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7 for the David Zindel Trust and the Lizabeth Zindel Trust

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 DAVID ZINDEL, as Trustee for the
11 David Zindel Trust and the Lizabeth
12 Zindel Trust,

13 Plaintiff,

14 vs.

15
16 FOX SEARCHLIGHT PICTURES,
17 INC., a Delaware corporation;
18 TWENTIETH CENTURY FOX
19 FILM CORPORATION, a Delaware
20 corporation; TSG
21 ENTERTAINMENT FINANCE
22 LLC, a Delaware limited liability
23 company; MACMILLAN
24 PUBLISHERS, LTD., a subsidiary of
25 a German limited liability company;
GUILLERMO DEL TORO, an
individual; DANIEL KRAUS, an
individual; and DOES 1 through 10,
inclusive,

26 Defendants.

Case No.: 2:18-CV-01435

COMPLAINT FOR:

- [1] COPYRIGHT INFRINGEMENT
(17 U.S.C. §§ 101 *ET SEQ.*);
- [2] CONTRIBUTORY COPYRIGHT
INFRINGEMENT; and
- [3] VICARIOUS COPYRIGHT
INFRINGEMENT

DEMAND FOR JURY TRIAL

1 Plaintiff DAVID ZINDEL, as Trustee for the David Zindel Trust and the
2 Elizabeth Zindel Trust, by and through his attorneys of record, hereby alleges as
3 follows:

4 **NATURE OF THE ACTION**

5 1. Defendants' motion picture *The Shape of Water* (the "Picture"),
6 though presented to the public as a highly original work of fantasy/science
7 fiction, in reality, brazenly copies the story, elements, characters, and themes
8 from a work by Pulitzer-Prize-winning author Paul Zindel ("Zindel"). Zindel's
9 1969 play *Let Me Hear You Whisper* (the "Play") tells the story of a lonely
10 janitorial cleaning woman who works the graveyard shift at a scientific
11 laboratory facility that performs animal experiments for military use. There she
12 becomes fascinated by a fantastic intelligent aquatic creature, held captive in a
13 glass tank. To the sounds of romantic vintage music playing on a record player,
14 she forms a deep, loving bond with the creature, discovering that it can
15 communicate – but chooses to do so only with her. When she learns that the
16 authorities plan to kill the creature, in the name of scientific progress, she
17 hatches a plan to liberate the creature in a rolling laundry cart and release it at a
18 dock that feeds into the ocean, where it will finally be free.

19 2. Defendants have plainly incorporated numerous copyright
20 protectible literary elements from the Play in their Picture. The Picture was
21 publicly released in December 2017 to much fanfare, garnering nominations
22 from dozens of associations, including thirteen nominations for "Best Original
23 Screenplay." Although the Picture has struck a chord with audiences
24 worldwide, filmgoers familiar with Zindel's Play have roundly recognized the
25 Picture as copying the Play, and have publicly criticized its creators for not
26 crediting Zindel's work.

27 3. Zindel's Play has been widely read, performed for decades. The
28 Play was also adapted into two made-for-TV productions which respectively

1 aired on public television in 1969 and on the A&E network in 1990, and have
2 been repeatedly re-broadcast on national television. The Play has been
3 published in at least ten print editions and is frequently taught in American
4 schools and staged in live productions.

5 4. In short, the highly original Play is a beloved work of
6 fantasy/science fiction by an esteemed author, making the glaring similarities
7 between the Picture and the Play too egregious to ignore. Furthermore,
8 Defendants' public statements about the Picture belie their blanket denials of
9 infringement. For instance, Defendant DANIEL KRAUS, a producer of the
10 Picture, reportedly pitched the idea for the Picture to its writer/director/producer,
11 Defendant GUILLERMO DEL TORO. Significantly, KRAUS is both on record
12 as an admirer of Zindel's work, and came up with the "idea" for the Picture *the*
13 *very year* the A&E production of Zindel's Play first aired on national television.
14 These and other telling details from the writing and production of the Picture
15 strongly evidence that Defendants knowingly infringed Zindel's Play. Indeed,
16 without Zindel's Play, which artfully blended an emotional human drama with a
17 highly original science fiction story, it is difficult to imagine that the Picture
18 could have connected so profoundly with audiences and critics.

19 5. When Defendants first realized that they were producing a
20 derivative film, they were obligated to obtain a straightforward license from the
21 Zindel family and to give fair credit to Zindel's original Play. Instead,
22 Defendants did nothing, necessitating this action to vindicate Zindel's
23 copyrights, and to prevent Defendants from exploiting a celebrated author's
24 creativity without due recognition.

25 **JURISDICTION AND VENUE**

26 6. This is a civil action for copyright infringement and injunctive
27 relief under the United States Copyright Act, 17 U.S.C. §§ 101 *et seq.*
28 (hereinafter, "the Copyright Act") and for declaratory relief under the

1 Declaratory Judgment Act, 28 U.S.C. § 2201.

2 7. This Court has original subject matter jurisdiction over the claims
3 set forth in this complaint pursuant to the Copyright Act, 17 U.S.C. § 101 *et*
4 *seq.*, 28 U.S.C. §§ 1331, 1332, and 1338(a) and (b), and the Declaratory
5 Judgment Act, 28 U.S.C. § 2201.

6 8. This Court has personal jurisdiction over the Defendants in that
7 Defendants are regularly doing business in the State of California and in this
8 District, and because a substantial portion of the relevant acts complained of
9 herein occurred in the State of California and in this District.

10 9. Venue is proper in the United States District Court for the Central
11 District of California pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(a)
12 because the wrongful acts that give rise to the claims herein below occurred in
13 this District and because Defendants FOX SEARCHLIGHT PICTURES, INC.,
14 TWENTIETH CENTURY FOX FILM CORPORATION, and TSG
15 ENTERTAINMENT FINANCE LLC, and GUILLERMO DEL TORO reside in,
16 have places of business in, and/or maintain offices in this District.

17 **PARTIES**

18 10. Plaintiff DAVID ZINDEL is an individual and citizen of, and
19 resides in, the State of California, in the County of Los Angeles, and is and at all
20 times has been a citizen of the United States. DAVID ZINDEL is the son of the
21 author Paul Zindel and the brother of Lizabeth Zindel. DAVID ZINDEL serves
22 as the Trustee of the David Zindel Trust and Lizabeth Zindel Trust, each of
23 which own an undivided 50% interest in Paul Zindel's literary works.

24 11. Plaintiff is informed and believes and based thereon alleges that
25 Defendant FOX SEARCHLIGHT PICTURES, INC. (hereinafter "FOX
26 SEARCHLIGHT") is a corporation organized and existing under the laws of the
27 State of Delaware, which has its corporate headquarters in the State of California
28 and the County of Los Angeles, and which regularly conducts significant

1 ongoing business in the State of California and in the County of Los Angeles.
2 Plaintiff is further informed and believes and based thereon alleges that FOX
3 SEARCHLIGHT is a wholly owned subsidiary and/or division of Defendant
4 TWENTIETH CENTURY FOX FILM CORPORATION.

5 12. Plaintiff is informed and believes and based thereon alleges that
6 Defendant TWENTIETH CENTURY FOX FILM CORPORATION (hereinafter
7 “FOX”) is a corporation organized and existing under the laws of the State of
8 Delaware, which has its corporate headquarters in the State of California and the
9 County of Los Angeles, and which regularly conducts significant ongoing
10 business in the State of California and in the County of Los Angeles.

11 13. Plaintiff is informed and believes and based thereon alleges that
12 Defendant TSG ENTERTAINMENT FINANCE LLC (hereinafter “TSG”) is a
13 limited liability company organized and existing under the laws of the State of
14 Delaware, which has its principal place of business in the State of New York and
15 the County of New York, and which regularly conducts significant ongoing
16 business in the State of California and in the County of Los Angeles.

17 14. Plaintiff is informed and believes and based thereon alleges that
18 Defendant MACMILLAN PUBLISHERS, LTD. (hereinafter “MACMILLAN”)
19 is a privately-held international publishing company and subsidiary of
20 Holtzbrinck Publishing Group, a German limited liability company. Plaintiff is
21 informed and believes and based thereon alleges that Defendant MACMILLAN
22 has its principal place of business in the State of New York and County of New
23 York and regularly conducts significant ongoing business in the State of
24 California and in the County of Los Angeles.

25 15. Plaintiff is informed and believes and based thereon alleges that
26 Defendant GUILLERMO DEL TORO (“DEL TORO”) is an individual and
27 citizen of and resides in the State of California and the County of Los Angeles.
28 Plaintiff is further informed and believes and based thereon alleges that

1 Defendant DEL TORO regularly conducts significant ongoing business in the
2 State of California and in the County of Los Angeles.

3 16. Plaintiff is informed and believes and based thereon alleges that
4 Defendant DANIEL KRAUS (“KRAUS”) is an individual and citizen of, and
5 resides in the State of Illinois, and is and at all times has been a citizen of the
6 United States. Plaintiff is further informed and believes and based thereon
7 alleges that Defendant KRAUS regularly conducts significant ongoing business,
8 including without limitation the conduct giving rise to this action, in the State of
9 California and in the County of Los Angeles.

10 17. Plaintiff is informed and believes and based thereon alleges that the
11 fictitiously named Defendants captioned hereinabove as Does 1 through 10,
12 inclusive, and each of them (hereinafter “DOE(S)”) were in some manner
13 responsible or legally liable for the actions, damages, events, transactions and
14 circumstances alleged herein. The true names and capacities of such fictitiously
15 named defendants, whether individual, corporate, associate, or otherwise are
16 presently unknown to Plaintiff, and Plaintiff will amend this Complaint to assert
17 the true names and capacities of such fictitiously named Defendants when the
18 same have been ascertained. For convenience, each reference herein to a named
19 Defendant or to Defendants shall also refer to the Doe Defendants and each of
20 them.

21 18. Plaintiff is informed and believes and based thereon alleges that
22 each of the Defendants was the agent, partner, servant, employee, or employer of
23 each of the other Defendants herein, and that at all times herein mentioned, each
24 of the Defendants was acting within the course and scope of such employment,
25 partnership and/or agency and that each of the Defendants is jointly and
26 severally responsible for the damages hereinafter alleged.

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28 //

FACTS COMMON TO ALL CLAIMS FOR RELIEF

1
2 19. Plaintiff DAVID ZINDEL (“Plaintiff”) is the son and heir of the
3 Pulitzer-Prize-winning playwright Paul Zindel (“Zindel”), who is now deceased.
4 Zindel rose to fame following the successful Broadway run of his 1964 play *The*
5 *Effect of Gamma Rays on Man-in-the-Moon Marigolds*, for which Zindel won
6 the 1971 Pulitzer Prize for Drama. In 1972, Defendant FOX adapted that play
7 into a feature motion picture, starring Paul Newman and his wife Joanne
8 Woodward, which was nominated for a Golden Globe and a Palme d’Or at the
9 1973 Cannes Film Festival. Zindel achieved subsequent acclaim and success for
10 prolific authorship of original of novels and plays, including the work at issue in
11 this case.

12 **The Play**

13 20. In or about 1969, Zindel authored the science fiction play *Let Me*
14 *Hear You Whisper* (the “Play”). Thereafter Zindel minimally edited the Play
15 into a somewhat abridged version, which was staged for television and broadcast
16 nationwide by the National Education Television Network beginning in 1969
17 (the “NET Production”). Plaintiff is informed and believes and on that basis
18 alleges that the NET Production has been repeatedly rebroadcast since its initial
19 1969 airing, including on PBS.

20 21. In addition to the NET Production, the Play was once again staged
21 for television and nationwide broadcast on the A&E Network on or about
22 January 4, 1990 (the “A&E Broadcast”). The A&E Broadcast was hosted by
23 Anthony Quinn and starred Jean Stapleton.

24 22. The Play centers on a lonely janitorial cleaning woman, Helen, who
25 works the night shift at a secret scientific laboratory facility that performs animal
26 experiments for sinister, military purposes in the 1960s (during the height of the
27 Cold War). Helen works with a talkative, humorous cleaning woman who
28 complains about her marriage to her former husband, whereas Helen is quiet,

1 introverted and keeps to herself. Inside one of the laboratories, she discovers an
2 aquatic creature of advanced intelligence (a dolphin) confined to a glass tank,
3 and begins a loving relationship with the creature, discovering that it can indeed
4 communicate – but chooses to do so only with her. When she learns that
5 authorities at the laboratory plan to kill the creature via “vivisection,” ostensibly
6 in the name of scientific progress, Helen hatches a plan to sneak the creature out
7 of the lab in a laundry cart, and release him at a dock on an urban river that feeds
8 into the ocean, where he will finally be free.

9 23. The Play has also been widely published in print form. The Play
10 was published in Scholastic Voice on or about April 6, 1970 and was published
11 again by Dramatists Play Service Inc. in 1973. In 1974, Harper & Row re-
12 published the Play with minor abridgements in a hardcover edition that was
13 illustrated by the popular artist Stephen Gammell, who is perhaps best known
14 for his fantastical illustrations in the *Scary Stories To Tell in the Dark* book
15 series. Plaintiff is informed and believes and on that basis alleges that both the
16 unabridged and abridged versions of the Play have been widely reviewed, taught
17 in American schools, and performed in live productions since their publication.

18 24. The Play has also been repeatedly published in anthologies with
19 other theatrical works. For example, the Play appears in the anthologies *6*
20 *Science Fiction Plays* (Pocket Books, New York, 1975) (the “*6 Science Fiction*
21 *Plays Anthology*”); *In Context (Anthology One)* (Nelson Canada 1989); and *Best*
22 *Plays: Introductory Level* (McGraw Hill) (the “*Best Plays Anthology*”).

23 Plaintiff is informed and believes and on that basis alleges that the *Best Plays*
24 Anthology was published in or about 1997 and re-published in or about 2001
25 and 2005. The *6 Science Fiction Plays Anthology* is a significant anthology,
26 because it includes *The City on the Edge of Forever* by Harlan Ellison, which
27 became the highly popular 1967 Season One finale episode of the original *Star*
28 *Trek* series. Plaintiff is informed and believes and on that basis alleges that the

1 Play has been reprinted in at least four additional anthologies.

2 25. Thus, the Play’s reach and exposure has been substantial, resulting
3 in at least ten print publications, two national television productions, and many
4 more live productions.

5 26. In addition to the two television productions of the Play, Zindel’s
6 thought-provoking books, plays, teleplays, and screenplays have resulted in at
7 least seven film and TV productions of his work. Zindel was also a beloved
8 teacher and lecturer. He began his career as a science teacher, a background that
9 informed many of the original scientific elements for the Play. Even amidst his
10 success as an author, he continued to speak at schools and libraries all over the
11 world, and taught graduate students at the University of Southern California, on
12 the condition that he could give all of his students an “A.”

13 27. Zindel died on March 27, 2003. Zindel’s copyrights to his literary
14 works, including the Play, were bequeathed to and are currently owned by the
15 testamentary trusts of his two children and heirs, David Zindel and Lizabeth
16 Zindel as follows: 50% by the David Zindel Trust and 50% by the Lizabeth
17 Zindel Trust. Plaintiff David Zindel is the trustee of both Trusts.

18 28. The 1969 version of the Play containing minor abridgements,
19 published in Scholastic Voice on April 6, 1970, was registered with the United
20 States Copyright Office on May 22, 1970 (Registration number B596267). A
21 true and correct copy of the United States Copyright Office registration
22 certificate for the 1969 version of the Play is attached hereto as “Exhibit A.”

23 29. Plaintiff David Zindel, as Trustee for the aforementioned
24 testamentary trusts, duly filed an application with the United States Copyright
25 Office on February 16, 2018 to register the renewal copyright to the 1969
26 version of the Play pursuant to 17 U.S.C. §§ 304(a)(2), (a)(3); Pub. L. No. 102-
27 307, 106 Stat. 264 (June 26, 1992). A true and correct copy of Plaintiff’s
28 application for renewal registration of the Play, pending with the United States

1 Copyright Office, is attached hereto as Exhibit “B.” Plaintiff David Zindel, as
2 Trustee for the testamentary trusts, also duly filed an application with the United
3 States Copyright Office on February 16, 2018 to register the copyright and
4 renewal copyright to the unabridged Play, pursuant to 17 U.S.C. §§ 304(a)(2),
5 (a)(3); Pub. L. No. 102-307, 106 Stat. 264 (June 26, 1992). A true and correct
6 copy of Plaintiff’s application for the renewal registration of the copyright to the
7 Play, pending with the United States Copyright Office, is attached hereto as
8 Exhibit “C.”

9 The Picture

10 30. Defendants premiered *The Shape of Water* (the “Picture”) at the
11 Venice Film Festival on or about August 31, 2017, and released the Picture
12 theatrically on or about December 1, 2017. Plaintiff is informed and believes
13 and based thereon alleges that Defendant FOX SEARCHLIGHT served as the
14 production company and distributor of the Picture; Defendant TWENTIETH
15 CENTURY FOX co-financed and is distributing the Picture; Defendant TSG co-
16 financed the Picture; Defendant DEL TORO is credited as the writer/director/
17 producer of the Picture; and Defendant KRAUS acted as an associate producer
18 on the Picture, and contributed to the Picture’s story and screenplay.

19 31. The Picture tells a story that is substantially similar, and in many
20 ways identical, to that of the Play. The Picture centers on a lonely janitorial
21 cleaning woman, Elisa, who works at a laboratory facility that performs marine
22 experiments for sinister, military purposes in the 1960s (during the height of the
23 Cold War). Elisa works with a talkative, humorous cleaning woman who
24 complains about her marriage to her husband, whereas Elisa is mute and
25 introverted. Inside one of the laboratories, Elisa discovers an aquatic creature of
26 advanced intelligence (an amphibian man) confined to a glass tank, and begins a
27 loving relationship with the creature, discovering that it can indeed communicate
28 – but chooses to do so only with her. When she discovers that authorities at the

1 laboratory plan to kill the creature via “vivisection,” ostensibly in the name of
2 scientific progress, Elisa hatches a plan to sneak the creature out of the lab in a
3 laundry cart and release him at a dock on an urban canal that feeds into the
4 ocean, where he will finally be free.

5 32. Despite the glaring similarities between the Play and the obviously
6 derivative Picture, Defendants never bothered to seek or obtain a customary
7 license from Plaintiff of motion picture and ancillary rights to the Play, nor did
8 Defendants credit Zindel on the Picture. Instead, the Picture is credited as
9 purportedly written solely by DEL TORO and Vanessa Taylor, based on a story
10 by DEL TORO.

11 33. Plaintiff is informed and believes and based thereon alleges that
12 Defendants and/or their officers, agents, employees, licensees and assigns,
13 and/or persons acting in concert with them, had ready access to the Play, the
14 NET Production and A&E Production of the Play, and infringed the Play’s
15 copyright in creating the Picture, a clear derivative work based on the Play,
16 which copies and incorporates key aspects of the Play. Plaintiff is informed and
17 believes and on that basis alleges that Defendants and/or their officers, agents,
18 employees, licensees and assigns, and/or persons acting in concert with them,
19 had access to and knowledge of the Play by virtue of the widespread NET
20 Production and/or A&E Production, the numerous print publications of the Play,
21 and/or the live productions of the Play. The widespread publication of the Play
22 in all its forms, coupled with the detailed and pervasive similarities the Picture
23 bears to the Play, evince that Defendants and/or their officers, agents,
24 employees, licensees and assigns, and/or persons acting in concert with them
25 created, produced, financed, and/or distributed the Picture knowing that it
26 infringed Zindel’s original literary work.

27 34. The alleged history behind how Defendants DEL TORO and
28 KRAUS developed the story for the Picture further evinces that the Picture is

1 derived from the Play. According to an interview with DEL TORO published in
2 the January 2018 issue of *Written By* (the Writers Guild of America trade
3 magazine), DEL TORO had always wanted to make a film in the vein of *The*
4 *Creature from the Black Lagoon*, but he had “never found a way to do” the
5 story. The article then recounts a pivotal meeting between him and Defendant
6 KRAUS:

7 “Finally, over a breakfast with novelist Daniel Krause [*sic*] in 2011, the
8 code was broken. The novelist shared with del Toro a story idea ‘about a
9 janitor that kidnaps an amphibian-man from a secret government facility.
10 I said, ‘That’s the way in!’”

11 P. Hanson, “Del Toro’s Labyrinth,” *Written By* (Jan. 2018).

12 35. KRAUS himself described the same meeting in a December 2017
13 interview with the online publication io9: “I don’t remember how it came up,
14 exactly, but [DEL TORO] asked me what I was working on and for some reason
15 I brought up this idea[.]” See <https://io9.gizmodo.com/the-shape-of-water-novel-does-much-much-more-than-adap-1820895586> (the “io9 Interview”).
16 According to KRAUS’s website, the Picture is “[b]ased on an original idea by
17 Guillermo del Toro and Daniel Kraus.” See <http://www.danielkraus.com/>.

18 36. Significantly, KRAUS’s description of how he allegedly came up
19 with the “idea” for the Picture (that according to DEL TORO broke the story)
20 points to Zindel’s Play. In the io9 Interview, KRAUS claims that when he was
21 *fifteen years old* he “c[ame] up with the seed of a story about a creature locked
22 in a lab and a janitor that tries to break it out.” Based on public reporting,
23 Plaintiff is informed and believes and alleges that KRAUS was born in 1975,
24 and, accordingly was fifteen years old in *1990 when the A&E Production of*
25 *Zindel’s Play first aired*. KRAUS’s io9 Interview further suggests that his
26 “idea” for the Picture came from watching television. Tellingly, KRAUS’ own
27 description of the “seed of a story” centers on “a janitor that *tries to* break” the
28

1 creature out of a laboratory, suggesting that the breakout attempt was
2 unsuccessful, just as in Zindel's Play.

3 37. Plaintiff is informed and believes and based thereon alleges that
4 during all relevant times Defendant KRAUS was well aware of Zindel and
5 admired his work. In or about June 2017, KRAUS published an article on
6 *Booklist Online* entitled "Booklist's 50 Best YA Books of All Time," for which
7 KRAUS wrote the introduction, naming Zindel's 1968 book *The Pigman* as the
8 third entry on his list. See [https://www.booklistonline.com/Booklist-s-50-Best-](https://www.booklistonline.com/Booklist-s-50-Best-YA-Books-of-All-Time-Kraus-Daniel/pid=8945051)
9 [YA-Books-of-All-Time-Kraus-Daniel/pid=8945051](https://www.booklistonline.com/Booklist-s-50-Best-YA-Books-of-All-Time-Kraus-Daniel/pid=8945051). In his introduction,
10 KRAUS wrote, "We wanted to pay homage to august classics" as well as recent
11 works, and that "Literary quality was our highest qualifier[.]" *Id.*

12 38. Based on numerous public reports, Plaintiff is further informed and
13 believes and based thereon alleges that KRAUS and DEL TORO are both
14 lifelong, avid fans and consumers of science fiction and fantasy works. For his
15 part, DEL TORO is reported to have amassed a collection of science fiction and
16 fantasy books, artwork, and memorabilia so vast that they had to be kept in two
17 standalone houses, dubbed "Bleak House" and "Bleak House 2," which are
18 dedicated solely to housing DEL TORO's collection. See, e.g.,
19 [https://www.nytimes.com/interactive/2015/10/07/movies/11guillermodeltoro-](https://www.nytimes.com/interactive/2015/10/07/movies/11guillermodeltoro-house.html)
20 [house.html](https://www.nytimes.com/interactive/2015/10/07/movies/11guillermodeltoro-house.html). DEL TORO has told interviewers that the two houses are
21 "organized as a research library" with "13 libraries throughout." See G. Vitello,
22 "Guillermo del Toro: Gods and Monsters," *Juxtapoz* (Aug. 2016) at 97. He has
23 professed that he is "in love with books," *id.*, and has "really 10,000 favorite
24 books." See <https://nypost.com/2009/06/14/in-my-library-guillermo-del-toro/>.

25 39. Significantly for this action, DEL TORO has publicly stated his
26 admiration for illustrator Stephen Gammell, calling his *Scary Stories To Tell in*
27 *the Dark* "a favorite book of my youth," and announcing that he plans to
28 produce a film adaptation of the book. See <https://litreactor.com/news/>

1 guillermo-del-toro-adapting-scary-stories-to-tell-in-the-dark. DEL TORO has
2 reportedly even collected several original Gammell drawings for display in
3 Bleak House. *Id.* Because Gammell was the *illustrator* for the 1974 edition of
4 Zindel’s Play, it is difficult to imagine that DEL TORO, an avid fan and
5 collector of Gammell’s work, and a devoted science fiction fan would be
6 unaware of the science fiction Play Gammell illustrated.

7 40. In short, it cannot be dismissed as mere coincidence that KRAUS,
8 and then DEL TORO in collaboration with KRAUS, supposedly came up with
9 an “idea” that substantially resembled Zindel’s Play. Plaintiff is informed and
10 believes and on that basis alleges that KRAUS and Defendants, through their
11 officers, agents, employees, licensees and assigns, and/or persons acting in
12 concert with them, willfully and intentionally included the story, characters,
13 themes and other original elements from the Play in their Picture, in violation of
14 Plaintiff’s copyrights and rights under copyright. In the past, Defendant
15 KRAUS has demonstrated a rather flippant attitude toward incorporating other
16 authors’ work into his own. During an online question-and-answer session with
17 fans in 2016, KRAUS was asked about his “research resources” for a book he
18 wrote. KRAUS answered: “I stole (grave robbed?) from everything I could.”
19 *See* [https://www.reddit.com/r/books/comments/3vxz7x/im_daniel_kraus_](https://www.reddit.com/r/books/comments/3vxz7x/im_daniel_kraus_author_of_the_death_life_of/)
20 [author_of_the_death_life_of/](https://www.reddit.com/r/books/comments/3vxz7x/im_daniel_kraus_author_of_the_death_life_of/).

21 41. Plaintiff is informed and believes and on that basis alleges that
22 KRAUS and DEL TORO have written a novelization of the Picture, which they
23 and Defendants intend to distribute (the “Novelization”). Plaintiff is informed
24 and believes and on that basis alleges that Defendants MACMILLAN intends to
25 publish the Novelization under the MACMILLAN imprint Feiwel & Friends.
26 Plaintiff is informed and believes and on that basis alleges that MACMILLAN
27 plans to publish the Novelization on or about March 6, 2018. Plaintiff is
28 informed and believes and on that basis alleges that the Novelization reflects a

1 substantial portion of the story, elements, characters and themes depicted in the
2 Picture, that the Novelization likewise constitutes a derivative work of the Play,
3 and that, accordingly, the pending publication, sale, and distribution of the
4 Novelization will likewise violate Plaintiff’s copyrights and rights under
5 copyright in the Play.

6 **Overwhelming Similarities**
7 **Between the Play and the Picture**

8 42. Given that the Picture incorporates the story, elements, characters,
9 and themes – large and small – of the Play, the Picture is by any objective
10 measure substantially similar to Zindel’s highly original Play. Even minor
11 overlapping elements, such as unusual words, phrases, or images, are so
12 idiosyncratic that they are strong evidence of the pervasive influence and use of
13 Zindel’s literary work in the Picture.

14 43. Set forth below are some of the more obvious similarities between
15 the infringing Picture and the Play:

	<u>The Play</u>	<u>The Picture</u>
A. The story takes place during the 1960s (during the height of the Cold War).	The story takes place during the 1960s (during the height of the Cold War).	The story takes place during the 1960s (during the height of the Cold War).
B. The genre is a blend of emotional human drama with fantasy and science fiction.	The genre is a blend of emotional human drama with fantasy and science fiction.	The genre is a blend of emotional human drama with fantasy and science fiction.
C. The mood is dreamy and oftentimes surreal, with fantasy sequences inside the main character’s mind juxtaposed against real-world	The mood is dreamy and oftentimes surreal, with fantasy sequences inside the main character’s mind juxtaposed	The mood is dreamy and oftentimes surreal, with fantasy sequences inside the main character’s mind juxtaposed

1 suspense.

against real-world suspense.

2

3 D. Thematically, the story indicts
4 mankind’s cruelty toward other
5 living creatures in the name of
6 scientific “progress,” and sends a
7 touching message that love and
8 empathy can overcome all odds and
9 lead to magical discoveries.

Thematically, the story indicts
mankind’s cruelty toward other
living creatures in the name of
scientific “progress,” and sends a
touching message that love and
empathy can overcome all odds
and lead to magical discoveries.

10

11 E. The locale is a metropolitan East
12 Coast city, close to a *dock on a*
13 *river that flows to the ocean*, which
14 is key to a later development in the
15 story.

The locale is a metropolitan East
Coast city, close to a *dock on a*
river canal that flows to the
ocean, which is key to a later
development in the story.

16

17 F. The setting is a secret laboratory
18 facility that conducts experiments
19 for military use.

The key setting is a secret
laboratory facility that conducts
experiments for military use.

20

21 G. The main character is Helen, an
22 unmarried, introverted cleaning
23 woman who lives alone in an
24 apartment.

The main character is Elisa, an
unmarried, introverted cleaning
woman who lives alone in an
apartment.

25

26 H. Helen works the graveyard shift as
27 one of the janitors at the laboratory
28 facility.

Elisa works the graveyard shift as
one of the janitors at the
laboratory facility.

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I. The action in the laboratory facility takes place between approximately midnight and dawn.

The action in the laboratory facility takes place between approximately midnight and dawn.

J. Six central characters interact at the laboratory facility: Helen (main character), Danielle (co-worker), Moray (Helen’s supervisor), Crocus (scientist), Fridge (Crocus’s assistant), and the creature.

Six central characters interact at the laboratory facility: Elisa (main character), Zelda (co-worker), Fleming (Elisa’s supervisor), Strickland (government operative with scientific knowledge), Hoffstetler (scientist), and the creature.

K. The action in the facility takes place in the laboratory, the hallway leading to the laboratory, a locker room for the custodial staff, and the service elevator used by Helen and laboratory personnel.

The action in the facility largely takes place in the laboratory, the hallway leading to the laboratory, a locker room for the custodial staff, and the service elevator used by Elisa and laboratory personnel.

L. Helen starts her night shift in an impersonal locker room at the lab facility where she hangs her coat and gathers her equipment.

Elisa starts her night shift in an impersonal locker room at the lab facility where she hangs her coat and gathers her equipment.

M. Helen’s co-worker at the laboratory

Elisa’s co-worker at the laboratory

1 is a garrulous, funny cleaning
2 woman, Danielle, remarked on for
3 her “idle *chatter*,” who prattles on
4 while Helen remains silent.

is a garrulous, funny cleaning
woman named Zelda, remarked on
for her “*chatting*,” who prattles
on while Elisa remains silent.

5
6 N. Danielle makes pejorative remarks
7 to Helen about Danielle’s former
8 husband such as, “Biggest mistake I
9 ever made, getting married . . .”

Zelda makes pejorative remarks to
Elisa about Zelda’s husband such
as “takes a lot of lies to keep a
marriage going”

10
11 O. At the lab facility cleaning women
12 like Helen and Danielle are treated
13 condescendingly as the lowest-
14 ranking employees.

At the lab facility cleaning women
like Elisa and Zelda are treated
condescendingly as the lowest-
ranking employees.

15
16 P. A supervisor (Moray) keeps a close
17 eye on Helen and Danielle’s
18 activities inside the laboratory and
19 is regularly seen giving them
20 instructions about their work.

A supervisor (Fleming) keeps a
close eye on Elisa and Zelda’s
activities inside the laboratory and
is regularly seen giving them
instructions about their work.

21
22 Q. The supervisor (Moray) is an
23 anxious worry wart and sucks up to
24 the scientists at the lab facility.

The supervisor (Fleming) is an
anxious worry wart and sucks up
to authority at the lab facility.

25
26 R. Helen is presented as someone who
27 finds private comfort in orderly
28 daily routines.

Elisa is presented as someone who
finds private comfort in orderly
daily routines.

1

2 S. Helen is depicted as a
3 conscientious hard worker,
4 “immediately moving her
5 equipment into place and getting
6 down on her hands and knees to
7 scrub the floor,” including scraping
8 *gum off the floor* in the NET
9 Production of the Play.

10

11 T. In one of the laboratories that Helen
12 cleans, she finds that there is a
13 fascinating *aquatic creature* (a
14 dolphin), held captive inside a
15 closed and claustrophobic glass
16 water tank.

17

18 U. Muteness and communication are
19 recurring themes. Helen suggests
20 that the creature, who does not yet
21 communicate with anyone at the
22 lab, may be “*mute*” and compares
23 the creature to a “*mute*” *human*
24 *being*.

25

26 V. The laboratory has a larger
27 tank/pool where the creature is
28 allowed to swim around, at the

Elisa is depicted as a
conscientious hard worker,
moving her equipment into place
and getting down on her hands
and knees to scrub *gum off the*
floor.

In one of the laboratories that
Elisa cleans, she finds that there is
a fascinating *aquatic creature* (an
amphibian man) held captive
inside a closed and claustrophobic
glass water tank.

Muteness and communication are
recurring themes. Elisa is a *mute*
human, who can only sign, and
strongly identifies with the
creature, who does not yet
communicate with anyone at the
lab.

The laboratory has a larger
tank/pool where the creature is
allowed to swim around, at the

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scientists' discretion.

scientists' discretion.

W. The scientists are studying the creature's advanced abilities for potential military applications and advantages.

The scientists are studying the creature's advanced abilities for potential military applications and advantages.

X. The use of the creature for military purposes is presented as the sinister exploitation of an innocent being.

The use of the creature for military purposes is presented as the sinister exploitation of an innocent being.

Y. The lead doctor at the laboratory is described as a highly dedicated scientist.

The lead doctor at the laboratory is portrayed as a highly dedicated scientist.

Z. The laboratory is stocked with scientific tools and implements that are used for performing experiments on the creature.

The laboratory is stocked with scientific tools and implements that appear to be used for performing experiments on the creature.

AA. *Electrodes* attached to the creature's head are used to control and incite reactions from the creature.

Electrodes are used to control the creature: Strickland repeatedly uses an electric cattle prod to control and incite reactions from the creature.

1 BB. Crocus uses the electrodes on the Strickland uses the electric cattle
2 creature to stimulate and test the prod on the creature, while saying,
3 creature’s emotional response such “Is that you crying? Is that what it
4 as “pain,” “pleasure,” “fear” and is? . . . Or maybe you’re angry?”
5 “anger.”

6
7 CC. The scientists at the laboratory are A scientist at the laboratory is
8 particularly interested in learning particularly interested in learning
9 whether the creature can whether the creature can
10 *communicate*. As one character *communicate*. The scientist
11 emphasizes, “And if we can teach emphasizes, “This creature, I think
12 them our language, or learn theirs – it may be able to *communicate*. . .
13 we’ll be able to *communicate*.” with us.”

14
15 DD. Moray explains that if the Strickland explains about the
16 creature could communicate with creature, “You know the natives in
17 humans, it “would be *worshipped* in the amazon *worshipped* it as a
18 oceanography.” God.”

19
20 EE. A recurring motif is a romantic A recurring motif is a romantic
21 vintage song playing on a *record* vintage song playing on a *record*
22 *player inside the laboratory where* *player inside the laboratory*
23 *the creature resides*, facilitating the *where the creature resides*,
24 close emotional relationship facilitating the close emotional
25 between Helen and the creature. relationship between Elisa and the
26 creature.

27
28 FF. Despite being set in the 1960s, Despite being set in the 1960s, the

1 the Play prominently features
2 music popularized by Hollywood
3 musicals from the 1930s and
4 1940s.

Picture prominently features
music popularized by Hollywood
musicals from the 1930s and
1940s.

5
6 GG. The romantic music played on
7 the record player is a key musical
8 cue to transition between scenes
9 and heighten the mood and
10 emotional resonance of the Play.

The romantic music played on the
record player is a key musical cue
to transition between scenes and
heighten the mood and emotional
resonance of the Picture.

11
12 HH. While the romantic song “Let
13 Me Call You Sweetheart”
14 (famously *featured in a 1940s*
15 *musical film*) plays on a record
16 player in the laboratory, Helen
17 bonds with the creature by
18 scrubbing the floor to the rhythm
19 of the music, singing along with
20 the record, and exchanging
21 playful glances with the creature,
22 who watches her intently from
23 inside the glass tank.

While the romantic song “I Know
Why (And So Do You)”
(famously *featured in a 1940s*
musical film) plays on a record
player in the laboratory, Elisa
bonds with the creature by
dancing to the music while
mopping the floor and exchanging
playful glances with the creature,
who watches her intently from
inside the glass tank.

24
25 II. Helen’s scrubbing to “*Let Me*
26 *Call You Sweetheart*” evokes a
27 famous Gene Kelly routine from
28 the 1943 film *Thousands Cheer*,

Elisa’s dancing with the mop
parallels the same Gene Kelly
routine from the 1943 film
Thousands Cheer, in which Kelly

1 in which Kelly dances to “*Let Me* dances to “*Let Me Call You*
2 *Call You Sweetheart*” with a *Sweetheart*” with a mop as his
3 mop as his partner. partner.

4
5 JJ. Helen secretly shares her *lunch* Elisa secretly shares her *lunch*
6 with the creature. She attempts to with the creature. She attempts to
7 gain the creature’s trust by giving it gain the creature’s trust by giving
8 sliced ham from her bag. it hardboiled eggs from her bag.

9
10 KK. The creature makes exotic The creature makes exotic aquatic
11 aquatic sounds in responding to sounds in responding to Elisa.
12 Helen.

13
14 LL. While they are alone, Helen While they are alone, Elisa
15 tenderly strokes the creature. tenderly strokes the creature.

16
17 MM. After spending time alone in the After spending time alone in the
18 laboratory trying to understand and laboratory trying to understand
19 communicate with the creature, and communicate with the
20 Helen forms a deep loving bond creature, Elisa forms a deep loving
21 with the creature. bond with the creature.

22
23 NN. Lab personnel are encouraged Lab personnel are encouraged to
24 to have a detached attitude to the have a detached attitude to the
25 animal specimens being studied. animal specimens being studied.
26 One character explains, “You One character explains, “This
27 will do best not to become fond thing dies, you learn, I leave,”
28 of the subject animals . . . it has admonishing another not to “fall

1 concerned me that you've in love with [your] playthings"
2 apparently grown . . . fond . . . of and "bottom line is this isn't a
3 the mammal." petting zoo."

4
5 OO. The creature "*hate[s]*" The creatures "*hates* mankind, but
6 mankind, except for Helen, for not" Elisa, for whom he ultimately
7 whom he ultimately professes professes his love.
8 his "love."

9
10 PP. At one point, Helen asks if a cat The cat of Elisa's neighbor is
11 was decapitated. decapitated.

12
13 QQ. Moray comments, "To look at Strickland comments, "They never
14 these mammals, you'd better learn their place. Rover, Lassie,
15 suspect they were such rapacious Spot. They're *carnivores*."
16 *carnivores*."

17
18 RR. Helen remarks that the pastry, A character's fingers are bitten off
19 "lady fingers", is a "strange," and lie on the floor; later after the
20 "almost macabre" term. fingers are reattached, but
21 decaying, the character rips them
22 off in a macabre fashion.

23
24 SS. Helen learns that the powers that Elisa learns that the powers that be
25 be at the laboratory have decided to at the laboratory have decided to
26 *kill the creature* because the *kill the creature* because the
27 creature refuses to cooperate and creature refuses to cooperate and
28 studying it has not yielded studying it has not yielded

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satisfactory results.

satisfactory results.

TT. The lab personnel use a unique scientific term when describing how they are going to kill the creature: “*vivisection*.”

The lab personnel use a unique scientific term when describing how they are going to kill the creature: “*vivisect*.”

UU. Moray claims that vivisection will provide critical scientific knowledge.

Strickland claims that vivisection will provide critical scientific knowledge.

VV. Helen’s discovery that the lab will kill the creature provides a “ticking clock” literary device that drives the plot, wherein Helen must now find a way to rescue the creature before time runs out.

Elisa’s discovery that the lab will kill the creature provides a “ticking clock” literary device that drives the plot, wherein Elisa must now find a way to rescue the creature before time runs out.

WW. Helen defends the creature’s right to live by comparing him to a “mute” human being, insisting, “Some human beings are mute, you know. Just because they can’t talk we don’t kill them.”

Elisa defends the creature’s right to live by comparing him to herself, a mute human being, signing: “And what am I? I move my mouth – like him – and I make no sound – like him. What does that make me?”

XX. A concerned Helen tries to persuade her supervisors, pleading

A concerned scientist (Hoffstetler) tries to persuade his supervisors,

1 not to kill the creature.

pleading not to kill the creature.

2

3 YY. The creature stares at Helen,
4 silently imploring her for help.

The creature stares at Elisa
silently imploring her for help
with pained eyes.

5

6 ZZ. Helen decides that she will sneak
7 the creature out of the laboratory
8 and set it free at the dock on the
9 river that feeds “*to the sea*” (the
10 Atlantic Ocean).

Elisa decides that she will sneak
the creature out of the laboratory
and set it free at the dock on the
canal that feeds “*to the sea*” (the
Atlantic Ocean).

11

12 AAA. To spring the creature from the
13 lab, Helen plans to hide him in a
14 large rolling *laundry cart*.

To spring the creature from the lab,
Elisa plans to hide him in a large
rolling *laundry cart*.

15

16 BBB. While Helen attempts her escape
17 plan, a character notices that Helen
18 has left her mop and coat but is
19 nowhere to be found, and becomes
20 concerned about what Helen is up
21 to.

While Elisa attempts her escape
plan, a character notices that Elisa
has not left for the day but is
nowhere to be found, and becomes
concerned about what Elisa is up
to.

22

23 CCC. The scientist takes out and
24 slowly fills a *hypodermic syringe*,
25 preparing to kill the creature.

The scientist takes out and slowly
fills a *hypodermic syringe*,
preparing to kill the creature.

26

27 DDD. In a suspenseful and
28 dramatically resonant moment,

In a suspenseful and dramatically
resonant moment, Elisa is seen

1 Helen is seen tenderly embracing
2 the creature as she lifts it out of the
3 tank to free it from captivity.

4 Helen's embrace of the creature is
5 behind a curtain pulled across the
6 tank like a shower curtain.

7
8 EEE. Although she was formerly
9 shy and compliant, Helen's
10 enlightening experience and
11 recognition by the creature
12 inspires her to defiantly stand
13 up to her hated superior who
14 wants to kill the creature.

15
16 FFF. There is a vivid *underwater*
17 *fantasy* sequence starring the
18 creature, which appears to be a
19 product of Helen's imagination.

20
21
22 GGG. Helen's and the creature's
23 relationship follows a specific
24 dramatic arc. After first being told
25 not to interact with the creature,
26 Helen dares to visit the creature,
27 bonding with it through
28 progressively more intimate

tenderly embracing the creature as
she lifts it out of the tank to free it
from captivity. Later, Elisa

embraces the creature behind a
shower curtain.

Although she was formerly shy
and compliant, Elisa's
enlightening experience and
recognition by the creature
inspires her to defiantly stand
up to her hated superior who
wants to kill the creature.

There is an *underwater fantasy* at
the opening, and later a vivid
fantasy sequence, starring the
creature, which appear to be
products of Elisa's imagination.

Elisa's and the creature's
relationship follows a specific
dramatic arc. After first being
told not to interact with the
creature, Elisa dares to visit the
creature, bonding with it through
progressively more intimate

1 connections: curiosity, playful connections: curiosity, playful
2 glances, food, music playing on the glances, food, music playing on
3 record player, then actual the record player, then actual
4 communication, tender touching, communication, tender touching,
5 and finally love and a resolution to and finally love and a resolution to
6 save the creature's life. save the creature's life.

7
8 HHH. Both Helen and the creature Both Elisa and the creature
9 transform as a result of their transform as a result of their
10 relationship, with the creature relationship, with the creature
11 becoming more humanlike, becoming more humanlike,
12 developing recognizable human developing recognizable human
13 emotions, and Helen becoming emotions, and Elisa becoming
14 truer to herself, expressing her truer to herself, expressing her
15 feelings without apology. feelings without apology.

16
17 III. The Play ends with the message The Play ends with the message
18 that love, empathy and compassion; that love, empathy and
19 even the unlikely love between a compassion, even the unlikely
20 lonely seemingly unremarkable love between a lonely seemingly
21 cleaning lady and an extraordinary, unremarkable cleaning lady and a
22 intelligent creature, triumphs over fantastic intelligent creature,
23 fear, violence and ordinary triumphs over fear, violence and
24 demonstrations of power. ordinary demonstrations of power.

25
26 44. Notably, ostensibly minor yet memorably unusual elements such as
27 the appearance of a record player in a science lab, the reference to a decapitated
28 cat, macabre severed fingers, Elisa dancing with a mop like Gene Kelley did to

1 the exact song featured in the Play, repeated use of the same terms of expression,
2 including the uncommon medical term “vivisection” are, cumulatively, strong
3 evidence that the Play exerted pervasive influence over the creation of the
4 clearly derivative Picture.

5 45. In addition, the Picture undeniably includes elements that *appeared*
6 *onscreen in the NET Production of the Play*, evidencing that one or more
7 Defendants (and/or their officers, agents, employees, licensees and assigns,
8 and/or persons acting in concert with them) had seen the NET Production and
9 incorporated elements of it in the Picture. In particular, Helen’s “coat”
10 referenced in the Play is shown in the NET Production as a green wool overcoat.
11 In the Picture, the coat of the parallel character Elisa is a green wool overcoat.
12 In the NET Production, when the song “Let Me Call You Sweetheart” plays on a
13 record player in the laboratory, Helen *dances with a mop* to amuse and flirt with
14 the creature. Matching the NET Production, the Picture stages a key scene in
15 which Elisa *dances with a mop* to amuse and flirt with the creature while a
16 romantic song from the same period plays on the record player in the laboratory.

17 46. Moreover, the design of the Picture’s creature, which was directed
18 by DEL TORO, was reportedly heavily influenced by dolphin anatomy and
19 behavior. The Picture’s visual effects supervisor who works under DEL TORO
20 has publicly stated that he relied on footage of *a dolphin* for the creature’s
21 movement. *See Forbes*, “Dennis Berardi Talks the VFX Behind The Shape Of
22 Water” (Dec. 18, 2017). In fact, the visual effects supervisor described the
23 creature in the Picture as “Michael Phelps mixed with *a dolphin*.” *Id.* (emphasis
24 added). Similarly, the supervising sound editor on the Picture publicly stated
25 that he “used those *dolphin-like* noises as initial inspiration” for the creature’s
26 vocalizations. *See Vanity Fair*, “Listen Carefully, and You’ll Find Guillermo
27 del Toro’s Shape of Water Cameo,” (Feb. 16, 2018) (emphasis added).

28 47. In addition, the creature from the Play and the creature from the

1 Picture exhibit numerous behavioral similarities. In the Picture, the creature is
2 highly intelligent and is shown learning to communicate with Elisa; dolphins,
3 similarly, are known for their highly developed intellect and their advanced
4 sonar powers and communicative capabilities, much of which we still do not
5 fully comprehend. Indeed, it is a short walk from the amazing dolphin in the
6 Play who learns to speak English and says “LOVE,” to the amphibian man-
7 creature from the Picture, given that dolphins, despite their alien appearance, are
8 known to exhibit human behavioral, sexual and social conduct; mimic human
9 speech; and to form deep personal bonds with humans.

10 48. The early production design of the laboratory for the Picture also
11 tellingly points to the creators’ knowledge of the Play. An early illustration of
12 the laboratory, which has been publicly disclosed, clearly shows a semi-opaque
13 curtain strung on a curtain rod across the creature’s open tank, acting as a visual
14 barrier to anyone standing on the laboratory floor. *See* <https://www.hollywoodreporter.com/news/how-guillermo-del-toros-black-lagoon-fantasy-inspired-shape-water-1053206>. (The production design was described to *The Hollywood Reporter* by the Picture’s production designer, whom Plaintiff is
18 informed and believes and on that basis alleges worked under DEL TORO’s
19 supervision.) The Play expressly uses a curtain in the same way: the curtain is
20 hung around the front of the creature’s tank in the laboratory, “shielding” the
21 creature from view whenever it is pulled across. Indeed, in the NET Production
22 of the Play, the curtain is a semi-opaque curtain strung on a rod across the
23 creature’s open tank, as depicted in the early production design for the Picture.
24 Although the creators of the Picture removed the curtain from the laboratory in
25 its final released version, the curtain’s early inclusion further indicates that the
26 Picture was directly derived from the Play.

27 49. Based on the above, it is inescapable that the Picture is an
28 unlicensed derivative work of the Play, and that Defendants have prepared,

1 produced, copied, distributed, exploited, and/or authorized others to prepare,
2 produce, copy, distribute, or exploit the Picture in violation of Plaintiff's
3 copyrights and rights under copyright in the Play. Plaintiff is informed and
4 believes and based thereon alleges that Defendants will continue to prepare,
5 produce, copy, distribute or exploit, and/or authorize others to copy, distribute or
6 exploit the infringing Picture and ancillary derivative works which copy and
7 exploit the Play in violation of the Copyright Act. Plaintiff is likewise informed
8 and believes and based thereon alleges that Defendants have prepared and will
9 distribute or exploit, and/or authorize others to prepare, produce, copy, distribute
10 or exploit the infringing Novelization and ancillary derivative works which copy
11 and exploit the Play in violation of the Copyright Act.

12 50. As a direct and proximate result of Defendants' actions Plaintiff
13 will suffer imminent and irreparable harm, much of which cannot be reasonably
14 or adequately measured or compensated in damages.

15 **Public Reaction to the Picture**

16 51. The Picture has received an outpouring of critical praise since its
17 December 2017 release, and has been nominated for awards by dozens of film
18 associations worldwide. The Picture received seven nominations for Golden
19 Globes Awards, including for Best Motion Picture (Drama) and Best
20 Screenplay, and received thirteen nominations for Academy Awards, including
21 for Best Picture and Best Original Screenplay. Indeed, to date the Picture has
22 received at least thirteen nominations from various film societies and
23 associations for the category of "*Best Original Screenplay*." It is evident that
24 much of the press's and industry's admiration for the Picture stems from the
25 perception that the Picture is an original work of art.

26 52. The Picture has also struck a chord with audiences. Based on
27 public reporting, Plaintiff is informed and believes and on that basis alleges that,
28 to date, the Picture has earned at least \$50 million in domestic box office

1 receipts and an additional \$24 million in foreign box office receipts.

2 53. However, members of the public who are familiar with the Play
3 have pointedly observed that the Picture appears to be an adaptation of Zindel's
4 work. Filmgoers have highlighted the substantial similarities between the Play
5 and the Picture through social media posts and online forums, including by way
6 of example, the following:

- 7 • At the film review website RogerEbert.com, Leo Doroschenko
8 commented, "Was the film influenced by Paul Zindel's short play LET
9 ME HEAR YOU WHISPER (it use to be frequently on PBS)?" The user
10 further posted: ". . . there is NO WAY someone involved in the story" of
11 the Picture "was unfamiliar with the play. There are way too many
12 similarities." Another RogerEbert.com user responded, "I remember
13 reading that in seventh grade; it definitely came to mind when I first read
14 the summary of the movie."
- 15 • Alfred Brock posted on Twitter: "The Shape of Plagiarism? 'Let Me Hear
16 You Whisper' . . . Like Apocalypse Now and Joseph Conrad's 'The Heart
17 of Darkness'
- 18 • Shanna Lodge posted on Twitter: "Quick Google search indicates that I
19 am not the only one to see the similarity between this film and the
20 @paulzindel play. #TheShapeofWater"
- 21 • Edward @ SavogoRoyal posted on Twitter: "Is it just me or does the Del
22 Toro 'The Shape of Water' trailer seem way to similar to the play 'Let Me
23 Hear You Whisper' by Paul Zindel?"
- 24 • Jonathan Yee posted on Twitter: "The new del toro movie reminds me of
25 Paul Zindel's 'Let Me Hear You Whisper' a one act play about a janitor
26 and an experimental dolphin"
- 27 • Danielle @daniellegee posted on Twitter: "Am I the only one who just
28 thought of 'Let Me Hear You Whisper' during 'The Shape of Water'?"

1 Surely it wasn't just me!"

- 2 • AScottFitz posted on Twitter: "Not sure I buy the 'he never saw it' line.
3 We watched Let Me Hear You Whisper in 8th grade English class in the
4 late '80s. The play was in our anthology book."
- 5 • Referring to whether the Picture copied the Play, Andrew Paul Wood
6 posted on Twitter: "it's one of my favourite plays and I can totally see
7 it[.]"
- 8 • John Podhoretz (the editor of *Commentary* magazine) posted on Twitter:
9 "whoa. Sounds like 'The Shape of Water' has a sourcing problem."
- 10 • In response to another's recommendation to "[s]ee" the Picture,
11 TheJediPorg posted on Twitter: "Or you could find a production of 'Let
12 me hear you whisper' to watch instead."
- 13 • Peter Bernhart commented on the CBC News YouTube channel: "Do the
14 film's credits acknowledge the television play from the 1960's, 'Let Me
15 Hear You Whisper,' which was broadcast on Public Television in at least
16 two versions?"
- 17 • At the RPG.net, a user commented, "Re: So, the trailer for Guillermo del
18 Toro's new movie is out ... It actually kinda feels like the weirdest
19 remake of Let Me Hear You Whisper possible."
- 20 • At the Turner Classic Movies website, a user commented, "The Shape of
21 Water looks like it was pretty much lifted from a play by Paul Zindel
22 called 'Let Me Hear You Whisper.' Zindels 1960s play is about a cleaner
23 in a research lab who forms an attachment to a dolphin that's being used
24 for research. Hmmmm."
- 25 • At the website SFcrownsnest.info, a user commented, "As soon as I saw
26 the creature slap the window of his container, I knew that the cleaning
27 lady was going to sneak him out in the laundry hamper. I had seen the
28 1969 airing of Let Me Hear You Whisper and even though I had not given

1 it a thought since I saw it (I was nine years old at the time), I recognized
2 that I was watching it again.”

- 3 • On Facebook, the community Trust Me, I’m a Nerd posted an embedded
4 trailer for the Picture and commented, “So it’s a movie version of Paul
5 Zindell’s [*sic*] ‘Let me hear you whisper’?”
- 6 • Zack Smith posted on Facebook: “So, THE SHAPE OF WATER’s plot is
7 a LOT like this play that was reprinted in several English class books
8 when I was growing up called LET ME HEAR YOU WHISPER . . .
9 There were two filmed versions on PBS and such”
- 10 • Barbara Kahn posted on Facebook: “I saw The Shape of Water.[]It
11 reminded me very much of the wonderful play by Paul Zindel called Let
12 Me Hear You Whisper, about a cleaning lady in a government lab where
13 they are trying to train a captive dolphin. There was also a TV version,
14 but it hasn’t been shown for years.”
- 15 • Dave Marshall posted on Facebook: “So The Shape of Water was not
16 inspired by the TV play Let Me Hear You Whisper? . . . Zindel wrote
17 young adult horror style fiction. 55 books. He won a Pulitzer Prize for a
18 script later directed by Paul Newman about Man in the Moon Marigolds
19 starring his wife. Daniel Kraus, very similarly, writes within the exact
20 same field of fiction but for a later generation. Kraus is of an age to have
21 been within Zindel’s target audience. Come on, ’fees [*sic*] up.”
- 22 • Marcallen Bell posted on Facebook: “The similarities are too close – the
23 only thing the movie had going for it was best original screen play – and
24 lookie-lookie – it’s exactly like another artist’s work[.]”
- 25 • David Hayward Bain posted on Facebook, in reference to a Guardian.com
26 article on the subject: “The source for the problem seems to be a Chicago
27 YA novelist, Daniel Kraus . . . If he forgot the source of inspiration he
28 certainly retained all the plot points.”

- 1 • On the webpage for the Picture on IMDB.com, IMDB has added the
2 comment: “Story bears a strong resemblance to Paul Zindel’s ‘Let Me
3 Hear You Whisper,’ which was a play and which aired on TV in May
4 1969. Story centers of [*sic*] a night cleaner in a research lab who forms a
5 strong bond with a dolphin held for research purposes. She learns to
6 communicate with it.”
- 7 • Joseph Dougherty posted on Facebook: “How can ‘Shape of Water’ be
8 nominated for Best Original Screenplay when its premise, plot, and
9 central character are ripped off from Paul Zindel’s 1969 play ‘Let Me
10 Hear You Whisper’?”

11 54. Plaintiff is informed and believes and based thereon alleges that
12 much of the popularity and acclaim that the Picture has attracted is due to the
13 original story, elements, characters, and themes authored by Zindel and
14 exploited in the Picture, as well as the widespread false perception that the
15 Picture is an original work. Plaintiff is therefore informed and believes and
16 based thereon alleges that Defendants’ infringement of the Play has generated
17 substantial profits for Defendants and has elevated the reputation and stature of
18 Defendants and their officers, agents, employees, licensees and assigns, and/or
19 persons acting in concert with them, involved in creating, financing, producing,
20 and/or distributing the infringing Picture.

21 **FIRST CLAIM FOR RELIEF**

22 **(Copyright Infringement against all Defendants)**

23 55. Plaintiff re-alleges and incorporates by reference paragraphs 1
24 through 54 inclusive, as though fully set forth herein.

25 56. The Play is a wholly original work and copyrightable subject matter
26 under the laws of the United States.

27 57. The Play was produced and distributed in strict conformity with the
28 provisions of the Copyright Act and all other laws governing copyright.

1 58. The 1969 version of the Play containing minor abridgements was
2 registered with the United States Copyright Office. Plaintiff as Trustee for the
3 David Zindel Trust and the Lizabeth Zindel Trust duly filed an application with
4 the United States Copyright Office on February 16, 2018 to register the renewal
5 copyright to the 1969 version of the Play. *See* Exhibit B. Plaintiff as Trustee for
6 said testamentary trusts also duly filed an application with the United States
7 Copyright Office on February 16, 2018 to register the renewal copyright to the
8 unabridged Play. *See* Exhibit C.

9 59. By their exploitation and release of the Picture, a film indisputably
10 derived from the Play, Defendants and/or their officers, employees, and/or
11 agents knowingly and willfully infringed, and will continue to infringe,
12 Plaintiff's copyright and rights under copyright in the Play.

13 60. Each infringement by Defendants of the Play constitutes a separate
14 and distinct act of infringement.

15 61. Plaintiff has placed Defendants on notice of their infringement, yet
16 Defendants continue to infringe Plaintiff's rights under copyright, in willful
17 disregard of and indifference to Plaintiff's rights.

18 62. As a direct and proximate result of Defendants' copyright
19 infringement, Plaintiff has suffered and will continue to suffer severe injuries
20 and harm, much of which cannot be reasonably or adequately measured or
21 compensated in money damages if such wrongful conduct is allowed to continue
22 unabated. The ongoing harm this wrongful conduct will continue to cause
23 Plaintiff is both imminent and irreparable.

24 63. Pursuant to 17 U.S.C. § 502, Plaintiff is entitled to a preliminary
25 injunction, during the pendency of this action, and to a permanent injunction,
26 enjoining Defendants, their officers, agents and employees, and all persons
27 acting in concert with them, from engaging in such further violations of the
28 Copyright Act.

1 64. Plaintiff is further entitled to recover from Defendants the damages,
2 including pre-judgment interest Plaintiff sustained and will sustain, and any
3 income, gains, profits, and advantages obtained by Defendants as a result of
4 their wrongful acts alleged hereinabove, in an amount which cannot yet be fully
5 ascertained, but which shall be assessed at the time of trial.

6 65. Plaintiff is further entitled to attorney's fees and full costs pursuant
7 to 17 U.S.C. § 505.

8 **SECOND CLAIM FOR RELIEF**

9 **(Contributory Copyright Infringement against all Defendants)**

10 66. Plaintiff re-alleges and incorporates by reference the allegations set
11 forth above in Paragraphs 1 through 65 inclusive, as though fully set forth
12 herein.

13 67. Plaintiff is informed and believes, and on that basis alleges, that
14 Defendants induced, caused, or materially contributed to the copyright
15 infringement by others of the Play as alleged herein. Plaintiff is informed and
16 believes, and on that basis alleges, that Defendants knew or had reason to know
17 that the conduct of such other parties infringed Plaintiff's copyright and rights
18 under copyright.

19 68. Each infringement by Defendants and/or the DOE Defendants, of
20 the Play constitutes a separate and distinct act of infringement.

21 69. As a direct and proximate result of Defendants' contributory
22 copyright infringement, Plaintiff has suffered and will continue to suffer severe
23 injuries and harm, much of which cannot be reasonably or adequately measured
24 or compensated in money damages if such wrongful conduct is allowed to
25 continue unabated. The ongoing harm this wrongful conduct will continue to
26 cause Plaintiff is both imminent and irreparable.

27 70. Pursuant to 17 U.S.C. § 502, Plaintiff is entitled to a preliminary
28 injunction, during the pendency of this action, and to a permanent injunction,

1 enjoining Defendants, their officers, agents and employees, and all persons
2 acting in concert with them, from engaging in such further violations of the
3 Copyright Act.

4 71. Plaintiff is further entitled to recover from Defendants the damages,
5 including pre-judgment interest Plaintiff sustained and will sustain, and any
6 income, gains, profits, and advantages obtained by Defendants as a result of
7 their wrongful acts alleged hereinabove, in an amount which cannot yet be fully
8 ascertained, but which shall be assessed at the time of trial.

9 72. Plaintiff is further entitled to attorney's fees and full costs pursuant
10 to 17 U.S.C. § 505.

11 **THIRD CLAIM FOR RELIEF**

12 **(Vicarious Copyright Infringement against all Defendants)**

13 73. Plaintiff re-alleges and incorporates by reference paragraphs 1
14 through 72 inclusive, as though fully set forth herein.

15 74. Plaintiff is informed and believes and thereon alleges that
16 Defendants, and each of them, if not directly liable for infringement of
17 Plaintiff's copyright in the Play, are vicariously liable for said infringements.
18 Plaintiff is informed and believes and thereon alleges that Defendants had the
19 right and ability to supervise the infringing conduct of others, including without
20 limitation the infringing conduct of co-Defendants, including Defendants DOES
21 1 through 10.

22 75. Plaintiff is informed and believes and thereon alleges that
23 Defendants possessed a direct financial interest in the infringing conduct of such
24 other parties.

25 76. Each infringement by Defendants and/or the DOE Defendants of
26 the Play constitutes a separate and distinct act of infringement.

27 77. As a direct and proximate result of Defendants' vicarious copyright
28 infringement, Plaintiff has suffered and will continue to suffer severe injuries

1 and harm, much of which cannot be reasonably or adequately measured or
2 compensated in money damages if such wrongful conduct is allowed to continue
3 unabated. The ongoing harm this wrongful conduct will continue to cause
4 Plaintiff is both imminent and irreparable.

5 78. Pursuant to 17 U.S.C. § 502, Plaintiff is entitled to a preliminary
6 injunction, during the pendency of this action, and to a permanent injunction,
7 enjoining Defendants, their officers, agents and employees, and all persons
8 acting in concert with them, from engaging in such further violations of the
9 Copyright Act.

10 79. Plaintiff is further entitled to recover from Defendants the damages,
11 including pre-judgment interest Plaintiff sustained and will sustain, and any
12 income, gains, profits, and advantages obtained by Defendants as a result of
13 their wrongful acts alleged hereinabove, in an amount which cannot yet be fully
14 ascertained, but which shall be assessed at the time of trial.

15 80. Plaintiff is further entitled to attorney's fees and full costs pursuant
16 to 17 U.S.C. § 505.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff prays for judgment against the Defendants as
19 follows:

20 **ON THE FIRST CLAIM FOR RELIEF**

21 1. For an order preliminarily during the pendency of this action and
22 thereafter, permanently, (i) enjoining Defendants, their officers, agents,
23 employees, licensees and assigns, and all persons acting in concert with them,
24 from infringing the copyrights in the Play, in any manner, and (ii) enjoining
25 Defendants, their officers, agents, employees, licensees and assigns, and all
26 persons acting in concert with them, from engaging in or authorizing the
27 production, reproduction, distribution and/or exploitation of the infringing
28 Picture, the infringing Novelization, and ancillary products based thereon,

1 derived from the Play, without Plaintiff's express written license and consent.

2 2. For compensatory and consequential damages, according to proof
3 in an amount determined at trial, together with interest thereon as provided by
4 law;

5 3. For an accounting and restitution to Plaintiff of all gains, profits and
6 advantages Defendants have derived from their production, distribution and
7 exploitation of the infringing Picture, the infringing Novelization, ancillary
8 exploitations based thereon, and from their copyright infringement of the Play;
9 and

10 4. For such other and further relief and remedies available under the
11 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, which the Court may deem just and
12 proper.

13 ON THE SECOND CLAIM FOR RELIEF

14 5. For an order preliminarily during the pendency of this action and
15 thereafter, permanently, (i) enjoining Defendants, their officers, agents,
16 employees, licensees and assigns, and all persons acting in concert with them,
17 from infringing the copyrights in the Play, in any manner, and (ii) enjoining
18 Defendants, their officers, agents, employees, licensees and assigns, and all
19 persons acting in concert with them, from engaging in or authorizing the
20 production, reproduction, distribution and/or exploitation of the infringing
21 Picture, the infringing Novelization, and ancillary products based thereon,
22 derived from the Play, without Plaintiff's express written license and consent.

23 6. For an award of Defendants' profits and Plaintiff's compensatory
24 and consequential damages, according to proof in an amount determined at
25 trial, together with interest thereon as provided by law;

26 7. For an order requiring that Defendants provide a complete
27 accounting and for the restitution to Plaintiff of all monies, gains, profits and
28 advantages Defendants have derived from their production, distribution and

1 exploitation of the infringing Picture, the infringing Novelization, and ancillary
2 products based thereon, and from their copyright infringement of the Play;

3 8. For an order imposing a constructive trust over all monies, gains,
4 and profits Defendants derive from their production, distribution and
5 exploitation of the infringing Picture, the infringing Novelization, and ancillary
6 products based thereon, and from their copyright infringement of the Play; and

7 9. For such other and further relief and remedies available under the
8 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, which the Court may deem just and
9 proper.

10 ON THE THIRD CLAIM FOR RELIEF

11 10. For an order preliminarily during the pendency of this action and
12 thereafter, permanently, (i) enjoining Defendants, their officers, agents,
13 employees, licensees and assigns, and all persons acting in concert with them,
14 from infringing the copyrights in the Novel, in any manner, and (ii) enjoining
15 Defendants, their officers, agents, employees, licensees and assigns, and all
16 persons acting in concert with them, from engaging in or authorizing the
17 production, reproduction, distribution and/or exploitation of the infringing
18 Picture, the infringing Novelization, and ancillary products based thereon,
19 derived from the Play, without Plaintiff's express written license and consent.

20 11. For an award of Defendants' profits and Plaintiff's compensatory
21 and consequential damages, according to proof in an amount determined at
22 trial, together with interest thereon as provided by law;

23 12. For an order requiring that Defendants provide a complete
24 accounting and for the restitution to Plaintiff of all monies, gains, profits and
25 advantages Defendants have derived from their production, distribution and
26 exploitation of the infringing Picture, the infringing Novelization, and ancillary
27 exploitations based thereon, and from their copyright infringement of the
28 Novel;

1 13. For an order imposing a constructive trust over all monies, gains,
2 and profits Defendants derive from their production, distribution and
3 exploitation of the infringing Picture, the infringing Novelization, and ancillary
4 exploitations based thereon, and from their copyright infringement of the Play;
5 and

6 14. For such other and further relief and remedies available under the
7 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, which the Court may deem just and
8 proper.

9 ON ALL CLAIMS FOR RELIEF

10 15. For Plaintiff’s costs of suit;

11 16. For interest at the highest lawful rate on all sums awarded Plaintiff
12 other than punitive damages;

13 17. For reasonable attorneys’ fees; and

14 18. For such other and further relief as the Court deems just and
15 appropriate.

16

17 Dated: February 21, 2018

TOBEROFF & ASSOCIATES, P.C.

18

19 By: /s/ Marc Toberoff
 Marc Toberoff

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Attorneys for Plaintiff David Zindel, as
Trustee for the David Zindel Trust and
Lizabeth Zindel Trust

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JURY TRIAL DEMANDED

Plaintiff hereby requests a trial by jury on each claim for relief alleged in the Complaint that is triable by a jury.

Dated: February 21, 2018 TOBEROFF & ASSOCIATES, P.C.

By: /s/ Marc Toberoff
Marc Toberoff

Attorneys for Plaintiff David Zindel, as
Trustee for the David Zindel Trust and
Lizabeth Zindel Trust