph 3.a.

C. The Relative Success of Bird Box as a Purported Factor for Residuals Computation Pursuant to the 2017 MBA's New Media Sideletter, Paragraph 3.a.

As discussed above, WGAW in turn argues the relative success of *Bird Box* following transition to Netflix's platform should be taken into consideration by the Impartial Arbitrator in computing residuals owed to Screenwriter Heisserer. Netflix, on the other hand, strongly argues

any assessment of *Bird Box*'s relative success has no basis in the 2017 MBA's New Media Sideletter, Paragraph 3.a.

As detailed below, the 2017 MBA's New Media Sideletter, Paragraph 3.a. provides an agreed upon formula for calculating residuals due screenwriters for exhibition of motion pictures transmitted via new media such as occurred with *Bird Box* on Netflix's platform. Just as with application of the before-mentioned Netflix/SAG-AFTRA MOA urged by Netflix, however, there is no basis in either the 2017 MBA or any past practice thereunder for the Impartial Arbitrator's consideration of a motion picture's relative success in relation to comparable pictures for purposes of residuals computation based upon an imputed license fee.

As noted above, the Impartial Arbitrator's jurisdiction in this regard is defined in the 2017 MBA's Article 10.B.2 which states the arbitrator has no power or jurisdiction to "reform, amend or extend the express terms and provisions" of the 2017 MBA. Consideration by the Impartial Arbitrator of a motion picture's relative success when computing "accountable receipts" and thus residuals owed, would therefore be contrary to the express terms of the 2017 MBA's Article 10.B.2.

D. The Agreed Upon Formula for Calculating Residuals Under the 2017 MBA's New Media Sideletter, Paragraph 3.a.

The 2017 MBA's New Media Sideletter, Paragraph 3.a., as quoted above and extrapolated upon by the parties in these proceedings, provides the following ten-step formula used for calculating residuals due screenwriters based on imputed license fees when a "Company" is both the exhibitor/retailer and producer of a motion picture:¹⁰

1. An imputed license fee is "measured" by an exhibitor/retailer's payments of license fees to (a) "unrelated and unaffiliated" entities in (b) "arm's length transactions" for (c) "comparable pictures;"¹¹

¹⁰ While WGAW and Netflix disagree on what percentage of the production budget should be used for imputing the license fee in *Bird Box*, both parties seek to impute a license fee based upon a percentage of budget.

¹¹ The precise details of the agreed upon formula applied pursuant to the 2017 MBA's New Media Sideletter, Paragraph 3.a. are vigorously disputed in five (5) separate areas each of which shall be analyzed in the Impartial Arbitrator's Findings and Award.

2. To perform a residuals calculation, a population or data set of “comparable pictures” must be established so their license fees, “in arm’s length transactions,” may be “measured;”¹²
3. The respective production budgets of each comparable motion picture in Step No. 1’s population of comparable pictures is then determined from reliable sources;¹³
4. License fees measured by the exhibitor/retailer’s payments to “unrelated and unaffiliated entities in arm’s length transactions” for each comparable picture in the population is then determined from reliable sources;
5. The average percentage of license fees to production budgets in the population of comparable pictures is then computed by dividing license fees by production budgets;¹⁴
6. The average percentage of license fees to production budgets for all comparable pictures in the population is then multiplied by *Bird Box*’s production budget, to yield the dollar amount of *Bird Box*’s imputed license fee as “measured” by the exhibitor/retailer’s payments of license fees to “unrelated and unaffiliated entities in arm’s length transactions for comparable pictures;”
7. “Fair and reasonable” percentages of *Bird Box*’s total imputed license fees as computed in Step No. 6 above, are then allocated among the following residuals producing markets: (a) theatrical; (b) SVOD; and (c) pay tv, home video and television (including free tv and basic cable);
8. The sum of all allocated residuals among the residuals producing markets in Step No. 7 above is then multiplied by 1.2% to yield the total residuals owed to a Screenwriter;
9. Residuals which have already been paid by a Company to a Screenwriter are then subtracted from the total residuals amount due as calculated in Step No. 8 above; and finally
10. Any remaining past due residuals amount owed by a Company as determined in Step No. 9 above is then multiplied by an interest rate of 1.5% per month which continues to accrue until all residuals and interest owed thereon have been paid in full.¹⁵

¹² There is furthermore a dispute concerning whether certain motion picture titles are “comparable” to *Bird Box*, most particularly, the larger budget films entitled *Mowgli* and *Spectral*. Also disputed is whether five motion picture titles released directly to SVOD without preliminary theatrical releases, such as occurred in *Bird Box*’s one-week theatrical release on December 14, 2018, should be included among the population of “comparable pictures” for purposes of the 2017 MBA’s New Media Sideletter, Paragraph 3.a. Each of the foregoing issues shall also be discussed and resolved below.

¹³ WGAW’s Exhibit No. 33C identifies the “Budget Source” for each alleged comparable picture within its proposed population of comparable pictures.

¹⁴ In this case, it is also disputed whether the production budget used for computations should be the producers “gross budget” or “net budget,” the latter of which excludes tax incentives received from governmental entities for a picture’s production within their geographic jurisdictions. In this instance, it is furthermore disputed whether, as claimed by WGAW, a “straight average” of each motion picture’s (1) individual percentage of license fees to production budgets should be used to then (2) determine the overall average of the percentages or, as argued by Netflix, a “weighted average” computed by (1) first totaling all production budgets, (2) then totaling all license fees, and (3) finally dividing total license fees by total budgets within the population of comparable pictures should be used.

E. Analysis of Five Sub-Issues Under the 2017 MBA's New Media Sideletter, Paragraph 3.a.

As noted in Footnote Nos. 11-17, the 2017 MBA's New Media Sideletter, Paragraph 3.a. contains the following five (5) sub-issues of ambiguity found within the before-mentioned ten-step formula which have been presented for adjudication in WGAW's Claim No. 19-CL-0094:

1. What is the population of "comparative pictures"?
 - (a) Should the population of comparative pictures include, as argued by Netflix, five titles released directly to SVOD without preliminary theatrical releases?
 - (b) Should the titles *Mowgli* and *Spectral*, as argued by WGAW, be excluded as "outliers" from the population of comparable pictures?
2. Should the production budgets used for computing the average of license fees to budgets in the population of comparable pictures be their "gross budgets," as argued by Netflix, or their "net budgets?"
3. Should the "average" of license fees to production budgets of the population of comparable pictures be computed as a "straight average," as argued by WGAW, or as a "weighted average," as argued by Netflix?
4. What should be the "fair and reasonable" allocation among the following residuals producing markets:
 - (a) theatrical;¹⁶
 - (b) SVOD; and
 - (c) pay tv, home video and television (including free tv and basic cable)?¹⁷ and finally
5. Should interest at the rate of 1.5% per month be added to additional residuals due, if any, to Screenwriter Heisserer from Respondent Netflix based on *Bird Box*'s imputed license fee?

¹⁵ In this case, there is a dispute whether interest should be paid on additional residuals, if any, which are due.

¹⁶ In this instance, it is undisputed the allocation percentage for the theatrical market should 10%.

¹⁷ It is, however, disputed whether the pay tv, home video and television (including free tv and basic cable) markets which have as yet not been exploited by Netflix should be included in the calculation of residuals due for *Bird Box*.

1. The Population of “Comparable Pictures”

WGAW identifies 51 titles of comparable pictures in its Exhibit No. 33C, 43 of which include known gross budgets, based upon the following five factors of comparability: (1) theatrical motion pictures; (2) marketed by Netflix as a “Netflix Original”; (3) licensed by Netflix in arm’s length transactions with producers; (4) motion pictures for which Netflix acquired global exploitation rights (with the exceptions of China, Syria and North Korea as noted earlier); and (5) motion pictures released within a similar time period as *Bird Box*.¹⁸

Without agreeing the films identified by WGAW in its Exhibit No. 33C are comparable pictures to *Bird Box*, Netflix does not dispute the before-mentioned five criteria should be used for purposes of determining comparability pursuant to the 2017 MBA’s New Media Sideletter, Paragraph 3.a.

(a) The Exclusion of Films Released Directly to SVOD Without Preliminary Theatrical Releases

As noted above, Netflix first argues five additional films listed in its Exhibit No. 4 (“Direct-to-SVOD Titles Included”) and not included in WGAW’s Exhibit No. 33C as “comparable films” because they were released directly to SVOD should be included in the population of comparable pictures to *Bird Box*.¹⁹

It is clear that limited theatrical release preceding SVOD exploitation enables a film production to attach high-level A-list talent which may prefer to garner prestige associated with theatrical motion pictures, as opposed to long-form made for SVOD projects, due to the former’s

¹⁸ WGAW’s Exhibit No. 33C consists of 51 titles, 41 of which indicate the known gross budgets therefor. Two such comparable titles in WGAW’s Exhibit No. 33C with known gross budgets, *Enola Holmes* and *The Outsider*, are not included in Netflix’s list of comparable pictures in its Exhibit No. 4, without explanation for their omission although it is noted they were added by WGAW more recently on January 8, 2021. Ten titles on WGAW’s Exhibit No. 33C indicate their gross budgets are “unknown.” Five of those same titles, *The Babysitter*, *High Flying Bird*, *Message from the King* and *Mudbound*, however, are included on Netflix alternative population of comparable pictures, Exhibit No. 4, with their respective license fees and gross budgets indicated thereon.

Because WGAW’s Exhibit No. 33C and Netflix Exhibit No. 4, with minor exceptions, are largely duplicative, by merging WGAW’s Exhibit No. 33C (containing 51 titles but excluding 10 titles appearing thereon whose budgets are unknown), with Netflix Exhibit No. 4 (containing 43 titles all with known budgets), an initial population of 45 comparable pictures with known budgets has been established.

¹⁹ The five direct to SVOD titles are *I Am the Pretty Thing That Lives in The House*, *I Don’t Feel At Home In This World*, *Little Evil*, *Pee Wee’s Big Holiday* and *Take The Ten*.

potential for nomination to coveted Oscar and Golden Globe recognition. Indeed, in this instance *Bird Box*, which was briefly released in 18 theatres on December 14, 2018, before transitioning to Netflix's platform on December 21, 2018, stars Academy Award-winning Actress Sandra Bullock and Academy Award-nominated Actor John Malkovich. *Bird Box* was furthermore directed by Emmy Award-winning Director Susan Bier and written by Academy Award-nominated Screenwriter Eric Heisserer.

It is thus apparent the limited initial theatrical release business model, employed by Netflix in this instance to attach high-level A-list talent in *Bird Box*, may require a different level of budget commitment as evidenced by its nearly \$71 million budget than many long-form made for SVOD projects.

It is furthermore observed that determining the “made for” market, whether it be SVOD or theatrical, is foundational for residuals calculations since pursuant to the MBA, different residuals formulas are applicable depending on a project's intended initial release market, regardless of its actual initial exhibitions.

In determining the population of comparable pictures for purposes of imputing the license fee for *Bird Box* pursuant to the 2017 MBA's New Media Sideletter, Paragraph 3.a., it is therefore concluded that because *Bird Box* (a) had a limited theatrical release allowing it to attach high-level A-list talent and (b) required a different MBA residuals formula due to its intended initial theatrical release, it is not a “comparable picture” to those long-form made for SVOD projects contained in Netflix Exhibit No. 4.

(b) The Exclusion of the Titles Mowgli and Spectral

WGAW argues the motion pictures entitled *Mowgli* and *Spectral* should be *excluded* from the population of comparable pictures since their budgets were significantly higher than other films in the proposed population of pictures and they are thus statistical “outliers” due to

their outsized influence in relation to other films when a weighted average is used in determining the average percentage of license fees to budgets.²⁰

Netflix, on the other hand, argues *Mowgli* and *Spectral* are comparable pictures in light of the size of their budgets compared to *Bird Box*'s approximate \$71 million budget which was much higher than most other films in the population of comparable pictures.

The gross budget of *Bird Box* was \$70,787,345 or nearly \$71 million while the gross budgets for *Mowgli* and *Spectral* were, respectively, \$156 million and \$70 million. While the budgets of *Bird Box* and *Spectral* were nearly equal, it must also be noted the percentages of license fees to budgets for *Mowgli* and *Spectral* were, respectively, 60% and 17.14%, which are significantly below the .8844% weighted average of license fees to gross budget even when they are included in Netflix Exhibit No. 4's population of comparable pictures.

On the other hand, when consistently using a weighted average, the percentage of license fees to budgets *excluding* *Mowgli* and *Spectral* is 1.11%, or approximately .23 percentage points higher than the before-mentioned .8844% when the titles are included in the population of comparable pictures.

Finally, as testified by expert witness Dr. Richard Garrett on behalf of WGAW, out of the 41 titles included in WGAW's Exhibit No. 33C, *Mowgli* is the only picture with a budget roughly equal to \$80 million more than *Bird Box* or more than double the latter's budget. Also, according to Dr. Garrett, *Spectral* is the only title out of 41 pictures in WGAW Exhibit No. 33C's population of comparable pictures with a known budget that has a budget to license fee percentage of less than 50% of its budget.

It is therefore concluded *inclusion* of *Mowgli* and *Spectral*, with their comparatively low percentages of license fees to budgets (respectively 60% and 17.14%), appreciably *lowers* by

²⁰ According to Dr. Garrett who testified on behalf of WGAW, the general rule is that an outlier is three standard deviations from the average of the other variables. Dr. Garrett thus opined that in this case both *Spectral* and *Mowgli* qualify as "outliers."

approximately 23 percentage points the average percentage of license fees to gross budgets when included in the population of “comparable pictures,” even though those two titles represent only approximately five percent of the total population of 43 motion pictures.

The Impartial Arbitrator therefore concludes inclusion of *Mowgli* and *Spectral*, whose budgets were large in comparison to the population of motion pictures but whose license fees to budgets percentages were significantly smaller in comparison, would have an outsized influence when compared to the other films in the proposed population of pictures when a weighted average is used and should therefore be excluded from the population of comparable pictures on that basis.

2. The Use of Comparable Pictures’ “Gross Budgets” vs. “Net Budgets” When Computing Bird Box’s Imputed License Fees

While WGAW’s closing and reply post-hearing briefs indicate its willingness to accept either the producers’ “gross budgets” or “net budgets” for comparable pictures when calculating imputed license fees and resulting residuals in *Birdbox*, Netflix strongly argues the more appropriate budgets to use for such calculations is the producers’ “gross budget.”

Between use of a motion picture’s “gross budget” or “net budget” for purposes of determining the “measured” “accountable receipts” under the 2017 MBA’s New Media Sideletter, Paragraph 3.a., use of gross budgets, as argued by Netflix, which more directly reflects a production’s true value in terms of payroll costs to attach screenwriters, directors, cast members, special effects talent and technology, is a better gauge with which to perform such a comparative analysis rather than its net budget. Net budgets are determined by deducting any tax credits received by producers from government entities as incentives for producing motion pictures within their respective jurisdictions. Such tax incentives, however, while undeniably important from an *accounting* perspective, are entirely tangential to a picture’s *production budget* incurred in actually producing a motion picture. Tax incentives from governmental entities are therefore irrelevant to the issue of comparability when weighing the value of what is

actually going into the production of pictures as compared to net budgets after receipt of tax incentives. It is accordingly concluded the more accurate gauge for purposes of computing accountable receipts from new media exploitation of motion pictures are motion pictures' gross budgets, which are comparable among the population of pictures rather than net budgets due to tax credits received by some members of the population.

3. The Use of "Straight Average" vs. "Weighted Average" for Computing Bird Box's Imputed License Fee

Netflix furthermore argues the more reliable method for computing the average ratio of license fees to budgets among the population of comparable pictures is to use a "weighted average" rather than a "straight average." According to Netflix, due to the disproportionate number of films with comparatively modest budgets as opposed to *Bird Box*'s larger \$71 million budget, as revealed in the regression model analysis prepared by its expert witness Dr. White, use of WGAW's method of (a) first individually computing the "straight average" of license fees to budget for each individual film, (b) adding the individual averages, and (c) finally dividing the total sum of all individual averages by the number of films, yields a straight average percentage which gives outsized influence to lower budget films such as *Win It All* within the population of comparable pictures, thereby inflating the overall average percentage of license fees to budgets of the total population.

Netflix therefore asserts the method of using a "weighted average" whereby (a) all license fees in the population are totaled, (b) all budgets for the population are then also totaled, and (c) total license fees are then divided by total budgets, eliminates giving outsized influence to lower budget films which tend to have higher license fees to budget percentages than the population's larger budget films such as *Bird Box* with a budget of close to \$71 million as opposed to, for

example, *Win It All* whose budget was much lower at \$986,499 and had a percentage of license fees to budget of 355%.²¹

WGAW, on the other hand, argues that by first computing the percent of license fees to budget for each individual motion picture and then averaging those ratios to determine the overall percentage of license fees to budgets, the overall trend of where the data for the population of comparable pictures is moving is more accurate.

Following the Impartial Arbitrator's deliberations, it is concluded using a straight average by computing the ratio of individual license fees to budgets for each picture in the population, as argued by WGAW, results in those pictures with comparatively smaller budgets such as *Win It All*, whose budget was relatively small at \$986,499, when compared to those pictures with larger budgets such as *Bird Box* with a nearly \$71 million budget, receiving oversized consideration when computing an average percentage of license fees to budgets among all the data points within the population of comparable pictures. When comparing parts of a data set which are substantially unequal, such as in this instance where among a population of 43 comparable pictures with a range of budgets (excluding the outliers *Spectral* and *Mowgli* discussed above) from as small as \$986,499 (*Win It All*) to as large as \$38,202,769 (*Trial of the Chicago Seven*) and license fees to budget percentages from as small as 54.48% (*The Polka King*) to as large as 355% (*Win It All*), use of a weighted average better accounts for the foregoing variations among data points.

As Netflix's expert witness, Dr. Paul White, explained in his testimony:

. . . It's my understanding that the Guild [WGAW] took – calculated the percentage for each of these productions separately. So, this is the last column of this table. And then for this bottom right-hand corner number, instead of taking the approach that we [Netflix] took which was the total license fee divided by the total

²¹ A weighted average is a well-accepted tool for statistical analysis providing a method to reduce the oversized consideration of certain data within a population of data points.

budget, the Guild's calculation took the average – the straight average of the percentages above it in this column.

...

It makes a difference in the calculation because in the way the Guild had calculated it, *it gives essentially equal weight to each production*. And when we have a production that's at issue like we do here that's not typical of a lot of the titles that are in this table, then, like I said, it gives a calculation that's not representative of the production that we're discussing here today that's at issue in this case.

So, it – and since the production that we're talking about here today is a relatively higher budget, then it gives overweight to the smaller productions.

...

[The Guild's] simple average implicitly assumes that every title that's in this data is similarly situated to BIRD BOX. And that means that even a title like WIN IT ALL, which has a very low budget and a very high license-to-gross budget percentage, is similar to BIRD BOX. And all these other productions that are, say, less than \$10 million are similarly situated to BIRD BOX, when it's clear that because of the size of the budget of BIRD BOX, there's some others that are more similarly situated as well. (Emphasis added).

...

The Impartial Arbitrator therefore concludes a weighted average analysis in order to account for the variations in budgets and license fees among the population of comparable pictures, whereby lower budget pictures are not given the same weight as higher budget pictures such as occurs when using a straight average, provides a more accurate method for computing average license fees to budget for comparable pictures.

4. The Allocation of Residuals Among Markets for Bird Box including (a) Theatrical, (b) SVOD and (c) Pay TV, Home Video and Television

As noted earlier, Netflix argues the allocation of residuals among the various MBA residuals markets should be at 10% for theatrical (for which no residuals are due), 82.5% for SVOD and 0% for pay tv, home video and television (including free tv and basic cable) due to the

fact the latter markets have not been exploited by Netflix. WGAW, on the other hand, argues the allocation of residuals among the above residuals markets should be at 10% for theatrical (for which no residuals are due), 82.5% for SVOD and 2.5% *each* for pay tv, home video and television (including free tv and basic cable).

The “accountable receipts” foundation when calculating a “fair and reasonable” allocation among the various residuals producing markets is addressed in the 2017 MBA’s New Media Sideletter, Paragraph 3.a. which provides, “the accountable receipts received by the Company . . . *shall be measured* by the exhibitor/retailer’s *payments* to unrelated and unaffiliated entities in arm’s length transactions for comparable pictures” (Emphasis added.) On the basis of the population of 43 comparable pictures established above, “accountable receipts received” due to an imputed license fee has been determined for *Bird Box* in accordance with the 2017 MBA’s New Media Sideletter, Paragraph 3.a.

As set forth in its Exhibit No. 66, WGAW has established by reliable evidence (1) the total amounts paid by Netflix for license fees in each arm’s length transaction among the population of 43 comparable pictures and (2) Netflix’s resulting residuals payments to Screenwriters based on 1.2% of those license fees paid. As a corollary to the two above amounts paid, it has also been established that Netflix allocated 10% of total license fees paid to the theatrical market place for which no residuals are due and the remaining 90% of total license fees paid to the residuals markets of SVOD, pay tv, home video and television (including free tv and basic cable).

Netflix, however, strenuously argues it should not be required to allocate a percentage of the total imputed license fees in *Bird Box* to the residuals markets of pay tv, home video and television since they have not as yet been exploited and it would be unprecedented to require Netflix as an exhibitor to do so in this instance.

It must be noted, however, that in determining imputed license fees to which residuals at 1.2% are computed, the 2017 MBA New Media Sideletter, Paragraph 3.a. instructs that

“Accountable Receipts” must be “measured” by Netflix’s *payments* to unrelated and unaffiliated entities in arm’s length transaction for comparable pictures. By reliable evidence, WGAW has thus established that among the population of comparable pictures in which license fees were *paid* in arm’s length transaction for comparable pictures, Netflix has paid residuals based on 90% of the license fees paid (excluding 10% apportioned to the theatrical residuals market for which no reuse residuals are paid) which, *a fortiori*, included payments for pay tv, home video and television residuals markets.

It is furthermore noted Netflix agrees 82.5% of license fees should be apportioned to the SVOD residuals market. It is therefore concluded the remaining 7.5% (90% - 82.5%) of license fees *paid* by Netflix (after subtracting 10% for the theatrical residuals market) among the population of comparable pictures has been apportioned to the pay tv, home video and television residuals markets.

For all of the foregoing reasons, the Impartial Arbitrator concludes it is “fair and reasonable,” as consistently done among the population of comparable pictures in the past, that 10% of its imputed license fee be allocated to the theatrical market for which no residuals are due, 82.5% be allocated to the SVOD market and the remaining 7.5% be allocated to the pay tv, home video and television markets.

5. Payment of Interest on Unpaid Residuals for Bird Box

Lastly, Netflix argues there is no basis upon which to award interest in this instance. According to Netflix, while WGAW made calculations of imputed license fees and interest thereon in connection with the above-entitled arbitration proceeding, it steadfastly refused to engage with Netflix in any meaningful discussions about the proper imputed license fee for *Bird Box* until after arbitration proceedings in this matter commenced. Netflix furthermore asserts WGAW has rebuffed its attempts to engage in good faith discussions about the proper calculation of imputed license fees, unlike its sister guilds, Directors Guild of America and SAG-

AFTRA, with whom Netflix reached amicable agreements regarding similar issues of imputed license fees for exhibition of motion pictures transmitted via new media.

The Impartial Arbitrator, however, has no jurisdiction to adjudicate the good faith efforts of either party to amicably resolve the issues now before The Writers Guild of America, West, Inc. – Producers Arbitration Tribunal for adjudication. Indeed, it is well-accepted arbitral jurisprudence that arbitrators may not even receive offers of settlement or compromise concerning matters presented for adjudication, although the Impartial Arbitrator certainly encourages all parties to amicably and privately resolve disputes whenever possible throughout the grievance-arbitration process.

The 2017 MBA Article 15.A.3.f. provides for an award of interest at the rate of 1.5% per month when a Company pays residuals which are due late, which accrual begins 60 days following the quarter end from which the payment becomes due.²² Moreover, arbitrators of disputes before the Writers Guild of America, West, Inc. – Producers Arbitration Tribunal have commonly awarded interest on late residuals due.²³ It must accordingly be concluded interest on any late residuals in this matter concerning *Bird Box* must be paid consistent with the 2017 MBA.

²² The 2017 MBA Article 15.A.3.f. provides, “If the Company shall fail to make any payment provided for in this Article 15.A. to be made to the writer when and as the same becomes due and payable, it shall bear interest at the rate of one and one-half percent (1.5%) per month on the unpaid balance thereof commencing to accrue on the earlier of: (a) seven (7) days after notice in writing to Company from the Guild of such delinquency, or (b) sixty (60) days after such payment becomes due and payable.”

²³ *WGA v. S&D Productions, LLC*, 16-CL-0103 (Croft 2017) (“*Sex and Death 101*”); *WGA v. An Olive Branch Productions et al.*, 14-CL-0296 (Rosenthal 2019) (“*Casino Jack*”); and *WGA v. Mr. Box Office Media Inc., et al.*, 15-CL-0060 (Kuperberg 2017) (“*Mr. Box Office and The First Family*”).

F. Summary²⁴

1. A total population or data set of 45 “comparable pictures” with known budgets has been established by the merger of Netflix Exhibit No. 4 (“Excluding Direct-to-SVOD Titles”) with the additional titles of *Enola Holmes* and *The Outsider* found in WGAW Exhibit No. 33C.

(a) The foregoing population of comparable pictures has excluded the five titles set forth in Netflix Exhibit No. 8 released directly to SVOD without preliminary theatrical releases, and

(b) The titles *Mowgli* and *Spectral* as set forth in Netflix Exhibit No. 4 are statistical “outliers” which are excluded for purposes of computation, resulting in a population or data set of 43 comparable pictures.

2. The “gross budgets” of motion pictures in the population of 43 comparable pictures should be used when computing an average of license fees to budgets.

3. An “average” of license fees to gross budgets of the population of 43 comparable pictures should be computed as a “weighted average” rather than as a “straight average.”

4. Based upon Netflix’s past payments of license fees and residuals among the population of 43 comparable pictures, Netflix shall “fairly and reasonably” allocate among the MBA residuals markets for *Bird Box* pursuant to the 2017 MBA’s Article 15.A.3.c.(2) as follows:

(a) 10% to the theatrical residuals market;

(b) 82.5% to the SVOD residuals market; and

(c) 7.5%, inclusive, to the pay tv, home video and television (including free tv and basic cable).

5. Interest at 1.5% per month, pursuant to the 2017 MBA’s Articles 15.A.3.f. and 51.C.6., shall be added to residuals due which are paid late, less all residuals already paid by Respondent Netflix to Screenwriter Heisserer.

²⁴ Attached is an Appendix to the Impartial Arbitrator’s Findings and Award which calculates residuals due to Screenwriter Heisserer.

Based upon the foregoing analysis, the Impartial Arbitrator respectfully issues the following:

AWARD

1. Under the terms of the 2017 MBA's SIDELETTER ON EXHIBITION OF MOTION PICTURES TRANSMITTED VIA NEW MEDIA, Paragraph 3.a., additional residuals, including interest thereon, are now due from Respondent Netflix to Screenwriter Heisserer in connection with the theatrical motion picture project entitled *Bird Box*.
2. As the appropriate remedy for the 2017 MBA violation found in Paragraph No. 1 above, the following remedy is hereby awarded:
 - (a) Computation and payment of residuals due by Respondent Netflix to Screenwriter Heisserer according the formula set forth in the attached Appendix to Award shall be made. The parties shall meet and confer to compare their respective computations of residuals owed by Respondent Netflix to Screenwriter Heisserer and mutually resolve any potential differences thereon; and
 - (b) The Impartial Arbitrator hereby remands to the parties the issue of remedy as set forth in Paragraph No. 2. (a) above, with the Impartial Arbitrator retaining jurisdiction within the limitations of the MBA's authority to resolve any dispute(s) thereon, to be exercised upon written request(s) received from either party.

Dated: May 2, 2022
Del Mar, California

Kenneth A. Perea

**KENNETH A. PEREA
IMPARTIAL ARBITRATOR**

APPENDIX TO AWARD

THE WRITERS GUILD OF AMERICA, WEST, INC. – PRODUCERS
ARBITRATION TRIBUNAL

Bird Box
WGAW Claim No. 19-CL-0094
MBA New Media Reuse Sideletter, Paragraph 3.a.

License Fees to Budgets Residuals Calculations

1. Using Netflix's Exhibit No. 4 containing 43 titles, subtract *Mowgli* and *Spectral* indicated on WGAW's Exhibit No. 4 as "Outliers" as follows:

	<u>License Fees</u>	<u>Gross Budgets</u>
	\$ 506, 663, 344	\$572,902,600
<i>Mowgli</i>	\$(105,000,000)	(\$156,060,854)
<i>Spectral</i>	\$(<u>12,000,000</u>)	(\$ <u>67,333,764</u>)
	\$ 389,663,344	\$349,507,982

2. Using Netflix's Exhibit No. 4 as modified above and now containing 41 titles, add *Enola Holmes* and *The Outsider*, whose license fees and budgets are known from Netflix's Exhibit No. 8, for a total population of 43 comparable pictures:

	<u>License Fees</u>	<u>Gross Budgets</u>
	\$389,663,344	\$349,507,982
<i>Enola Holmes</i>	+\$ 60,000,000	+\$ 54,846,239
<i>The Outsider</i>	+\$ <u>24,500,000</u>	+\$ <u>22,295,985</u>
	\$474,163,344	\$426,650,206

3. For the above total population of 43 comparable pictures, divide total gross budgets into total license fees for a weighted-average percentage of gross budgets to license fees as follows:

$$\$474,163,344 \div \$426,650,206 = 1.111\%$$

4. Multiply the weighted average percentage of 1.111% times *Bird Box's* gross budget to determine *Bird Box's* imputed license fee as follows:

$$1.111\% \times \$70,787,345 = \$78,644,740$$

5. Allocate *Bird Box's* imputed license of \$78,644,740 among the following residual markets as follows:

<u>Market</u>	<u>Percentage</u>	<u>Allocation of Dollars</u>
(1) Theatrical	10.0%	\$ 7,864,474
(2) SVOD	82.5%	\$64,881,910.50
(3) T.V., etc.	7.5%	\$ 5,898,355.50
Allocation Totals	100%	\$78,644,740

6. Calculate total residuals owed at 1.2% as follows:

1.2% (Theatrical) x \$	0.00	=	\$	0.00
1.2% (SVOD)	x \$64,881,910.50	=	\$778,582.92	
1.2% (T.V., etc).	x \$ 5,898,355.50	=	\$ <u>70,780.26</u>	
TOTAL RESIDUALS			\$849,363.18	

7. Subtract Residuals Paid to Date as follows: (\$391,481.00)

8. Total Remaining Residuals Due: \$457,882.18

9. Interest Due at 1.5% per month on Remaining Residuals Due: Remanded to Parties for Calculation

10. Net total Due to Screenwriter Heisserer: Remanded to Parties for Calculation