# The Inside Story of Buchwald v. Paramount

DOUBLEDAY
New York London Toronto Sydney Auckland

# FATAL SUBTRACTION

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and Dennis McDougal

PUBLISHED BY DOUBLEDAY
a Division of Bantam Doubleday Dell Publishing Group, Inc.
666 Fifth Avenue, New York, New York 10103

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Library of Congress Cataloging-in-Publication Data

O'Donnell, Pierce.
Fatal subtraction : the inside story of Buchwald v. Paramount / Pierce O'Donnell and Dennis McDougal. — 1st ed.
p. cm.
Includes index.
1. Buchwald, Art—Trials, litigation, etc. 2. Paramount Pictures—Trials, litigation, etc. 3. Breach of contract—United States. 4. Coming to America (Motion picture). I. McDougal, Dennis. II. Title.
KF228.B78036 1992
346.73'022—dc20
[347.30622] 92-19938
CIP

ISBN 0-385-41686-5

Printed in the United States of America
July 1992

10 9 8 7 6 5 4 3 2

# Appendixes

## Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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| ART BUCHWALD, et al.,<br>Plaintiffs,<br>v.<br>PARAMOUNT PICTURES CORPORATION, etc., et al.,<br>Defendants. | C 706083<br>STATEMENT OF DECISION [FIRST PHASE] |

### Statement of Facts

In early 1982 Art Buchwald (Buchwald), an internationally renowned writer and humorist, prepared an eight page screen treatment entitled "It's a Crude, Crude World." (Exhibit 500A) Buchwald testified that he wrote this treatment by himself without help from anyone. (RT 441; 464) The inspiration of the principal character came from Buchwald's observance of a state visit by the Shah of Iran. Alain Bernheim (Bernheim), a close friend of Buchwald and co-plaintiff in this action, or Louis Malle, a prominent film director, suggested that the principal character be made a black man. (RT 442)

In March 1982, Buchwald sent his treatment to Bernheim. (Exhibit 2) Bernheim registered the treatment with the Writers Guild of America (Exhibits 3 and 4)

Subsequently, Bernheim suggested to Buchwald that the latter reduce his eight page treatment to a shorter version, which Buchwald did. (Exhibit 500B) The shorter treatment is basically a condensed version of the eight page treatment, except for the ending.

In late 1982, Bernheim met with Jeff Katzenberg (Katzenberg), the head of motion picture production at Paramount Pictures Corporation (Paramount)(RT 96), for the purpose of "pitching" Buchwald's story to Paramount for development into a movie starring Eddie Murphy. Murphy was then under contract to Paramount. In fact, Bernheim apparently retyped Buchwald's three page treatment and inserted Eddie Murphy's name after the name of the emperor. (Exhibit 6) Katzenberg read Buchwald's treatment and had a high regard for the concept as a movie. (RT 100; 106) Katzenberg described Buchwald's treatment as "a succinct, smart, straightforward idea with a lot of potential to it." (RT 106)

In late 1982 and early 1983 Paramount was extremely anxious to develop a project



for Eddie Murphy. (Exhibits 11; 14) Buchwald's treatment, the title of which had by this time been changed to "King for a Day" by Paramount, was a project in which Paramount was interested. (Exhibit 15; RT 703–704) In fact, in January 1983 Paramount registered the title "King for a Day" with the MPAA. (Exhibit 16) Bernheim and Katzenberg remained in communication and a search for a writer began. (Exhibit 17) During this period of time, there was no doubt Paramount considered "King for a Day" a possible project for Eddie Murphy. (Exhibit 18) In fact, Paramount's creative executives loved Buchwald's story and concept and thought it would be a terrific vehicle for Eddie Murphy. Paramount envisioned Murphy playing at least two roles in Buchwald's story. (RT 707)

On February 24, 1983, Paramount and Bernheim entered into an agreement pursuant to which Bernheim was to produce and be entitled to certain payments if Paramount entered into an agreement with Buchwald acquiring Buchwald's story idea. (Exhibit 507) After the Bernheim-Paramount agreement was executed, the search for a writer for "King for a Day" continued. (Exhibit 22) On March 22, 1983, Buchwald and Paramount entered into an agreement pursuant to which Paramount purchased the rights to Buchwald's story and concept entitled "King for a Day." (Exhibit 506) According to Paramount creative executive David Kirkpatrick (Kirkpatrick), in his ten years at Paramount, Buchwald's treatment was the only one optioned by Paramount. Paramount did, of course, frequently option screenplays.

On March 28, 1983, Kirkpatrick and Ricardo Mestres (Mestres), another Paramount creative executive, sent a memorandum to Jeff Katzenberg.[1] In this memorandum it was indicated that a search for a writer for "King for a Day" was continuing. The same memorandum indicated that the project was being developed for Eddie Murphy "based on Art Buchwald." (Exhibit 25) On the same day "King for a Day" was listed as a project "potentially committed or active in development." (Exhibit 26) On April 2, 1983, in a handwritten note, Katzenberg indicated to Kirkpatrick and Mestres that he wanted a "full court press" on the "King for a Day" project. Several persons, including Buchwald himself, were being considered as potential screenplay writers. (Exhibits 27; 30; 31; 32; 33; 34; 35) Other persons were under consideration as possible directors. (Exhibit 28)

In the spring of 1983, Kirkpatrick met at the Ma Maison Restaurant with Eddie Murphy and others to discuss various potential movie development projects for Murphy. Katzenberg was present, as was Robert Wachs (Wachs), one of Murphy's managers. During this dinner meeting, ten or twelve potential movie projects were discussed. The Paramount executives went through the ten or twelve projects with Murphy and talked basically about characters or people involved. One of the stories that was discussed was Buchwald's "King for a Day." Murphy was positively responsive to the "King for a Day" presentation. At the same meeting Murphy indicated that he liked playing the African character in "Trading Places." (RT 552–555)

On March 23, 1983, Kirkpatrick sent a status report to Wachs, in which Wachs was advised that Paramount was still searching for a writer for the potential Eddie Murphy project "King for a Day." (Exhibit 36) Katzenberg testified that he spoke regularly with Wachs during 1983, both in person and on the telephone. They discussed projects that were in development for Murphy at Paramount. Katzenberg had similar conversations with Murphy's other manager, Richie Tienkin. (RT 122) On June 6, 1983, Kirkpatrick sent Wachs a short outline of Buchwald's "King for a Day." (Exhibit 39)

On July 9, 1983, a meeting was held at Paramount's office. Present were Kirkpatrick, Katzenberg, Mestres, Bernheim and Tab Murphy, who ultimately wrote the first screenplay for "King for a Day." After receiving a synopsis of Buchwald's treatment,

[1] It is important to note that Katzenberg had both a close professional and social relationship with Eddie Murphy. (RT 98)

Katzenberg suggested a number of changes. These changes included making the Eddie Murphy character more likable, having the Murphy character change in a cultural, rather than financial way, and having Murphy play a number of different roles. (Exhibit 41) On June 13, 1983, Kirkpatrick reported that the first draft of "King for a Day" was due on July 22, 1983. (Exhibit 42) Four days later, in a memorandum, "King for a Day" was described as the "Art Buchwald idea" that Paramount was "now developing for Murphy." (Exhibit 46) In late June the "Eddie Murphy picture" "King for a Day" was described as a possible project for direction by John Landis. (Exhibit 48) On July 1, 1983, Kirkpatrick wrote a letter to Landis which was accompanied by a description of a number of projects that were being proffered by Paramount for consideration by Landis. The description for "King for a Day" stated in pertinent part:

> "KING FOR A DAY is high-styled political satire inspired by Art Buchwald. The movie is intended for Eddie Murphy, who is familiar with the idea and likes it very much. If necessary, however, I believe any one of several comedy stars could be excellent in the role. The writer is Tab Murphy, who has proven in another project that he has a terrific sense for Eddie Murphy's style. We expect a first draft in about four weeks."
> (Exhibit 49; RT 120–121; 556)

In a memorandum dated July 12, 1983, the budget for "King for a Day" was estimated to be in the ten to twelve million dollar range by Mestres and Kirkpatrick. (Exhibit 51) In late July, 1983, an agreement was reached between Paramount and Tab Murphy, pursuant to which the latter was hired to do the first screenplay for "King for a Day." (Exhibit 53)

In August 1983, "King for a Day" was still being considered by Paramount as a possible project for Landis. (Exhibits 55; 56) As of August 19, 1983, it was anticipated by Kirkpatrick that Tab Murphy's first draft would be ready on September 2, 1983. (Exhibit 57) This date was later changed to September 23, 1983. (Exhibit 59) In mid-September 1983 the budget for "King for a Day" was still estimated at ten million dollars. (Exhibit 60) The date for submission of the first draft of "King for a Day" was later extended to September 30, 1983. At this time "King for a Day" was still identified among "potential Eddie Murphy projects." (Exhibit 62)

On September 30, 1983, Tab Murphy submitted his first draft of "King for a Day." (Exhibits 63; 64) The script was not well received by Paramount, Bernheim or, apparently, anyone else. (RT 599–600) As a result, the search for a writer for "King for a Day" continued. (Exhibits 66; 68) In the meantime, Paramount paid $2500 to Buchwald to extend its option on "King for a Day." (Exhibit 67)

In late October 1983 the search for a writer focused on the French writer and director, Francis Veber. (Exhibits 69; 70; 71; RT 601) At the same time, "King for a Day" was still being thought of by Paramount as a possible project for John Landis. (Exhibit 72) Additionally, Paramount was still referring to "King for a Day" as a high-styled political satire inspired by Art Buchwald. (Exhibit 73) On December 6, 1983, Kirkpatrick reported that Paramount was negotiating with Veber to write the script for "King for a Day" and that the deal might close that day. A copy of this memorandum was sent to Wachs, Murphy's manager. (Exhibits 75; 77) In December, Paramount indicated that a screenplay draft was expected by March 16, 1984, and that "King for a Day" was targeted for release in the summer of 1985. (Exhibit 76) On December 8, 1983, Wachs was sent a review of one of Veber's movies. (Exhibit 80) On December 12, 1983, Katzenberg sent a letter to Brandon Tartikoff, President of NBC Entertainment. In this letter, "King for a Day" was identified as a "priority development" that "Eddie Murphy will star in." (Exhibit 81; RT 128)

On January 4, 1984, Kirkpatrick reported that negotiations with Veber were still ongoing with respect to "King for a Day"—a potential Eddie Murphy project. A copy of this report was sent to Wachs and Murphy's agent, Hildy Gottlieb. (Exhibit 83) On January 17, 1984, "King for a Day" was still listed as an "active" project. (Exhibit 84) Negotiations with Veber were still ongoing as of January 23, 1984. (Exhibit 85) On January 24, 1984, Katzenberg was notified that the title "King for a Day" had been cleared for use by Paramount. (Exhibit 86) In late January, Paramount's financial agreement with Bernheim was amended. (Exhibit 87) At the same time it was again reported that the deal with Veber was nearly closed. (Exhibit 88) On February 14, 1984, it was reported at Paramount that a draft for "King for a Day" was due to be submitted by Veber by May 30, 1984. (Exhibit 92) In a February 17, 1984, memorandum relating to "Eddie Murphy projects," "King for a Day" was described as a "political satire inspired by Art Buchwald" that was an excellent candidate for release in summer 1985. (Exhibit 93; see also Exhibit 99)



Sometime in 1984, Veber went to Washington, D.C., where he was shown around the ghetto by Bernheim and Buchwald.

On March 20, 1984, Paramount exercised its second option on Buchwald's work. (Exhibit 98)

In a memorandum dated May 14, 1983, Katzenberg informed Frank Mancuso, the head of Paramount, that "King for a Day" was one of the top three projects under development for Eddie Murphy at the time. Katzenberg stated: "Francis Veber, who is set to direct, will deliver his script [on "King for a Day"] mid-June. This is an excellent idea, and the marriage of Murphy and Veber could be something very special." (Exhibit 103)

On June 20, 1984, Kirkpatrick reported to Katzenberg that Veber's script should be ready by mid-August and that Veber would like "to shoot in the spring."[2] Wachs is shown as receiving a copy of this memorandum. (Exhibit 105)

On July 30, 1984, Katzenberg informed Kirkpatrick that Paramount should obtain a one-year extension on its option from Buchwald "for cheap money." (Exhibit 107)

On August 1, 1984, Bernheim reported to Katzenberg that Veber had read his script to him (Bernheim) and that Bernheim was very impressed. Bernheim stated that Veber had "captured" Buchwald's idea and that "Eddie is, I believe, in for a treat." (Exhibit 108)

In a memorandum dated August 3, 1984, Darlene Chan of Paramount reported "King for a Day" was scheduled for a summer 1985 release. (Exhibit 109) On August 15, 1984, the Paramount-Buchwald agreement was amended to provide for a third option. (Exhibit 110)

On October 1, 1984, Katzenberg was informed by Michael Besman, a member of Paramount's creative group, that Veber had "unofficially submitted the first draft of his screenplay." Besman reported that the "feeling was that the material was good, but it was hard to digest because of the format of the script." (Exhibit 114)

On October 3, 1984, Katzenberg informed Mancuso that Kirkpatrick had read the first third of Veber's screenplay, that Veber was coming to America the end of November and that there was a deal in place for Veber to direct "King for a Day." (Exhibit 115)

On October 10, 1984, Bernheim wrote Mancuso and informed him that he (Bernheim) had "been working with Francis Veber on our Eddie Murphy project (King for a Day)." Bernheim stated that he hoped Veber would arrive in Los Angeles by the end of November with the completed script. (Exhibit 116)

On October 16, 1984, Paramount exercised its third option on Buchwald's work. (Exhibit 117) On October 19, 1984, Ned Tanen, who by this time had taken over as President of Paramount, authorized payment of an additional $10,000 to Bernheim by reason of the latter's efforts in holding the "King for a Day" project together. (Exhibits 118; 119; RT 869)

[2] Veber was paid $300,000 by Paramount to write the script for "King for a Day." This was a large sum of money for such a script. (RT 148–149)

In mid-November Veber's first draft screenplay was submitted.

On January 1, 1985, Kirkpatrick directed a memorandum to Eddie Murphy's agents and managers—Gottlieb, Tienkin and Wachs. "King for a Day" was identified as one of the two strong development projects that would be "coming down the pike at the end of the month." In his memorandum Kirkpatrick reported that Veber was unhappy with his first script and wanted to revise it before it was shown to " 'Eddie's people.' " (Exhibit 123) Veber produced his revised draft in January 1985. (Exhibit 627) On February 1, 1985, it was reported that May 1, 1985, was the final date for Paramount to exercise its option on "King for a Day." (Exhibit 125) On the same date Bernheim wrote Tanen and inquired whether "Eddie [was] still interested in the basic Buchwald premise." Bernheim noted that he had been told that "Eddie and his associates were very high on the idea." (Exhibit 126)

On February 7, 1985, Bernheim again wrote Tanen. Bernheim indicated he had had a recent telephone conversation with Kirkpatrick in which the latter hung up on him. Bernheim also referred to the fact that they were "on the verge of signing a new writer (John See)." (Exhibit 128; see also Exhibit 127)

On February 20, 1985, Richard Fowkes of Paramount reported that a deal had been made with the writing team of Mierson and Krikes to do a rewrite on "King for a Day." (Exhibit 129; see also Exhibit 131) However, one week later it was reported that the deal with Mierson and Krikes "has been aborted." (Exhibit 132)

On March 6, 1985, Kirkpatrick sent a copy of the "King for a Day" script to Wachs, with copies to Gottlieb and Tamara Rawitt (of Eddie Murphy Productions). (Exhibit 134; RT 636) Wachs received the script and read at least part of it. (RT 766)

On March 29, 1985, Bernheim was informed that Paramount was abandoning "King for a Day." (Exhibit 135) On April 18, 1985, Paramount confirmed that "King for a Day" was "in turnaround."[3] (Exhibit 136) On April 3, 1985, Virginia Briggs of Paramount confirmed that "King for a Day" had been abandoned as of March 29, 1985. "King for a Day" was described as: "First draft screenplay by Tab Murphy; first draft and set of revisions by Francis Veber; both based upon original story and concept by Art Buchwald." (Exhibit 137) However, on May 5, 1985, in a report identifying the "state of potential Eddie Murphy projects," "King for a Day" was listed as one of the "projects in abeyance/on hold." (Exhibit 138) This memorandum was sent to Wachs, Tienkin, Rawitt and Gottlieb. (RT 787–788)

On August 14, 1985, a "coverage"[4] was written for the title "Ambassador at Large." The person who prepared this coverage likened "Ambassador at Large" to a story that Paramount had optioned from Art Buchwald. (Exhibit 139)

After Paramount abandoned "King for a Day," Bernheim became interested in finding another production company for the project. He was informed that Paramount had invested in excess of $418,000 in developing "King for a Day." (Exhibit 140) Although Bernheim attempted to purchase an option on the screenplay from Paramount (Exhibit 141), he was unsuccessful. (Exhibit 142; RT 882–883)

In May 1986, Buchwald optioned his treatment "King for a Day" to Warner Brothers (Exhibits 144; 146) Bernheim also entered into an agreement with Warner Brothers on the same project. (Exhibit 145)

In the summer of 1987, Paramount began the development process of a property called "The Quest," which was reported to be based upon a story by Eddie Murphy. (Exhibits 156; 508) The director selected for this project was John Landis. (Exhibits 157; 162) Barry Blaustein and David Sheffield were chosen to collaborate on the screenplay with Eddie Murphy and Arsenio Hall. (Exhibit 158) The shooting script for

[3] The term "turnaround" means that a producer is given the right to "take the project, call it his own, and try to set it up at another studio or third party financing." (RT 639)

[4] A "coverage" is a document in which the story is broken down, synopsized and explained. This document permits a reader to obtain a quick understanding of the story being synopsized. (RT 877)



"Coming to America," the subsequent title for "The Quest," is dated October 21, 1987. (Exhibit 171) In the meantime, Warner Brothers was still involved in developing the Buchwald treatment. (Exhibit 172) A script entitled "King Jomo" by Allan Katz was ready in revised form in November 1987. (Exhibit 173)

In early November 1987, after Bernheim learned that Paramount was going to begin shooting a movie in which Eddie Murphy was to play a black prince who comes to America to find a wife, Bernheim and Tanen met for lunch. Tanen became angry when Bernheim suggested that Paramount's movie was based on a character close to the one suggested by Buchwald. Tanen insisted Paramount's film had nothing to do with Buchwald's story. (Exhibit 605)

In January 1988, Warner Brothers cancelled the "King for a Day" project. Warner Brothers executive Bruce Berman made it clear that the cancellation was due, at least in part, to Warner's discovery of the fact that Paramount was shooting "Coming to America" starring Eddie Murphy. (RT 726–728; 732–736)

When "Coming to America" was released, the screenplay credit was given to Sheffield and Blaustein and Eddie Murphy received the story credit. (Exhibits 180; 183)

On June 29, 1988, Michael Batagglia of Paramount reported on "Coming to America" field publicity and promotions. One of the promotions was the use of a "King for a Day" concept, where a prize winner was afforded the opportunity to go on a shopping spree. (Exhibit 184)

## Discussion

### *Introduction*

At the outset the Court desires to indicate what this case is and is not about. It is *not* about whether Art Buchwald or Eddie Murphy is more creative. It is clear to the Court that each of these men is a creative genius in his own field and each is an uniquely American institution. This case is also *not* about whether Eddie Murphy made substantial contributions to the film "Coming to America." The Court is convinced he did. Finally, this case is *not* about whether Eddie Murphy "stole" Art Buchwald's concept "King for a Day." Rather, this case is primarily a breach of contract case between Buchwald and Paramount (not Murphy) which must be decided by reference to the agreement between the parties and the rules of contract construction, as well as the principles of law enunciated in the applicable legal authorities.

### *The Contract Between Buchwald and Paramount*

As indicated, the starting point for the analysis of this case is the contract between Buchwald and Paramount.[5] Pursuant to this agreement (Exhibit 507) Buchwald transferred to Paramount "the sole and exclusive motion picture and other rights" to the "original story and concept written by Art Buchwald . . . tentatively entitled "KING FOR A DAY," also known as "It's a Crude, Crude World" (which material, as defined in said Standard Terms is hereinafter called the 'Work')." (Exhibit 506, p. 1) In the agreement Buchwald warranted "[t]hat the Work is original with Author; that neither the Work nor any part thereof are taken from or based upon any other material or any motion picture. . . ." (Exhibit 506, p. 3) As is pertinent to the present case, the agreement provided that:

> " 'Work' means the aforementioned Material and includes all prior, present and future versions, adaptations and translations thereof (whether written by Author

[5] Although the Court intends to focus on the agreement between Buchwald and Paramount, there appears to be no dispute between the parties that co-plaintiff Bernheim's entitlement to damages under his agreement with Paramount (Exhibit 507) is dependent upon the outcome of the dispute between Buchwald and Paramount.

or by others), its theme, story, plot, characters and their names, its title or titles and subtitles, if any, . . . , and each and every part of all thereof. 'Work' does not include the material referred to in paragraph 2 (f) above, written or prepared by Purchaser or under Purchaser's Authority." (Id. at 15)

Finally, the agreement entitled Buchwald to certain "contingent consideration" "[f]or the first theatrical motion picture (the 'Picture'): If, but only if, a feature length theatrical motion picture shall be produced *based upon* Author's Work." (Emphasis added.) (Exhibit 506, p. 18)

### *The Meaning of "Based Upon"*

Since the agreement provided Buchwald was entitled to payment only if Paramount produced "a feature length theatrical motion picture" "based upon Author's Work," the threshold inquiry in this case is what is meant by the term "based upon." Because the term is not defined in the contract, it was the Court's hope that the term had a specific meaning in the entertainment industry and that the experts who testified would so indicate. Unfortunately, there was as little agreement among the experts concerning the meaning of this term as there was between plaintiffs and Paramount concerning whether "Coming to America" is based upon Buchwald's treatment. For example, David Kirkpatrick testified that his understanding of "based upon," as used in the entertainment industry, is that "there exists some underlying antecedents that triggered the realization of the story in a screenplay." (RT 515) Kirkpatrick amplified his answer to state that "based upon" has two aspects—"the studio or production company had purchased or had access to [the author's work]. And two, that the antecedents were of a significant story nature to claim a based upon credit." (RT 646) In other words, Kirkpatrick opined that a movie is based upon a writer's work if it "was created out of significant elements from the underlying materials." By significant elements, Kirkpatrick meant "that there were character similarities, story similarities as it relates to the Act One, to (sic) Two, Three structure." (RT 647)

Helene Hahn, a Paramount attorney, testified (by way of deposition) that, in her opinion, "based upon" meant that the "screenplay of the motion picture had been derived from and incorporated the elements of author's work as herein defined." (Depo. Tr., p. 32) Alexandra Denman, another Paramount attorney, testified (by way of deposition) that "based upon" meant that the screenplay was written "with the elements of Mr. Buchwald's story, I mean the specific elements of the story, which is the work." (Depo. Tr., p. 50)

David Rintels, a writer, testified (by way of deposition) that "based upon" means "intent." (Depo. Tr., p. 115) Mr. Rintels further testified: "Before you get into plot you'll be able to see, just because you've been doing it for 30 years yourself, or I'll be able to see that—if I think that there is a similarity in spirit over—regardless of details, I think that's a factor, for something to be based on." (Depo. Tr., p. 127)

Edmund H. North, another writer, testified (by way of deposition) that he believed the focus in making the "based upon" determination should be whether there is an overriding similarity to plot, theme and characters. (Depo. Tr., pp. 91–92) Lynn Roth, another writer, defined "based upon" as meaning "something came from something else." Miss Roth conceded that "because we're dealing with so many kinds of material, you could not put it into a specific or as neat a definition as you can other credits in the industry, because we are dealing with, as I said before, different things. . . ." (Depo. Tr., p. 69) In determining whether one work came from an earlier work, according to Miss Roth, one looks at the essence of the material, i.e., "the basic theme" (Depo. Tr., p. 69) but not plot, characters and motivation because these relate to the "development of the project," not its theme (i.e., nucleus). (Dep. Tr., p. 71)

Since the Court found the testimony of the entertainment experts, both individually and collectively, to be of little value with respect to the "based upon" issue, the Court turned to the appellate decisions of this State for guidance. Fortunately, that guidance existed. Indeed, as will be discussed more fully below, the Court believes these decisions provide a road map through the "based upon" mine field.



### *Access and Similarity*

In cases involving infringement, which this case is not, it has been held that an inference of copying may arise where there is proof of access to the material with a showing of similarity. *Golding v. R.K.O. Pictures, Inc.*, 35 Cal.2d 690, 695 (1950). "Where there is strong evidence of access, less proof of similarity may suffice." (Id.) These same rules have been applied in a case involving a cause of action alleging breach of an express contract. *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 1013 (1970).

### *Access*

In the present case, there is no real issue concerning Eddie Murphy's access to Buchwald's concept. Indeed, the evidence is that Murphy *knew* about Buchwald's concept. Specifically, it is undisputed that in the spring of 1983, Paramount creative executives Kirkpatrick and Katzenberg met with Murphy and his manager, Robert Wachs, at the Ma Maison Restaurant and discussed Buchwald's concept with them. In fact, it was reported that Murphy was positively responsive to the "King for a Day" presentation and indicated that he liked playing the African character in the movie "Trading Places." Murphy himself testified (by way of deposition) that he had "a very vague recollection, maybe of Jeff [Katzenberg] going into the 'King for a Day' thing. 'You'd be great in it.' " (Depo. Tr., p. 91) Murphy further testified that Katzenberg "liked the idea of it, I guess, 'cause I remember." (Id.)

There is other, persuasive evidence on the issue of access. For example, on June 6, 1983, Kirkpatrick sent Wachs a short outline of Buchwald's "King for a Day." (Exhibit 39) Wachs admitted that he read at least part of Buchwald's treatment. (RT 768)

Finally, there is evidence that Kirkpatrick discussed "King for a Day" with Eddie Murphy on at least three occasions subsequent to the meeting at the Ma Maison Restaurant in the spring of 1983. (RT 556–558)

### *Similarity*

Since there is no real issue concerning access, the focus must then be on the question of similarity. Similarity is, of course, a question of fact for the trier of fact to determine. *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 660 (1950).

The parties have directed a substantial amount of their attention to the issue of similarity. Paramount contends that there must be *substantial* similarity between Buchwald's treatment and "Coming to America" in order for Buchwald to succeed in this case.[6]

Paramount also relies on *Teich v. General Mills, Inc.*, 170 Cal. App. 2d 791 (1959), *Henried v. Four Star Television*, 266 Cal. App. 2d 435 (1968) and *Whitfield v. Lear*, 582 F. Supp. 1186 (E.D.N.Y. 1984), *rev'd*, 751 F. 2d 90 (2nd Cir. 1984).

The Court believes Paramount's reliance on the cases cited above is misplaced because none of these cases involves an express contract with language similar to that involved in the Buchwald-Paramount contract. This point is cogently made by Nimmer in his classic work "Nimmer on Copyright":

[6] In Paramount's Trial Brief it is stated: "In order to sustain a finding of breach of contract under the contention that Coming to America was 'based upon' It's a Crude, Crude World, there must be a finding of significant or substantial similarity between the two works." (At 3)

*"However, the copyright requirement that similarity between plaintiff's and defendant's work be 'substantial' . . . is not applicable in idea cases.* If the only similarity is as to an idea then by definition such similarity is not substantial in the copyright sense. *Whitfield v. Lear,* 582 F. Supp. 1186 (E.D.N.Y. 1984) (Treatise quoted), *rev'd,* 751 F. 2d 90 (2nd Cir.) (1984). (Although the appellate decision in *Whitfield* refers to a requirement of 'some substantial similarity' the holding is that the district court's finding of 'no similarities' is unsupported in the record on appeal. 751 F. 2d at 93–94.) *If there is a contractual or other obligation to pay for an idea, the defendant cannot avoid such liability by reason of the fact he did not copy more than the abstract or basic idea of plaintiff's work.* [Citations omitted.] *Contra: Henried v. Four Star Television,* 72 Cal. Rptr. 223 (Cal. App. 1968). The result in the *Henried* case may be justified on the ground that the only element of similarity between the plaintiff's and defendant's works ('both heroes travel in chauffeur-driven Rolls Royces') was so well known as to preclude a trier of fact from concluding that defendant copied this element from plaintiff . . . *[b]ut the Henried court appears to be in error in affirming the sustaining of defendant's demurrer to plaintiff's implied contract count on the ground that the similarity between the two works was not 'substantial.' This principle of law would be equally applicable even if a non-substantial element of similarity were clearly copied by defendant from plaintiff, thus doing violence to the principles of contract law discussed above . . . and articulated in Weitzenkorn v. Lesser,* 40 Cal. 2d 778 (1953)." . . . [Emphasis added.] (Vol. 3, § 16.08[B], pp. 16–64, 65, fn. 58)

Although the Court believes the cases relied upon by Paramount are inapplicable to the issue of the extent of similarity that is required in this case, the Court has concluded the two controlling cases with respect to this issue are *Fink supra,* and *Weitzenkorn, supra.*

In *Fink,* as in the present case, the contract between the parties obligated the defendant to compensate the plaintiff if the defendant created a series "based on Plaintiff's Program or any material element contained in [it]." (9 Cal. App. 3d at 1002)[7] The Court stated that a " '[m]aterial element' could range from a mere basic theme up to an extensively elaborated idea, depending upon what might be proved as the concept of the parties." (Id. at 1008, fn. 15) With respect to the contract cause of action, the Court framed the issue: "[W]hether . . . defendants have *based* their series *on a* material element of plaintiff's program." (Id. at 1007) (Emphasis added.) The Court noted that its "based on any material element" test was "quite close to the concept of 'inspiration for' which was the key to the upholding of an implied contract count in *Minniear v. Tors,* 266 Cal. App. 2d 495, 505 [72 Cal. Rptr. 287]." (Id. at 1008)

Similarly, in *Weitzenkorn, supra,* the contract obligated the defendants to pay for plaintiffs' composition "if they used it or any portion of it, regardless of its originality." (40 Cal.2d at 791)

Based on the decisions in *Fink* and *Weitzenkorn,* and the contract involved in this case, the Court concludes that Paramount's obligation to pay Buchwald arose if "Coming to America" is based upon a material element of or was inspired by Buchwald's treatment. As the Court in *Fink* noted, this determination is to be made by searching for "points of similarity" both quantitatively and qualitatively. (9 Cal. App. 3d at 1010) It is to this search that the Court now turns.

[7] This contract language appears to be virtually identical to the language in the Buchwald-Paramount contract, which requires Paramount to compensate Buchwald if it produced a motion picture based upon Buchwald's work, which is defined as "its theme, story, plot, characters and their names . . . and each and every part of all thereof."



### *The Comparison of Buchwald's Treatment and "Coming to America"*

Before engaging in a comparison of "King for a Day" and "Coming to America," the Court wishes to state the obvious. Specifically, plaintiff has the burden of proving similarity by a preponderance of the evidence. " 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it." (BAJI 2.60)

In Buchwald's treatment, a rich, educated, arrogant, extravagant, despotic African potentate comes to America for a state visit. After being taken on a grand tour of the United States, the potentate arrives at the White House. A gaffe in remarks made by the President infuriates the African leader. His sexual desires are rebuffed by a black woman State Department officer assigned to him. She is requested by the President to continue to serve as the potentate's United States escort. While in the United States, the potentate is deposed, deserted by his entourage and left destitute. He ends up in the Washington ghetto, is stripped of his clothes and befriended by a black lady. The potentate experiences a number of incidents in the ghetto, and obtains employment as a waiter. In order to avoid extradition, he marries the black lady who befriended him, becomes the emperor of the ghetto and lives happily ever after.

In "Coming to America" the pampered prince of a mythical African kingdom (Zamunda) wakes up on his 21st birthday to find that the day for his prearranged marriage has arrived. Discovering his bride to be very subservient and being unhappy about that fact, he convinces his father to permit him to go to America for the ostensible purpose of sowing his "royal oats." In fact, the prince intends to go to America to find an independent woman to marry. The prince and his friend go to Queens, New York, where their property is stolen and they begin living in a slum area. The prince discovers his true love, Lisa, whose father—McDowell—operates a fast food restaurant for whom the prince and his friend begin to work. The prince and Lisa fall in love, but when the King and Queen come to New York and it is disclosed who the prince is, Lisa rejects the prince's marriage invitation. The film ends with Lisa appearing in Zamunda, marrying the prince and apparently living happily ever after.

There are, to be sure, differences between Buchwald's "King for a Day" and "Coming to America." However, as noted above, where, as here, the evidence of access is overwhelming, less similarity is required. Moreover, " '[e]ven if the similar material is quantitatively small, if it is qualitatively important . . . the trier of fact . . . may properly find substantial similarity.' " (*Fink, supra,* at 1013)

In his opening statement, counsel for plaintiffs made the following comparison of "King for a Day" and "Coming to America":

> "Both are modern day comedies. The protagonist is a young black member of royalty from a mythical African kingdom, pampered and extremely wealthy, well educated. They both come to a large city on the American East Coast. And they arrive as a fish out of water from this foreign kingdom.
>
> Abruptly, finding themselves without royal trappings of money and power, they end up in the black, urban American ghetto, about as far culturally as they could ever hope to be from their pampered, royal status in their mythical kingdom. Each character abandons his regal attitudes. Both live in the ghetto as poor blacks experiencing the realities of ghetto life.
>
> Each takes a menial job as (sic) a series of harrowing and comedic adventures in the ghetto, is humanized and enriched by his experiences. Love always triumphing over all, each meets and falls in love with a beautiful young American woman whom he will marry and make his Queen and live happily ever after in his mythical African kingdom." (RT 45)

The Court agrees with this comparison. In fact, the Court believes that these similarities alone, given the language of the contract involved in this case and the law that liability in a contract case can arise even if a non-substantial element is copied, might well be sufficient to impose contract liability on Paramount. (*Fink, supra; Weitzenkorn, supra; Minniear, supra*) The fact is, however, that other compelling evidence of similarity exists.

In the original script written by Tab Murphy that was indisputably based upon Buchwald's treatment, the king ends up as an employee of a fast food restaurant where he ultimately foils a robbery attempt by use of a mop. In "Coming to America" the prince is also employed by a fast food restaurant and foils a robbery attempt by use of a mop. These similar "gimmicks" provide compelling evidence that the evolution of plaintiffs' idea provided an inspiration for "Coming to America." (*Minniear v. Tors, supra*, at 505)[8]

The Court has found an item of documentary evidence significant with respect to the similarity issue. In early September, 1984, a writer by the name of Jim Harrison sent a treatment to Robert Wachs, Murphy's manager, which he suggested was "closely aligned with Murphy's talents." (Exhibit 111) This treatment envisioned Eddie Murphy playing an aide to a powerful Southern senator. The aide ultimately becomes the King of Somaili. (Exhibit 112) In rejecting this idea, Wachs wrote Harrison in pertinent part as follows:

> "Unfortunately, there is a project under development at Paramount for Eddie entitled 'King for a Day', based on an unpublished Art Buchwald story, which is fairly close to your story line, hence I really can't give you a go-ahead on this one." (Exhibit 113; RT 794–796)

When asked what he meant by "fairly close," Wachs replied "that an ordinary person would find that any two items had more similarities than dissimilarities." (RT 799) If Murphy's manager thought that the Harrison treatment had more similarities than differences to Buchwald's treatment, it seems to the Court that a substantially stronger case can be made with respect to the similarities between Buchwald's treatment and "Coming to America."[9]

There are other factors that are present in this case that strongly support plaintiffs' position that Buchwald's original concept and its subsequent development at Paramount was the inspiration for "Coming to America." For example, the evidence is overwhelming that for two years Paramount considered "King for a Day" to be a project that was being developed for Eddie Murphy. In fact, when "Coming to America" was made, its star was Eddie Murphy. Additionally, during the development of "King for a Day" it was contemplated Murphy would portray multiple characters. In "Coming to America" he did.

Moreover, when "King for a Day" was under development, Paramount sought to interest John Landis in directing the movie. On July 1, 1983, David Kirkpatrick of Paramount sent to Landis a description of "King for a Day." In fact, Landis directed "Coming to America". The fact that Landis was aware of Buchwald's concept for "King for a Day" is important. Since the evidence revealed that Landis had creative input into "Coming to America," it is his access and knowledge, in addition to Eddie Murphy's, that is relevant to the issue of similarity.

It is also important to observe that one of the promotional ideas utilized in connection with "Coming to America" was a "King for a Day" concept where a prize winner was afforded the opportunity to go on a shopping spree. (Exhibit 184)

As indicated above, there are differences between Buchwald's treatment and "Coming to America." One of the principal differences is that the king in Buchwald's original treatment was despotic, while the prince in "Coming to America" is kind and naive. The fact is, however, that early in the development process Paramount desired to make Buchwald's king more likable. (Exhibit 41) Indeed, by the time Francis Veber submitted his second script, which was clearly based upon Buchwald's original treatment, the king had none of his despotic characteristics. As indicated above (fn. 8), the Court believes that "Coming to America" must be compared with the Buchwald treatment as it was developed in the Tab Murphy and Veber scripts.

The other significant difference between Buchwald's treatment and "Coming to America" is the motivation that brought the principal character to America. In Buchwald's treatment the motivation was to obtain military weapons from the United States. In "Coming to America" it was to find an independent wife. This dissimilarity does not, however, require a finding that "Coming to America" is not "based upon" Buchwald's work.

In many ways, the decision in *Weitzenkorn, supra*, is similar to the present case. *Weitzenkorn* was a breach of contract case in which the plaintiff sued to recover damages by reason of the defendant's use of her Tarzan/Fountain of Youth idea. Although both plaintiff's idea and the defendant's movie involved Tarzan, there were striking dissimilarities between the two. In plaintiff's story, Tarzan entered the area where the Fountain of Youth was located because he was captured by the evil persons who dwelled in the area. By contrast, in the defendant's version Tarzan voluntarily entered the area which was occupied by a king who was a friend of Tarzan. In plaintiff's version, Tarzan undertook his journey to rescue Boy. In defendant's version, Tarzan was on a mission of mercy to find a missing aviatrix. In plaintiff's version, the evil queen and her subjects disintegrated when Tarzan destroyed the Fountain of Youth. In defendant's version, the ending was totally different.

In *Weitzenkorn* the Court found no similarity as to form and manner of expression between plaintiff's composition and defendant's movie. Although both works included the same characters in Africa being involved with a mythical Fountain of Youth, the moral of each was entirely different. Specifically, the moral of plaintiff's work was that eternal youth was not a blessing. The moral of defendant's work was that eternal youth was a reward for good.

In spite of the significant differences between plaintiff's and defendant's work, the Court concluded that the trial court had erroneously sustained the demurrers of the defendants without leave to amend. Because the defendants had expressly agreed to compensate the plaintiff if they used plaintiff's composition, or any portion of it, the Court concluded that plaintiff's complaint stated a cause of action "no matter how slight or commonplace the portion which" the defendants used. (40 Cal. 2d at 792)

Finally, *Blaustein v. Burton*, 9 Cal. App. 3d 961 (1970) is also instructive. In this case plaintiff's idea of using Richard Burton and Elizabeth Taylor as the stars of "Taming of the Shrew," together with several ideas with respect to how and where the movie should be made, was held to give rise to contract liability.

Based upon the authorities discussed above and the provisions of the contract involved in this case, the Court concludes that "Coming to America" is a movie that was

[8] During the trial of this case, an issue arose concerning whether the similarity comparison must be made between Buchwald's treatment and "Coming to America" or Buchwald's treatment as it evolved in the Tab Murphy and Veber's scripts and "Coming to America." The Court believes it is the latter comparison that must be made for several reasons. First, the contract between Buchwald and Paramount specifically authorized Paramount to "adapt, use, dramatize, arrange, change, vary, modify, alter, transpose . . . the Work and any parts thereof." (Exhibit 506, p. 4) Second, it is not just Buchwald's treatment, but the subsequent Tab Murphy and Veber's scripts, to which Murphy had access. Third, even though the contract provided that " 'Work' does not include the material referred to in paragraph 2 (f) above, written or prepared by Purchaser or under Purchaser's Authority" (Exhibit 506, p. 15), that provision simply means that the subsequent adaptations of Buchwald's treatment became the property of Paramount. It does not mean that Buchwald was not entitled to "based upon" compensation if the evolution of his treatment resulted in a motion picture produced by Paramount.

[9] Much the same may be said of the review of a work entitled "Ambassador at Large" which was prepared by a Paramount employee in August, 1985. (Exhibit 139)

"based upon" Buchwald's treatment "King for a Day."[10] "Bearing in mind the unlimited access . . . [proved] in this case and the rule that the stronger the access the less striking and numerous the similarities need be . . . [the Court concludes that Paramount has] appropriated and used a qualitatively important part of the plaintiff's material in such a way that features discernible in . . . [Paramount's] work are substantially similar thereto. (*Fink, supra*, at 1013)[11]

Finally, the Court wishes again to emphasize that its decision is in no way intended to disparage the creative talent of Eddie Murphy. It was Paramount and not Murphy who prepared the agreement in question. It is Paramount and not Murphy that obligated itself to compensate Buchwald if any material element of Buchwald's treatment was utilized in or inspired a film produced by Paramount. "Coming to America" is no less the product of Eddie Murphy's creativity because of the Court's decision than it was before this decision was rendered.

### *The Issue of the Originality of Buchwald's Treatment*

As indicated, in the agreement between Buchwald and Paramount, the former sold to Paramount his "original story and concept" and warranted that his work was original and not taken from or based upon any other material or motion picture. During the trial, Paramount was permitted to introduce into evidence a movie made in the 1950's by Charlie Chaplin entitled "A King in New York." Although the Court understood it to be Paramount's position during trial that Buchwald's treatment was not original in that it was based upon "A King in New York," it appears that this position was abandoned by Paramount during oral argument. Paramount's present position, as the Court understands it, is that if the Court concludes "Coming to America" is based upon Buchwald's treatment, it must similarly conclude that Buchwald's treatment is based upon "A King in New York" since the same degree of similarity exists between Buchwald's treatment and each of the two movies. The Court does not agree.

It is true that Buchwald testified that he saw "A King in New York" in Paris in the 1950's and wrote a column concerning his review of the movie after seeing it. Besides these facts, there is not a scintilla of evidence that Buchwald's treatment was in any way based on "A King in New York." Indeed Buchwald testified that his treatment was an original document and that he could not remember anything about the Chaplin movie. Moreover, the Court has viewed "A King in New York." Besides the fact that this movie involves a king who comes to America, there is not the slightest resemblance between "A King in New York" and "King for a Day." In Chaplin's movie the king is an elderly caucasian who is already married and deposed by the time he comes to America. Although he loses his fortune, he spends the entire movie living in luxury at the Ritz Hotel. Moreover, and most significantly, the movie is a satirical look at the McCarthy era and the American mentality during that period of time.

In sum, to the extent Paramount still intends to advance the argument, the Court rejects the contention that Buchwald's treatment was not original and that it was in any way based upon "A King in New York." Stated another way, while plaintiffs have proved by a preponderance that "Coming to America" is "based upon" "King for a Day," plaintiffs have also proved by a preponderance of the evidence that "King for a Day" is not "based upon" "A King in New York."

[10] The Court wishes to add that to the extent there is an ambiguity with respect to interpreting the "based upon" provision of the contract, that ambiguity must be resolved against Paramount as the drafter of the agreement. (Civ. Code § 1654; *Glenn v. Bacon*, 86 Cal. App. 58 (1927)

[11] The statement by Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*, 293 F.145 (1924) is appropriate to quote at this point. Judge Hand stated: "Everything registers somewhere in our memories, and no one can tell what may evoke it." Eddie Murphy, with commendable candor, admitted as much when he testified (by way of deposition) that he did not know "what triggers my subconscious." (Depo. Tr., p. 92)



### *Plaintiffs' Tort Claims*

In addition to their contract claims, plaintiffs have advanced several tort theories of recovery, namely, bad faith denial of existence of contracts, bad faith denial of liability on their contracts, tortious breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraudulent concealment by a fiduciary and constructive trust. The obvious reason plaintiffs have asserted tort causes of action is to recover punitive damages since, absent such damages, the Court is able to discern no difference between any tort damages plaintiffs might recover and their contract damages.

The Court has concluded, as indicated, that "Coming to America" was based upon Buchwald's treatment. The Court is unable to find, however, any tortious conduct on the part of Paramount or any of its representatives. In order to award punitive damages to plaintiffs the Court would be required to find by clear and convincing evidence that defendant was guilty of fraud, oppression or malice, as those terms are defined in Civil Code Section 3294. While the Court rejects Paramount's contention that "Coming to America" is not "based upon" "King for a Day," the Court is unable to conclude that Paramount's conduct was in bad faith, let alone fraudulent, oppressive or malicious. Accordingly, while plaintiffs are entitled to recovery on their breach of contract claims, the Court finds the defendant is entitled to judgment on plaintiffs' tort claims.

Since neither party has requested a Statement of Decision, the Tentative Decision (as corrected herein) shall constitute the Statement of Decision. The Court understands there will now be an accounting phase of this case. The Court desires to make it clear that, depending on the evidence adduced during the accounting phase, the possibility exists that Paramount's accounting practices may make the imposition of tort damages appropriate.

DATED: JAN 31 1990

HARVEY A. SCHNEIDER
Judge of the Superior Court

## Appendix B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| ART BUCHWALD, et al.,<br>Plaintiff,<br>v.<br>PARAMOUNT PICTURES CORPORATION, etc., et al.,<br>Defendants. | No. C 706083<br>TENTATIVE DECISION (SECOND PHASE) |

### I. PRELIMINARY STATEMENT

In the first phase of this case, this Court ruled that Paramount's film *Coming to America* was "based upon" the screen treatment written by plaintiff Art Buchwald. In the second phase of the case, the Court has been presented with numerous issues, including whether: (i) The contract between plaintiff Bernheim and Paramount is a contract of adhesion; (ii) the contract, or any provision thereof, is unconscionable; (iii) the relationship between Bernheim and Paramount was that of co-venturers; (iv) Paramount owed a fiduciary duty to Bernheim; and (v) conduct on the part of Paramount breached the implied covenant of good faith and fair dealing. The Court has also been presented with the task of interpreting other contract provisions, including the so-called "consultation" clause; the "turnaround" provision; and paragraph D.2.b. of the Bernheim Deal Memo.

## II. THE CONTRACT

In order to understand the issues presented to the Court in this phase of the proceeding, it is important to identify the components of the contract that present those issues. These components are:

1. The February 24, 1983, Deal Memo (consisting of six pages) entered into between Alma Productions, Inc. (Alain Bernheim's loan-out company)[1] and Paramount;
2. The so-called "turnaround" agreement (consisting of three pages);
3. Additional Terms and Conditions (consisting of six pages); and
4. Paramount's standard net profit participation agreement (consisting of 23 pages), with two attachments relating to royalties.

## III. DISCUSSION

### A. *Contract of Adhesion*

A "contract of adhesion" " 'signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' (Citation omitted.)" *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817 (1981). As the Court in *Graham* stated:

> "Such contracts are, of course, a familiar part of the modern legal landscape, in which the classical model of 'free' contracting by parties of equal or near-equal bargaining strength is often found to be unresponsive to the realities brought about by increasing concentrations of economic and other power. They are also an inevitable fact of life for all citizens—businessman and consumer alike. While not lacking in social advantages, they bear within them the clear danger of oppression and overreaching. It is in the context of this tension—between social advantage in the light of modern conditions on the one hand, and the danger of oppression on the other—that courts and legislatures have sometimes acted to prevent perceived abuses." (*Id.* at 817–818)

In the present case, the Court finds that Bernheim's compensation package, as set forth in the Deal Memo, was negotiated by Bernheim's agent and Paramount's representative, as were other provisions of the Deal Memo not relevant to this case. The Court finds, however, that the "boilerplate" language of the Deal Memo was not negotiated.

The Court further finds that the "turnaround" provision, the Additional Terms and Conditions, and the net profit participation agreement were not negotiated. With respect to the latter three parts of the Bernheim-Paramount contract, there is not the slightest doubt that they were presented to Bernheim on a "take it or leave it" basis. Indeed, the evidence reveals that Bernheim did not have the "clout" to make a better deal.

It is true Paramount has submitted evidence that it freely negotiates its net profit formula with the talent with which it deals. The Court is not impressed with Paramount's evidence. To the contrary, the Court concludes plaintiffs have proved by a

[1] In this Tentative Decision, for ease of reference, Bernheim will be referred to as the contracting party.



preponderance of the evidence that Paramount negotiates its net profit formula with only a relatively small number of persons who possess the necessary "clout," and even these negotiations result in changes that are cosmetic, rather than substantive. Indeed, if, as Paramount contends, it freely negotiates with respect to its net profit formula, the Court presumes it would have been inundated with examples of contracts where this was done. Succinctly stated, this has not occurred.

The evidence also discloses that the entire contract was drafted by Paramount and that the "turnaround" and net profit participation provisions were standard, form provisions. Indeed, there is evidence in the record that Paramount's net profit formula is standard in the film industry. Further, there is evidence in the record to support the conclusion that essentially the same negotiations are conducted at all studios and that when one studio revises a provision of its net profit formula, that revision is adopted by the other studios.

The above factors lead to the inescapable conclusion that the Bernheim-Paramount contract is a contract of adhesion. The fact that a portion of the contract was negotiated, i.e., Bernheim's compensation package in the Deal Memo, does not require a different conclusion. In *Graham, supra*, the Court held that the contract before it was a contract of adhesion, even though some of the terms were negotiated between the parties. (28 Cal.3d at 807)

### B. *Unconscionability*

In *Graham, supra*, the Court stated:

> "To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis in so far as enforceability of its terms is concerned.' (Citation omitted.) Thus, a contract of adhesion is fully enforceable according to its terms (citations omitted) unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise.
>
> "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. (Citation omitted.) The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectation of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' (Citations omitted.)" (28 Cal. 3d 807 at 819–820)

#### 1. *Unconscionability—Sword or Shield*

Before addressing the issue of whether the Bernheim-Paramount contract, or any provision thereof, is unconscionable, it is necessary to discuss several contentions advanced by Paramount. First, relying primarily on *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758 (1989), Paramount argues that plaintiffs are impermissibly using the doctrine of unconscionability as a "sword." Paramount claims that Civil Code section 1670.5,[2] as interpreted by *Dean Witter*, permits the doctrine to be utilized only as a "shield," i.e., by a defendant who has been sued. The Court does not agree.

In *Dean Witter* the plaintiff brought a class action attacking certain fees charged by

[2] Civil Code section 1670.5 provides in pertinent part as follows: "(a) If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Dean Witter. Three of plaintiff's causes of action were the subject of defendant's petition for writ of mandate: The first cause of action for unfair competition; the third cause of action for unconscionability under Civil Code section 1670.5; and the fourth cause of action for unconscionability under the Consumer's Legal Remedy Act (CLRA). (*Id.* at 763)

In *Dean Witter* the Court of Appeal held, *inter alia*, that no affirmative cause of action for unconscionability was created by Civil Code section 1670.5. In reaching this conclusion the Court found that section 1670.5 merely codified the defense of unconscionability and did not support an affirmative cause of action based on that doctrine.

In the present case, plaintiffs have not violated the holding in *Dean Witter* by bringing an affirmative cause of action based on the doctrine of unconscionability. Rather, plaintiffs have raised the doctrine of unconscionability in response to Paramount's reliance on the contract between the parties as written. Several California appellate decisions support the use of the unconscionability doctrine in the manner in which plaintiffs seek to use that doctrine in this case.

In *Graham v. Scissor-Tail, Inc., supra*, plaintiff sued for breach of contract, declaratory relief and rescission. Defendant attempted to invoke the arbitration provision contained in the contract. Plaintiff claimed, however, that this provision was unconscionable. The Court not only permitted the plaintiff to assert the unconscionability doctrine, but found the arbitration provision unconscionable and struck it.

In *A & M Produce Co. v. FMC Corporation*, 135 Cal. App. 3d 473 (1982), the buyer of a tomato processing machine sued the seller for breach of express warranties, breach of implied warranty of fitness for a particular use and misrepresentation (although this last cause of action was dismissed by plaintiff at trial). The contract sued upon contained both a disclaimer of warranties and a limitation on the buyer's ability to recover consequential damages. Plaintiff attacked both of these provisions as unconscionable, after the defendant relied on the contract between the parties as written. Both the trial and appellate courts agreed and struck the unconscionable provisions.

In *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985), plaintiff claimed that his bank's "non-sufficient funds" charges were unconscionably high. He alleged five causes of action: (i) declaratory relief (that the signature card was not a contract authorizing non-sufficient funds charges); (ii) declaratory relief (that the non-sufficient funds charges were unconscionable); (iii) damages for unjust enrichment; (iv) to enjoin unfair and deceptive practices; and (v) to recover the difference between the non-sufficient funds charges and the bank's actual expenses (incurred in processing an NSF check).

Although the trial court sustained the bank's demurrer to all causes of action, the Supreme Court reversed on the second and third causes of action and reversed with leave to amend on the first and fourth causes of action. By validating plaintiff's second and third causes of action, the Supreme Court effectively held that an affirmative cause of action for unconscionability exists if it is brought as an action for declaratory relief and that unconscionable fees may be recovered under the rubric of unjust enrichment.

A careful review of *Dean Witter, Graham, A & M* and *Perdue* reveals no inconsistency. To the contrary, the following conclusions can be gleaned from these cases:

1. A cause of action for damages based on the doctrine of unconscionability (in the absence of a CLRA-type statute) is impermissible. *Dean Witter Reynolds, supra.*

2. A plaintiff may commence an action, even one for damages, based on the implicit assumption that the unconscionable provision does not exist. *A & M Produce, supra* (cause of action for breach of warranty; *Graham, supra* (suing in civil court, rather than arbitrating); *Perdue, supra* (suing for unjust enrichment).

3. In the kind of cases described in paragraph 2, when the defendant relies on the contract as written, e.g., *A & M Produce, supra* (disclaimer of warranty); *Graham, supra* (arbitration clause); *Perdue, supra* (bank rules allowing non-sufficient fund fees), then



plaintiff can counter with the claim the provisions are unconscionable. It also appears that a plaintiff may bring a cause of action for declaratory relief to have a contract provision declared unconscionable, without violating the principles enunciated in the cases referred to above. (*Perdue, supra*)[3]

To summarize, in the present case plaintiffs have not attempted to allege a cause of action based on the doctrine of unconscionability. To the contrary, plaintiffs have alleged three causes of action for breach of contract in which they seek damages. Paramount, by contrast, seeks to defend against plaintiffs' contract damage claims by invoking the provisions of the agreement between the parties as written. Plaintiffs, as is permitted by the cases referred to above, have countered by claiming certain contractual provisions are unconscionable. The Court finds that plaintiffs' use of the doctrine of unconscionability comports with the decisions in *Graham, supra; A & M Produce Co., supra,* and *Perdue, supra.*

### 2. *Unconscionability—Surprise*

Paramount also argues that the provision of the net profit formula cannot be found to be unconscionable because similar provisions have existed in the film industry for years and that all of the provisions were well known to Bernheim. In other words, Paramount argues the contract provisions, particularly the provisions of the net profit formula, cannot be unconscionable because Bernheim was in no way surprised by them.

It is no doubt true that the prevention of surprise is one of the two principal purposes of the doctrine of unconscionability. *A & M Produce Co., supra,* at 484. " 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *A & M Produce Co., supra,* at 486. It is equally true that, except perhaps for the amount of gross participation shares given to Murphy and Landis, Bernheim was not surprised by the provisions of the contract in question in this case, i.e., the contract provisions were not contrary to Bernheim's reasonable expectations.

The absence of surprise, however, does not render the doctrine of unconscionability inapplicable. Indeed, in *Graham, supra,* the trial court specifically found that the plaintiff was not surprised by the contract provision that was being attacked as unconscionable. (28 Cal. 3d at 821) Nevertheless, the trial court found the provision unconscionable and the California Supreme Court affirmed.

### 3. *Unconscionability—Oppression*

The other principal target of the unconscionability doctrine is oppression. *A & M Produce Co., supra,* at 484. " 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' " *A & M Produce Co., supra,* at 486. This has been referred to as the procedural aspect of unconscionability. (*Id.,* at 486)

Unconscionability also has a substantive aspect. In *A & M Produce Co., supra,* the Court stated:

> "Commercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also *substantively* unreasonable. (Citations omitted.) No precise definition of substantive unconscionability can be proffered. Cases have talked in terms of 'overly harsh' or 'one-sided' results. (Citations omitted.) One commentator has pointed out, however, that '. . . unconscionability turns

[3] The Court's analysis also appears to be consistent with the decision in *Cowin Equipment Co., Inc. v. General Motors Corporation*, 734 F.2d 1581 (11th Cir. 1984), another case relied upon by Paramount. In *Cowin* the Court held that unconscionability can be used to counter an affirmative defense but cannot be used as a "sword of restitution." (*Id.* at 1583)

not only on a "one-sided" result, but also on an absence of "justification" for it' (citation omitted), which is only to say substantive unconscionability must be evaluated as of the time the contract was made. (Citation omitted.) The most detailed and specific commentaries observed that a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. (Citations omitted.) But not all unreasonable risk allocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability (citation omitted) such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated." (Citation omitted.) (*Id.* at 487)

### 4. *Unconscionability—All or Any Provision of the Contract*

There is no question that the law relating to the doctrine of unconscionability permits a court to strike down an entire contract or any provision thereof. Indeed, Civil Code section 1670.5, quoted in footnote 2 hereof, so provides. See also *Perdue, supra,* at 925–926.

Paramount, while apparently recognizing the above quoted law, argues that it would be impermissible to apply the unconscionability doctrine to this case. As the Court understands it, Paramount's argument has two prongs. First, Paramount argues that a court may strike an unconscionable clause of a contract only where that clause is "divisible." (Memorandum of Points and Authorities of Defendant Paramount Pictures Corporation Re Phase II Hearing on Legal and Contract Interpretation Issues, filed July 24, 1990, at p. 15) (hereinafter referred to as "7/24/90 Memo.") Paramount contends that in the present case, plaintiffs are impermissibly attacking "financially interrelated provisions" and demanding "an individual defense of each." (*Id.*) Second, relying on a number of so-called "price" cases, Paramount argues that "profitability is not relevant to unconscionability." (Letter from Paramount's counsel dated October 10, 1990, attached to Notice of Filing Prior Correspondence to Court, filed November 9, 1990)

Addressing the last argument first, it is apparent that the events that occurred at the November 8, 1990, hearing in this case have rendered Paramount's second argument moot. A little discussion of the history of this case is required in order to validate this conclusion.

In many documents filed with the Court prior to November 8, 1990, Paramount argued that its net profit formula was justified, and indeed required, in order to permit it to remain in business. For example, in the Response of Defendant Paramount Pictures Corporation to Plaintiffs' Preliminary Statement of Contentions, filed May 21, 1990 (hereinafter referred to as "5/21/90 Memo"), Paramount argued:

> "In agreeing to underwrite what it could thus anticipate to be a $66.5 million investment, Paramount alone bore the risk that the Picture (sic) would not be produced or, if produced, would not commercially succeed and that its investment would be lost. In contrast, Bernheim and Buchwald risked nothing. Not surprisingly, Paramount obtained from Buchwald and Bernheim, as it does in varying degrees of all net participants, the right to attain gross receipts in excess of its direct out-of-pocket costs before it began sharing those receipts with participants. This simply reflects an attempt by the studio to balance the enormous economic risks attendant to motion picture production by insuring that the studio will reap a fair portion of the rewards resulting from a commercial success. As a means for compensating for an allocation of risks in the motion picture industry that places all the uncertainties on the studio, Paramount's contracts with Bernheim and Buchwald are not unconscionable. . . ." (at 12)



Similarly, in its 7/24/90 Memo Paramount stated:

> "As forty years of studio-talent bargaining has established, a studio is entitled to a return commensurate with the risks of movie-making. *Otherwise, it could not remain a viable business.* (Citations omitted.) There is nothing unfair or unreasonable about how the 'Net Profits' formula strikes this balance. . . .
>
> "The level of return allowed to Paramount under its 'Net Profits' formula is more than offset by the risks that the studio alone takes. As plaintiffs' experts readily conceded, 'Net Profits' participants bear no risk; if a film flops, participants have no obligation to take up the shortfall and their up-front fee is guaranteed. (Citations omitted.)
>
> "In contrast, the studio's risks are enormous. When it signed the Buchwald and Bernheim contracts, Paramount assumed the risk that, despite substantial script development costs (nearly $500,000), the picture might never be made and that, even if made, the picture would not make money. Paramount spent $40 million to produce 'Coming to America' and committed another $35 million to an advertising and a promotional campaign with no assurance that a single theater admission would be sold. (Citation omitted.)
>
> "The risk of failure in the motion picture business is ever-present, immense, and unmitigable. . . ." (Emphasis added.) (at 19–21)

The Court interpreted the above quoted statements of Paramount, and many others like them, to mean that Paramount was attempting to justify its net profit formula on the ground that this formula was necessary for Paramount's survival. Indeed, when Paramount's counsel stated, "[o]therwise it could not remain a viable business" (7/24/90 Memo at 19), the Court understood Paramount to mean what its counsel had stated.

It was because Paramount argued that its net profit definition was justified by the exigencies of the film industry that the Court decided to appoint its own accounting expert, pursuant to Evidence Code section 730. Indeed, the November 8, 1990, hearing was scheduled for the specific purpose of defining the tasks to be performed by the Court's expert. This would have included, of course, an examination of Paramount's books and records to determine the accuracy of Paramount's representation with respect to its profitability, the number of films that make and lose money, and whether it was necessary for successful films to subsidize unsuccessful films.[4] Remarkably, it was at this same hearing that counsel for Paramount abandoned the argument that Paramount's net profit formula was required by the nature of the motion picture business.

Paramount's abandonment of its "justification" argument rendered inquiry into Paramount's profitability moot and the appointment of the Court's expert unnecessary. This abandonment also renders inapplicable the so-called "price" cases relied upon by Paramount. These "price" cases were submitted to the Court, according to Paramount, to establish the point that "profitability" is not relevant to unconscionability." (October 10, 1990, letter, *supra,* at p. 1) Since Paramount no longer seeks to

[4] So long as Paramount maintained its net profit formula was justified by the nature of the motion picture industry, the Court felt an inquiry into Paramount's profitability was necessary and proper. In effect, Paramount was arguing that the net profit formula was justified in order to properly allocate the risks between Paramount and Bernheim, Paramount's position being that it bore substantially all of the risks. The Court reasoned that if Paramount's representations as to its profitability were untrue, i.e., if it really ran no meaningful risk because of the profit structure of its business, then its argument that the net profit formula was justified would fall by its own force. The Court concluded it was required to engage in an allocation of risk analysis because, as noted in *A & M Produce Co., supra,* "[a] contract is largely an allocation of risks between the parties, and therefore . . . a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." (135 Cal. App. 3d at 487)

defend its net profit formula on the ground it is justified by the nature of its business, it is clear Paramount's profitability is irrelevant to the determination of whether the contract involved in this case is unconscionable.

As indicated above, Paramount also argues that the Court may not strike down all or any portion of the net profit definition because that definition is part of the entire compensation package between Paramount and Bernheim. Paramount further argues that it would not have paid Bernheim as much "up-front" money if it had known many of the components of the net profit formula would be invalidated, and that Bernheim will reap a windfall if the Court finds unconscionable portions of the net profit formula.

Paramount's argument is based on the proposition that the dispute between the parties is one over price. The Court is not convinced that this is the case. However, even if Paramount is correct, it is "clear that the price term, like any other term in a contract, may be unconscionable." *Perdue, supra,* at 926. In fact, in *Perdue* the Court stated:

> "The courts look to the basis and justification for the price (citation omitted), including 'the price actually being paid by . . . other similarly situated consumers in a similar transaction.' (Citation omitted.) The cases, however, do not support defendant's contention that a price equal to the market price cannot be held unconscionable. While it is unlikely that a court would find a price set by a freely competitive market to be unconscionable (citation omitted), the market price set by an oligopoly should not be immune from scrutiny. Thus courts consider not only the market price, but also the cost of the goods or services to the seller (citations omitted), the inconvenience imposed on the seller (citation omitted), and the true value of the product or service (citation omitted)." (38 Cal. 3d at 926–927)

In the present case, the Court has already found the Bernheim-Paramount contract to be adhesive. Moreover, it is clear, as the Court has already found, that contractual relations between certain talent and studios, at least talent such as Bernheim who lack the "clout" of major stars, do not take place in a freely competitive market. Rather, it is clear that if a talent such as Bernheim wishes to work in the film industry, he must do so on terms substantially dictated by the studio. This is particularly true with respect to the net profit formula contained in the contract involved in this case. As previously indicated, Paramount simply does not negotiate with respect to its net profit formula with talent such as Bernheim.

Additionally, Paramount's argument that it would be unfair if the Court found any part of the net profit formula unconscionable is based on the faulty premise that the only thing that mattered to Bernheim was the "up-front" money. While it is true Bernheim's agent, Roger Davis, testified that "up-front" money was important to Bernheim, he also testified that the other important consideration was "to get the project developed into a form where it could be made the basis of a motion picture." (Davis depo at 54) Presumably, Bernheim wanted to make a picture so that he could profit from it. (See Davis depo at 33; see also Youngstein depo at 121–122)

Moreover, Paramount's argument that net profits represented a relatively insignificant part of Bernheim's total compensation package flies in the face of other evidence in the record. For example, in his Supplemental Declaration, Carmen Desiderio, Paramount's Vice-President of Contract Accounting, testified that Paramount had paid more than $150 million in net profits over the past 15 years, using the net profit formula contained in Bernheim's contract, or one similar to it. Additionally, Paramount itself admitted in its 7/24/90 Memo, at 25, that " 'Net Profits' are a valuable form of contingent compensation, not the 'cruel hoax' that plaintiffs insinuate." Indeed, *Paramount's* "turnaround" provision provides for *Paramount* to receive net profits in the event Bernheim was successful in convincing another studio to make a film based on Buchwald's treatment. (Bernheim Deal Memo, at p. 2)



Further, the doctrine of unconscionability would be rendered nugatory if a contracting party could escape its application by negotiating some monetary provisions, while at the same time imposing unjustifiably onerous provisions with respect to other contract provisions. Yet, that is precisely what Paramount argues is permissible.

Paramount has referred the Court to four cases[5] which, it is contended, supports Paramount's position that the Court may not strike down certain provisions of its net profit formula while enforcing the remainder of the contract with Bernheim. Paramount's argument is totally refuted by the provisions of Civil Code section 1670.5, which specifically permits the Court to "enforce the remainder of the contract without the unconscionable clause" or to "limit the application of any unconscionable clause so as to avoid any unconscionable result." Moreover, none of the four cases relied upon supports Paramount's argument, and at least one refutes it.

In *York, Sykes* and *Chow* the respective courts did not address the question of whether a provision of a contract may be struck as unconscionable, while the balance of the contract is enforced. Indeed, if either of the two out-of-state cases had answered that question in the negative, the result would have been contrary to the express provisions of Civil Code section 1670.5.[6]

Furthermore, the other California case cited by Paramount, *IMO Development,* at least by implication refutes Paramount's argument. In *IMO Development,* the Court specifically held that a contract cannot be partially rescinded, i.e., a party cannot seek to rescind part of a contract and seek enforcement of the remainder. The Court in *IMO Development* never addressed the doctrine of unconscionability because it had never been pled. The language utilized by the Court strongly suggests, however, that if unconscionability had been pled, the result under that doctrine might well have been different than the decision reached on the issue of partial rescission. The Court in *IMO Development* stated:

> "What IMO does allege is that its *consent* was obtained by economic duress. Business or economic duress '. . . exists when threats to business or property interests by way of coercion and/or wrongful compulsion are present.' (Citation omitted.) *That, however, is not tantamount to a showing of unconscionability. In other words, the presence of a supposed unconscionable contract provision, such as would admit to differential enforcement, does not logically provide for differential rescission.*" (Emphasis in original.) (*Id.* at 460)

In sum, the Court concludes that there is nothing about the contract involved in this case, or the circumstances surrounding its execution, which precludes the Court from addressing the issue of whether certain component parts of the net profit definition are unconscionable. The next issue that must be addressed is the appropriate manner of applying the doctrine of unconscionability to the contract involved in this case.

### 5. *Unconscionability—The Doctrine Applied*

Plaintiffs have challenged as unconscionable a number of provisions of Paramount's net profit formula. The challenged provisions include: 15 percent overhead on Murphy and Landis participation; 15 percent overhead on Eddie Murphy Productions operational allowance; 10 percent advertising overhead; 15 percent overhead; interest on

[5] These cases are *York v. Georgia-Pacific Corp.,* 585 F. Supp. 1265 (N.D. Miss. 1984); *Sykes v. Perry,* 162 Kan. 365 (1947); *IMO Development Corp. v. Dow Corning Corp.,* 135 Cal. App. 3d 451 (1982); and *Chow v. Levi Strauss,* 49 Cal. App. 3d 315 (1975).

[6] *Chow, supra,* was decided before Civil Code section 1670.5 was enacted. It is obvious, therefore, that the Court in that case could not have considered the applicability of that section.

negative cost balance without credit for distribution fees; interest on overhead; interest on profit participation payments; the interest rate not being in proportion to actual cost of funds; exclusion of 80 percent of video cassette receipts from gross receipts; distribution fee on video royalties; charging as distribution costs residuals on 20 percent video royalties; charges for services and facilities in excess of actual costs; no credit to production cost for reusable items retained or sold; charging taxes offset by income tax credit; charging interest in addition to distribution fees; 15 percent overhead in addition to distribution fees; and 10 percent advertising overhead in addition to distribution fees.

Paramount has never argued that any of these provisions are individually fair and reasonable. Rather, as has been indicated, Paramount has argued that the Bernheim-Paramount contract must be considered as a whole, that that contract is fair and reasonable and, therefore, the Court is not permitted to focus on individual provisions of the net profit formula to determine if such provisions are unconscionable. As discussed above, the Court rejects the argument that it is impermissible for it to focus on individual provisions of the net profit formula.

Plaintiffs, by contrast, have presented evidence which they argue supports their position that each of the challenged provisions are unconscionable. The Court is not persuaded that plaintiffs have sustained their burden of proof with respect to *each* challenged item. In fact, with respect to a number of challenged items it appears plaintiffs would like the Court to make a finding of unconscionability based upon the mere description of the item and without supporting evidence. This the Court is not prepared to do. However, with respect to a number of provisions plaintiffs have sustained their burden of proving such provisions are "overly harsh" and "one-sided." *A & M Produce Co., supra,* at 487. Indeed, in light of Paramount's "all or nothing" approach to unconscionability, plaintiffs' evidence stands unrefuted.

The Court finds the following provisions of Paramount's net profit formula unconscionable for the reasons indicated:

1. *Fifteen Percent Overhead on Eddie Murphy Productions Operational Allowance.* The Court finds this provision unconscionable because an additional 15 percent charge is made for overhead "on top of" this item. In effect, this results in charging overhead on overhead. The Court is able to perceive no justification for this obviously one-sided double charge and Paramount has offered none.

2. *Ten Percent Advertising Overhead Not in Proportion to Actual Costs.* This flat overhead charge, which has no relation to actual costs, adds significantly to the amount that must be recouped by Paramount before the picture will realize net profits. Again, the Court is able to discern no justification for this flat charge and Paramount has offered none.

3. *Fifteen Percent Overhead Not in Proportion to Actual Costs.* Paramount's charge of a flat 15 percent for overhead yields huge profits, even though the overhead charges do not even remotely correspond to the actual costs incurred by Paramount. In this connection it should be observed that although Paramount originally contended that this charge was justified because "winners must pay for losers" (Sapsowitz Deposition at 65), this justification was abandoned by Paramount during the November 8, 1990 hearing held in this case.

4. *Charging Interest on Negative Cost Balance Without Credit for Distribution Fees.* Paramount accounts for income on a cash basis, while simultaneously accounting for cost on an accrual basis. This slows down the recoupment of negative costs and inflates the amount of interest charged. The Court finds this practice to be "one-sided" in the absence of a justification for the practice.

5. *Charging Interest on Overhead.* Paramount receives revenues in the form of distribution fees and overhead charges, neither of which are taken into account in determining whether costs have been recouped. This results in "interest" becoming an additional source of unjustified profit. The Court finds this practice to be "overly harsh" and "one-sided," and thus unconscionable.

6. *Charging Interest on Profit Participation Payments.* Paramount charges the payments made to gross participants to negative costs. In fact, these payments are not paid until the film has derived receipts. Accordingly, Paramount has not in any real sense advanced this money. Nevertheless, Paramount charges interest on gross participation shares. This is unconscionable.

7. *Charging an Interest Rate Not in Proportion to the Actual Cost of Funds.* Paramount charges an interest rate which can be as much as 20 to 30 percent (Zimbert Deposition at 172), even when no funds have been laid out by Paramount. This is a one-sided, and thus unconscionable, provision.



In sum, the Court concludes that the foregoing provisions of Paramount's net profit formula are unconscionable. The conclusion that these provisions are unconscionable is by no means the end of the analytic trail. While this conclusion does actuate the Court's powers under Civil Code section 1670.5, it remains to be decided how those powers should be invoked.

As noted in *A & M Produce Co., supra,* "unconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process." (135 Cal. App. 3d at 484) Similarly, in *Frostifresh Corporation v. Reynoso,* 274 N.Y.S. 2d 757, 759 (1966) the Court stated that paragraph 2–302 of the Uniform Commercial Code, upon which Civil Code section 1670.5 is based, gives "the courts power 'to police explicitly against the contracts or clauses which they find to be unconscionable.' "

This Court interprets the cases dealing with the doctrine of unconscionability as authorizing the Court to use its powers under Civil Code section 1670.5 to produce an equitable result. Indeed, "equitable" would appear to be the antithesis of "unconscionable." In *Graham v. Scissor-Tail, Inc., supra,* the Court specifically recognized that the doctrine of unconscionability involves "a principle of equity applicable to all contracts generally— . . . that a contract or provision, even if consistent with the reasonable expectation of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' " 28 Cal. 3d at 820. See also *Slaughter v. Jefferson Federal Savings and Loan Association,* 361 F. Supp. 590, 602 (D.C.D.C. 1973), in which the Court, after concluding the provisions of a contract were unconscionable, stated that in such circumstances "[t]he Court has broad discretion to fashion relief appropriate to the situation presented. . . ."

Since it is the task of the Court to achieve an equitable result, the question before the Court is: What decision is necessary in order to produce such a result? Plaintiffs answer this question by arguing that Bernheim is entitled to receive the compensation provided for in paragraph D.2.b of the Bernheim Deal Memo, after all of the unconscionable provisions are stricken and after permitting Paramount to recoup its actual costs plus a reasonable rate of return on its investment. Counsel for Paramount, although specifically asked by the Court during oral argument on December 6, 1990, stated he had no position with respect to this issue in light of his view that the Court could not determine that individual provisions of the net profit formula were unconscionable.

After careful consideration, the Court has concluded plaintiffs' approach must be rejected because it does not produce an equitable result. There are a number of reasons for the Court's conclusion.

If the Court were to strike all of the challenge provisions of the net profit formula that it has found to be unconscionable and permit Paramount only to recover its costs, plus a reasonable rate of return, the result would be an inequitable windfall to Bernheim. Stated another way, accepting plaintiffs' argument would result in Bernheim receiving a profit far beyond the contemplation of the parties at the time the contract was entered into and, apparently, far beyond the profit a producer with Bernheim's experience and track record would reasonably have been expected to earn.

The Court believes it does not have sufficient facts to fix the amount that Paramount should be required to pay Bernheim in this case. The Court intends, therefore, to defer to the third phase of this trial the amount of damages to which Bernheim is entitled and the manner in which such damages should be calculated. The Court anticipates that expert testimony may be required. Further, the Court desires to hear argument from counsel concerning these issues, particularly with respect to the factors that the Court should consider in arriving at an equitable award. Although counsel for Paramount has heretofore declined to take a position with respect to these issues, the Court assumes that, in light of the views expressed by the Court herein, counsel will now proffer Paramount's position.

The Court also desires to emphasize that its focus in the third phase will be on awarding damages to Bernheim which are fair and reasonable, but which will not result in Bernheim receiving a windfall, i.e., an award far beyond the reasonable expectations of the parties when the contract was executed.

The Court also intends to defer ruling on the amount to which Buchwald is entitled until after the amount due Bernheim is fixed. The Court observes, however, that under the contracts as written, Buchwald was to receive only a fraction of the net profits to which Bernheim would have been entitled (1½ percent for Buchwald; 17½ to 40 percent for Bernheim). The Court will in all likelihood be influenced by this fact in setting the amount due Buchwald.

### C. *The Juxtaposition of Unconscionability and the Consultation Clause*

Paragraph D.2.b of the Bernheim Deal Memo contains the so-called "consultation clause." That clause provides that Bernheim "will be consulted on gross- and net-profit participations granted by PPC to third parties, but PPC's decision shall be final."

Bernheim contends that Paramount breached the consultation clause by not consulting with him. Paramount argues that the consultation clause is not significant since Paramount retained the right to make the final decision with respect to granting gross- and net-profit participations. The Court finds it unnecessary to resolve this dispute.

If Bernheim is correct, the result would be that he is entitled to receive 33.5 percent of the net profits on *Coming to America* under the net profit formula contained in the contract as written. This conclusion follows from Bernheim's position that, by reason of Paramount's breach of the "consultation" clause, he is entitled to the highest percentage of net profit permissible under paragraph D.2.b of the Deal Memo and Bernheim's concession that that highest percentage is 33.5 percent. If Paramount is correct, the result would be that Bernheim is entitled to receive only 17½ percent of net profits (the floor established in Section D.2.b of the Bernheim Deal Memo) under the net profit formula contained in the contract as written.

In the preceding section of this Tentative Decision, however, the Court has concluded that a number of provisions of the net profit formula as written are unconscionable. The Court has also determined that it will follow a different path in arriving at equitable compensation for Bernheim and Buchwald in light of such unconscionability. Since, pursuant to the Court's ruling, the net profit formula as written no longer exists, it makes no difference whether Bernheim or Paramount is correct with respect to the percentage of net profits to which Bernheim is entitled. This factor also makes Paramount's alleged breach of the consultation clause irrelevant.



### D. *The "Turnaround" Provision*

As indicated above, one of the component parts of the contract between Paramount and Bernheim is the so-called "turnaround" provision. The purpose of the "turnaround" provision is to permit a producer to take his project to another studio if the first studio is no longer interested in pursuing it, while at the same time permitting the first studio to recoup its development costs if the project is undertaken by the second studio. (Hahn Declaration, paragraph 19; Sattler Declaration, paragraph 53; Denman 6/28/90 Deposition at 55) Insofar as is pertinent to the present case, the "turnaround" agreement provides:

> "If, prior to the expiration of the turnaround period, the project is not placed elsewhere and/or if Lender has not complied with the conditions above, including, without limitation, complete reimbursement to Paramount, then at the end of the turnaround period, Lender's rights with respect to the project shall cease and Paramount's ownership thereof and all properties and rights encompassed therein shall be absolute."

The facts with respect to the application of the "turnaround" agreement to the present case are these: In March 1985 Paramount purported to give notice that it was abandoning the project that had been inspired by Buchwald's treatment. In May 1985 Paramount permitted its option with respect to the Buchwald material to expire. Paramount contends that since Bernheim failed to set up the project at another studio within the 12-month period ending in March 1986, the "turnaround" agreement extinguished any obligations Paramount had with respect to Bernheim.

It is true, as Paramount argues, that if the "turnaround" provision is considered in isolation, it would appear Bernheim's rights to compensation ended in March 1986. The vice of Paramount's argument is that the "turnaround" provision cannot be considered in isolation. Paragraph D.1 of the Bernheim Deal Memo provides, in pertinent part, that "[i]f the Picture is produced, Lender will furnish the services of Artist, who shall be employed by PPC to personally render all customary services as producer."

The Court has already concluded that the picture was made, i.e., that *Coming to America* was "based upon" Buchwald's treatment entitled "King for a Day." In light of this conclusion, it is clear Paramount was required to employ Bernheim as producer on *Coming to America* and that Paramount breached its contract with Bernheim by failing to do so. It would make no sense to conclude that Paramount breached the agreement by failing to employ Bernheim, while at the same time concluding Bernheim's right to compensation was terminated by application of the "turnaround" provision.

In reality, and the Court so finds, it was never contemplated that the "turnaround" provision would apply in a situation such as is presented by the facts of this case. Moreover, to the extent that there exists an ambiguity by reason of the existence of paragraph D.1 and the "turnaround" provision, it is clear that such ambiguity must be resolved against Paramount as drafter of the agreement. Civil Code section 1654; *Jacobs v. Freeman*, 104 Cal. App. 3d 177, 189 (1980).

Finally, the Court observes that one of the important purposes, perhaps the most important purpose of the "turnaround" provision, from Paramount's perspective, was to permit it to recoup its costs in the event Bernheim placed the project at another studio. In the present case that purpose has been satisfied since it is too clear to doubt Paramount has recovered all of its costs on *Coming to America*.

### E. *The Co-Venturer and Fiduciary Duty Issues*

Bernheim contends that he and Paramount were co-venturers and that Paramount owed a fiduciary duty to him. With one exception to be discussed below, the Court is unable to agree with either of these contentions.

Whether or not the relationship between parties is that of co-venturer is essentially a question of fact. *Nelson v. Abraham* 29 Cal. 2d 745, 750 (1947). Few, if any, of the features that usually characterize a joint venture are present in this case. Bernheim did not have a right at all times to inspect and copy the purported venture's books and records (*Milton Kauffman v. Superior Court*, 94 Cal. App. 2d 8, 17 (1949)) and Paramount had pervasive control over the purported venture. Moreover, while there was an agreement between Bernheim and Paramount with respect to the sharing of profits (but not losses) (see *Howard v. Societa Di Unione, etc.* 62 Cal. App. 2d 842, 848 (1944)), Paramount retained the virtually unlimited power to determine whether Bernheim ever received any profit. The factors present in this case do not point to the existence of a joint venture between Bernheim and Paramount.

The Court is also unable to find the existence of a fiduciary relationship between Paramount and Bernheim, except with respect to Paramount's duty to render an accounting. *Waverly Productions v. RKO General, Inc.*, 217 Cal. App. 2d 721 (1963). In fact, the Court disposed of Bernheim's fiduciary duty claim in the Statement of Decision that was issued in the first phase of this case. In its Statement of Decision the Court stated:

> "In addition to their contract claims, plaintiffs have advanced several tort theories of recovery, namely, bad faith denial of existence of contracts, bad faith denial of liability on their contracts, tortious breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraudulent concealment by a fiduciary and constructive trust. The obvious reason plaintiffs have asserted tort causes of action is to recover punitive damages since, absent such damages, the Court is able to discern no difference between any tort damages plaintiffs might recover and their contract damages.
>
> "The Court has concluded, as indicated, that *Coming to America* was based upon Buchwald's treatment. The Court is unable to find, however, any tortious conduct on the part of Paramount or any of its representatives. In order to award punitive damages to plaintiffs, the Court would be required to find by clear and convincing evidence that defendant was guilty of fraud, oppression or malice, as those terms are defined in Civil Code section 3294. While the Court rejects Paramount's contention that *Coming to America* is not 'based upon' 'King for a Day,' the Court is unable to conclude that Paramount's conduct was in bad faith, let alone fraudulent, oppressive or malicious. Accordingly, while plaintiffs are entitled to recover on their breach of contract claims, the Court finds the defendant is entitled to judgment on plaintiffs' tort claims." (Statement of Decision (First Phase) at 33–34)[7]

In light of the Court's finding that Paramount's conduct was not tortious, the issue of whether a fiduciary duty existed between Bernheim and Paramount and, if so, whether Paramount breached that duty has been rendered moot. As indicated, however, the Court does find that a fiduciary duty exists with respect to Paramount's duty to render an accounting. *Waverly Productions v. RKO General, Inc., supra.*

### F. *The Covenant of Good Faith and Fair Dealing*

Plaintiffs argue that Paramount breached the implied covenant of good faith and fair dealing by improperly or excessively charging a number of different items as costs on *Coming to America*. Paramount has countered by arguing that plaintiffs will be given the opportunity to challenge these costs in the third (damage) phase of this trial.

In a preceding section of this Tentative Decision, the Court has ruled that a number of provisions of Paramount's net profit formula are unconscionable. The Court also indicated that it intends to fashion relief that will produce an equitable result in this case. In light of the Court's ruling, it appears to the Court that application of the doctrine of unconscionability will produce damages at least equal to damages that could be awarded for a breach of the covenant. The Court finds it unnecessary, therefore, to determine whether a breach of covenant has in fact occurred.

[7] In the same Statement of Decision the Court did indicate that "depending on the evidence adduced during the accounting phase,the possibility exists that Paramount's accounting practices may make the imposition of tort damages appropriate." Statement of Decision (First Phase) at 34.



If a statement of decision is requested with respect to this phase of the trial, it shall be prepared by counsel for plaintiffs. This Tentative Decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the Tentative Decision. Rule 232, Cal. Rules of Court.

DATED: December 21, 1990.

HARVEY A. SCHNEIDER
Judge of the Superior Court

# Appendix C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| ART BUCHWALD, et al.,<br>Plaintiffs,<br>v.<br>PARAMOUNT PICTURES CORPORATION, etc., et al.,<br>Defendants. | No. 706083<br>STATEMENT OF DECISION [THIRD PHASE] |

*Introduction*

In the first phase of the trial of this case, the court concluded that Paramount's highly successful film "Coming to America" was "based upon," i.e., inspired by, a concept created by humorist Art Buchwald. In the second phase of the trial the court decided, *inter alia*, that certain provisions of Paramount's net profit formula were unconscionable. In a subsequent Order filed June 14, 1991, the court referred "to cases which indicate that 'unconscionability is a flexible doctrine' " (*A&M Produce Co. v. FMC Corporation*, 135 Cal. App. 3d 473, 484 (1982)) that gives the courts power "to police explicitly against the contracts or clauses which they find to be unconscionable." *Frostifresh Corporation v. Reynoso*, 274 N.Y.S. 2d 757, 759 (1966). The court then stated that it "interpreted these and other cases to mean that Civil Code Section 1670.5 permits the court to exercise the discretion granted by that section in a manner that produces an equitable result. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 (1981)." (June 14, 1991, Order at 1–2.) In the same Order the court indicated that it was refusing to enforce the contract between the parties because it was permeated with unconscionability and that, as a result, "it would be appropriate to measure . . . [the recovery of plaintiffs] by the fair market value of plaintiffs' contributions to 'Coming to America.' " (*Id.* at 4.) The court further states that it was "able to discern no meaningful distinction between this approach, which was suggested by plaintiffs, and the *quantum meruit* approach which was alternatively suggested by Paramount." (*Id.* at 4.)

As a consequence of the court's decisions in the first two phases of this case and the June 14, 1991, Order, the third and final phase of this case was concerned with establishing the compensation to which plaintiffs Alain Bernheim and Art Buchwald are entitled.

### *Summary of the Evidence Presented*

Plaintiffs approached the issue of the contributions of Bernheim and Buchwald to the success of "Coming to America" by assuming that in 1987 Paramount had given the go-ahead for a motion picture to be made based on Buchwald's concept, and that Paramount was already committed to pay Eddie Murphy and John Landis millions of dollars in compensation, whether or not the picture was actually made. Not surprisingly, under this "gun-to-the-head" approach to fair market value, one of plaintiffs' witnesses (Jeffrey Robin) opined that Bernheim and Buchwald were entitled to combined compensation in the amount of $6.2 million. (3/3/92 Tr. at 43.)[1]

The court rejects plaintiffs' approach to the issue of the compensation to which Bernheim and Buchwald are entitled, and specifically rejects as unfounded in fact the testimony of Mr. Robin. In rejecting this testimony, the court wishes to make it clear that it does not doubt Mr. Robin's good-faith belief in the opinion expressed by him.

Paramount, on the other hand, proffered the opinions of three experienced motion picture producers and executives, all of whom testified that Bernheim is entitled to "up-front" compensation in the range of $150,000–$200,000, and Buchwald in the range of $25,000–$65,000. All of these witnesses believe Bernheim and Buchwald are entitled to no additional contingent compensation because "Coming to America" has generated no net profits.

Paramount's economist, Benjamin Klein, utilizing a regression analysis, testified that Bernheim was entitled to compensation in the amount of $252,000. He also opined that Buchwald was entitled to compensation in the range of $22,000–$82,000.

Although the court believes Paramount's experts came closer to the mark in establishing the compensation to which plaintiffs are entitled than did plaintiffs' experts, the court is not prepared to accept the opinion of Paramount's experts *in toto*. Specifically, the court declines to accept in full the testimony of Paramount's motion picture producers and executives because, as discussed below, the court believes these witnesses failed to give sufficient consideration to factors which increase the compensation to which plaintiffs are entitled. The court declines to accept in full Professor Klein's analysis in part because, by his own admission, his opinion is based upon arbitrary assumptions (3/4/92 A.M. Tr. at 67; 72–73). Moreover, the court observes that even Professor Klein was required to admit that if certain adjustments were made for provisions of the net profit formula which the court found to be unconscionable, Bernheim's compensation would increase to $347,000 (3/4/92 A.M. Tr. at 74).

### *The Court's Approach to the Value of Bernheim's Services*

Since the court declines to accept either plaintiffs' or defendants' evidence, is the court entitled to establish compensation within the parameters established by the evidence of the parties? Under established law, the answer to this question is clearly in the affirmative. Thus, in *People ex rel. Department of Public Works v. Peninsula Enterprises, Inc.*, 91 Cal. App. 3d 332, 346–347 (1979) the court stated:

[1] The court fully understands that in August 1991, it stated that the appropriate time frame for assessing damages was 1987. It was not the court's intention to suggest, however, that it would assess damages in 1987 based on a scenario that gave Paramount no choice but to pay large sums of money to Bernheim and Buchwald.



"In assessing the opinions of the valuation witnesses, however, the trier of fact is not required to accept the testimony of any one witness in total, but may instead, after balancing and reconciling the various opinions of the witnesses and their bases, decide upon a value which falls within the range of the opinion testimony. (Citations omitted.)"

Similarly, in *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App. 3d 384, 409 (1969) the court made the following observations:

". . . 'However, "Upon the trier of fact rests the responsibility to reconcile, if possible, any apparent conflict, whether the same arises upon the entire case or in the testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition." ' (Citation omitted.) In this case the jurors after viewing the premises and hearing all the testimony may have determined that the property was not desirable for church purposes after the taking, but that the improvements which would be lost were not as valuable as the church contended; or they may have determined that the property could be used for church purposes after the taking, but would have a depreciated market value because any expansion would lead to crowded conditions."

See also *South Bay Irrigation District v. California-American Water Co.*, 61 Cal. App. 3d 944, 968–969 (1976).

Finally, the court notes that in eminent domain cases it is provided by statute that "[t]he fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable." (Code of Civ. Proc. § 1263.320(b).) By analogy, the court believes the concept expressed in Code of Civil Procedure section 1263.320(b) may be applied in this case, since Civil Code section 1670.5 permits the court to fashion an equitable result.

As indicated, the court has rejected as unpersuasive plaintiffs' evidence of value. Moreover, while the court finds Paramount's evidence to be more persuasive, the court concludes that the opinions of value expressed by Paramount's experts are too low for the reason that such experts failed to ascribe sufficient value to factors which the court believes are important. It is these factors to which the court now turns.

At the outset, the court notes that under the contract entered into by Bernheim and Paramount, Bernheim was to received $200,000 in "up-front" compensation if a movie was made based upon Buchwald's concept and, in addition, contingent compensation in the amount of 33.5 percent of net profits reducible to 17.5 percent.[2] This deal, which was negotiated at a time when the parties believed the net profit formula was valid, is better than the amount some of Paramount's experts believe Bernheim is presently entitled to receive. In other words, Paramount's experts appear to ascribe no value to the kind of deal Bernheim might have been able to negotiate had both parties known the net profit formula was invalid.

The court also believes Paramount's experts have failed, in arriving at the value of Bernheim's compensation, to give sufficient consideration to the fact that Bernheim controlled Buchwald's concept—a concept that virtually everyone who testified at trial indicated was unique[3]—and that this control enhanced the value of Bernheim's services. Similarly, although several of Paramount's experts opined that the fact Buchwald's name was associated with the project would have resulted in increased media

[2] Although the contract between the parties actually provided that Bernheim was to receive 40 percent of net profits reducible to 17.5 percent, plaintiffs have stipulated that the actual percentage should be 33.5 percent.

[3] Plaintiffs' expert, Howard Suber, testified that he was aware of no other motion picture that involved a member of African royalty Coming to America and becoming involved in life in the urban ghetto. (3/3/92 Tr. at 99–100.)

attention, it appears to the court none of these ascribed any additional value to that fact.

Further, although the evidence revealed that Eddie Murphy and John Landis earned millions of dollars in "up-front" compensation for their respective roles in "Coming to America," and although plaintiffs' expert, Dr. Suber, testified that the twin pillars of the success of "Coming to America" were Buchwald's concept and Murphy's persona, none of Paramount's witnesses appeared to take these factors into consideration in arriving at Bernheim's compensation.[4]

Finally, and importantly, the court notes that although Paramount has earned tens of millions of dollars of profits from "Coming to America," none of Paramount's experts considered that fact in arriving at the compensation to be paid to Bernheim. The fact is, however, that it is entirely permissible for the court to consider the success of "Coming to America" in determining what compensation should be awarded Bernheim. Thus, in *How J. Ryan and Associates v. Century Brewing Association*, 55 P. 2d 1053, 1054 (1936) the Supreme Court of Washington observed:

> "The value of the property right or the value of the services each depend upon the value of the idea to the user and evidence as to the extent of the use and the volume of sales would be admissible in either case."

The same principle of law was enunciated by the California Supreme Court in *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 667 (1950), wherein the court stated:

> "In the present case, both plaintiff and his expert witness testified as to the estimated worth of the program idea, and as to the custom in the industry to pay the author a certain percentage of the production costs based on the number of weeks the show was on the air. 'The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case, the proper measure or damages is generally its actual value of its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist—such as its cost, the cost of reproducing or replacing it, its utility and use. . . .' (Citation omitted.)"

Since the court has decided that the evidence of the parties sets the outside limits (i.e., the high and low) of the compensation to which Bernheim is entitled, but not the precise amount of that compensation, the question remains: To what compensation is Bernheim entitled? In reaching this decision, the court is fully mindful of the fact that its task is to produce a fair and equitable result—neither a windfall to Bernheim nor unjust enrichment for Paramount. Additionally, since the standard for an expert witness "is not mathematical exactness but only a reasonable approximation" (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 408 (1940)), it is clear the trier of fact cannot be held to a stricter standard.

Having considered all the above, the court believes the fair and just compensation for Bernheim for his contribution to "Coming to America" is $750,000. The court observes that, given the fact it was stipulated that Paramount has earned tens of millions of dollars of profits from "Coming to America," the compensation awarded to Bernheim represents less than 1 percent of Paramount's profits (if "Coming to America" generated profits as high as $100 million) and less than 5 percent of Paramount's

[4] There was testimony adduced at trial that Bernheim's contribution to "Coming to America" was comparable to that of John Landis, the director. While the court seriously doubts this is true, the fact that Bernheim made a lesser contribution to "Coming to America" than Landis did not justify Paramount's experts in ascribing little value to Buchwald's concept and Bernheim's control of it.



profits (if "Coming to America" generated profits as low as $20 million). In awarding compensation to Bernheim, the court has also considered the fact that "Coming to America" was the product of creative efforts by many persons other than Bernheim and Buchwald, although that film was clearly based upon Buchwald's concept and Bernheim had a significant role in the early development of that concept.

The court's decision concerning the compensation to which Bernheim is entitled is buttressed by other evidence in the record. For example, Paramount's Exhibit 901 is entitled "Data on Films Meeting Court Specified Discovery Criteria."[5] This summary reflects that total producer compensation on five comparable films ranges between $150,000 and $4.3 million. The amount awarded to Bernheim falls within the range of total compensation paid to producers on the comparable films.[6]

The court also finds Exhibit 157, and the testimony of Jeffrey Robin (3/3/92 Tr. at 195–197), to be somewhat helpful in arriving at the compensation to which Bernheim is entitled. Mr. Robin testified:

> "A: If one has gross participation, you're trying to determine how much net, in essence, you're giving away to third parties when you're converting gross to net. It's normal to do it at a two-to-one ratio, which is what Mr. Gelfan has done [in Exhibit 157]. If you look at Mr. Murphy's 15 percent of the gross, 29.5 percent of the net is approximately two times."

As the court interprets Exhibit 157 and Mr. Robin's testimony, Paramount and other studios consider 1 percent of gross profits to be the equivalent of 2 percent of net profits. In this case, Paramount's expert, David Picker, testified that Bernheim was entitled to receive contingent compensation of 10 percent of net profits reducible to 5 percent, and Paramount's other expert, Martin Ransohoff, testified that Bernheim was entitled to contingent compensation of 35 percent of net profits reducible to 12.5 percent. Taking the low number from each witness's testimony (Picker 5 percent and Ransohoff 12.5 percent) and utilizing the conversion factor of 1 percent of gross profits being equal to 2 percent of net profits, the result would be that 5 percent to 12 percent of net profits would be the equivalent of 2.5 percent to 6.25 percent of profits. Since Paramount has earned tens of millions of dollars of gross profits on "Coming to America," the range of gross profits to which Bernheim would be entitled, using these percentages and assuming a low gross profit figure of $20 million, would be $500,000 (2.5 percent of $20 million) to $1,250,000 (6.25 percent times $20 million). The amount awarded to Bernheim falls within this range.

### *The Court's Approach to the Value of Buchwald's Concept*

If the evidence presented by the parties was less than persuasive with respect to the compensation to which Bernheim is entitled, it was even less so with respect to Buchwald. Paramount's experts did opine, however, that Buchwald was entitled to compensation in the range of $22,000 to $82,000. As indicated, Jeffrey Robin, the only one of plaintiffs' experts who ascribed a number to the compensation to which Buchwald and

[5] It is significant to note that Paramount's economist, Dr. Klein, testified at trial that he believed "the court did an excellent job in terms of standardizing for the quality of the producers in terms of the court's criteria." (3/4/92 Tr. at 44.)

[6] The court is fully aware that the costs on "Coming to America" were far greater than on any of the comparable films. One of the main reasons for this is that substantial gross profit participation shares were paid to Eddie Murphy and John Landis. The court was presented, of course, with no evidence concerning the contributions made by any of the producers on the comparable films. The court has been presented, however, with evidence of a number of factors which the court believes increases the compensation to which Bernheim is entitled, which factors were not given sufficient consideration by Paramount's experts. The court has concluded, therefore, that Bernheim is entitled to the compensation awarded in this decision, notwithstanding the substantial costs on "Coming to America."

Bernheim were entitled, opined that the plaintiffs were entitled to combined compensation of $6.2 million.

As stated above, the court is unable to accept plaintiffs' evidence with respect to the compensation to which Bernheim and Buchwald are entitled. On the other hand, the court believes Paramount's evidence with respect to Buchwald's entitlement to compensation is even closer to the mark than was its evidence with respect to Bernheim. As was the case with Bernheim, however, the court finds that Paramount's experts failed to give sufficient consideration to factors which have caused the court to conclude Buchwald is entitled to somewhat more compensation than testified to by Paramount's experts. These factors include the uniqueness of Buchwald's concept and the effect of that concept on the success of "Coming to America"; Buchwald's stature as a nationally known humorist and the media attention that would result from a film based upon a concept created by him; and the fact that Paramount has earned tens of millions of dollars of profits on "Coming to America." Considering all of these factors, the court concludes Buchwald is entitled to compensation in the amount of $150,000.

DATED: March 16, 1992

HARVEY A. SCHNEIDER
Judge of the Superior Court