

APPENDIX - PETITION FOR A WRIT OF CERTIORARI

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FEB 21 2019

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CHRISTINE SAWICKY,

Plaintiff-Appellant,

v.

AMC NETWORKS INC., a Delaware
corporation,

Defendant-Appellee.

No. 18-56067

D.C. No. 2:18-cv-00114-R-MRW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted February 19, 2019**

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

Christine Sawicky appeals pro se from the district court's judgment dismissing her action alleging copyright infringement and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(c). *Lyon v. Chase Bank USA*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A pla

N.A., 656 F.3d 877, 883 (9th Cir. 2011). We affirm.

The district court properly dismissed Sawicky's copyright infringement claim because Sawicky's copyrighted work "Sons of the Legends" and defendant's television show "Growing Up Hip Hop," including its promotional trailers, are not substantially similar under the extrinsic test, and any similarities in the general concepts are unprotected. *See Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624-25 (9th Cir. 2010) (setting forth extrinsic test to assess substantial similarity between specific expressive elements of copyrighted works at issue); *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006) (substantial similarity may be decided as a matter of law by applying the extrinsic test); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (when applying the extrinsic test, the court "must filter out and disregard the non-protectible elements in making its substantial similarity determination").

The district court properly dismissed Sawicky's unfair competition claim because it is preempted by the Copyright Act. *See Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006) (setting forth two-part test to determine whether a state law claim is preempted by the Copyright Act).

The district court properly dismissed Sawicky's breach of contract, breach of implied contract, and breach of confidence claims because the pleadings demonstrate that the express contract in question was not breached. *See Oasis W.*

Realty, LLC v. Goldman, 250 P.3d 1115, 1121 (Cal. 2011) (setting forth elements of a breach of contract claim under California law); *Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am.*, 51 Cal. Rptr. 2d 622, 628 (Ct. App. 1996) (“[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.”); *see also Berkla v. Corel Corp.*, 302 F.3d 909, 917-18 (9th Cir. 2002) (setting forth elements of a breach of confidence claim; explaining that a breach of confidence claim is grounded on a quasi-contractual theory).

The district court did not abuse its discretion by denying Sawicky’s requests for an extension of time to submit a Rule 26 report or to file a sur-reply regarding defendant’s motion to stay or suspend discovery. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992) (district court has broad discretion to manage its docket).

We reject as without merit Sawicky’s contentions that the district court was biased against her as a pro se litigant, or erred by ruling on the Rule 12(c) motion without oral argument.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions and requests are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTINE SAWICKY,)	CASE NO. CV 18-114-R
)	
Plaintiff,)	ORDER GRANTING AMC'S MOTION
)	FOR JUDGMENT ON THE PLEADINGS
v.)	
)	
AMC NETWORKS INC., a Delaware)	
corporation; DOES 1-10, inclusive,)	
)	
Defendants.)	

Before the Court is Defendant AMC Networks Inc.'s ("AMC") Motion for Judgment on the Pleadings, filed on May 1, 2018. (Dkt. 33). Having been thoroughly briefed by both parties, this matter was taken under submission on May 31, 2018.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Motions under Federal Rules of Civil Procedure 12(b) and 12(c) are "functionally identical." *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Dismissal under Rule 12(b)(6) is proper only when a complaint exhibits either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Under *Twombly* and *Iqbal*, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," so the defendant has "fair notice of what the...claim is and the

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grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). On a Rule 12(c) motion, “the allegations of the non-moving party must be accepted as true,” and judgment on the pleadings is proper when “the moving party clearly establishes on the face of the pleadings that no material issue of fact remains.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). When considering a motion for judgment on the pleadings, a court typically does not consider material beyond the pleadings. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). However, a court may consider material the complaint relies on if the material’s authenticity is uncontested. *Id.*

Plaintiff Christine Sawicky, appearing pro se, brings five claims: (1) copyright infringement, (2) unfair competition, (3) breach of contract, (4) breach of implied contract, and (5) breach of confidence.¹ AMC seeks dismissal of all claims.

As an initial matter, Sawicky requests leave to file a sur-reply in support of this motion based on AMC’s “misinterpreted arguments.” (Dkt. 52). All of AMC’s arguments on reply are in direct response to Sawicky’s opposition. It appears Sawicky seeks a second bite at the apple but does not show good cause to do so. Therefore, her request is denied.

Copyright Infringement

First, Sawicky alleges AMC violated the Copyright Act by infringing on her copyrighted reality television “concept,” *Sons of the Legends* (“*SotL*”). She alleges AMC adapted protected elements of *SotL* into AMC’s reality television series, *Growing Up Hip Hop* (“*GUHH*”).

Sawicky alleges she owns a copyright in *SotL*, embodied in a PowerPoint presentation comprising a nine-sentence synopsis of *SotL*, biographies of three proposed *SotL* cast members, and a picture of Gandhi accompanied by a brief description of *SotL*’s inspirational theme.

According to the synopsis, *SotL* purports to “follow[] the sons of some of the most legendary figures in American history” as they learn to “stand on their own and becom[e] their own person.” *GUHH* is a reality television series that follows the children of famous hip hop musicians.

“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Copying is established by proof that (1) the

¹ Courts must liberally construe pro se pleadings. *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014).

1 defendant had access to the work and (2) the works are substantially similar in their protected
2 elements. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). Here, Sawicky's
3 copyright ownership is not disputed—thus, two issues remain: (1) whether AMC had access to
4 *SotL*, and (2) whether *SotL* and *GUHH* are substantially similar. The Court does not reach the
5 question of access because, even assuming AMC had access to *SotL*, the two works are not
6 substantially similar as a matter of law.

7 On a motion for judgment on the pleadings, a court may compare two works to determine
8 whether they are substantially similar. See *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130
9 (C.D. Cal. 2007). In preparing to rule on this motion, this Court has reviewed Sawicky's
10 PowerPoint and watched the first season of *GUHH*.

11 “‘Substantial similarity’ refers to similarity of expression, not merely similarity of ideas or
12 concepts.” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir.
13 1997). The Ninth Circuit’s two-part method for determining whether two works are substantially
14 similar involves both an objective, extrinsic test and a subjective, intrinsic test. *Narell v.*
15 *Freeman*, 872 F.2d 907, 912 (9th Cir. 1989). Only the extrinsic test is important on a motion for
16 judgment on the pleadings. See *Zella*, 529 F. Supp. 2d at 1133. A plaintiff who cannot satisfy
17 this test loses as a matter of law. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045
18 (9th Cir. 1994).

19 “The extrinsic test is an objective test based on specific expressive elements; the test
20 focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace,
21 characters, and sequence of events in two works.” *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d
22 620, 624 (9th Cir. 2010). “A court must take care to inquire only whether the protectable
23 elements, standing alone, are substantially similar.” *Id.* To do so, the court must filter out
24 “unprotectable elements,” including ideas, facts, and any elements borrowed from the public
25 domain. *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1176-77 (C.D. Cal. 2001). The court
26 then compares the remaining protected elements to look for objective similarities. *Id.* at 1177-78.

27 Sawicky’s claim fails the extrinsic test because *SotL* does not share any protectable
28 similarities with *GUHH*. In fact, the two works share little more than the same general premise—

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1 following the children of famous people. First, *SotL*'s characters do not boast any protectable
 2 elements. The PowerPoint lists a proposed cast for *SotL* that includes only factual biographies of
 3 three real people.² Sawicky does not create any characters, and the general idea of casting
 4 children of famous people is not protectable expression. See *Bethea v. Burnett*, 2005 U.S. Dist.
 5 LEXIS 46944, at *40 (C.D. Cal. June 28, 2005) (a creator cannot copyright the idea of casting a
 6 real person on a show). Moreover, none of *SotL*'s proposed cast members appeared on *GUHH*.

7 Second, Sawicky contends the settings of both works are "identical," but her PowerPoint
 8 does not describe where *SotL* might take place. Third, Sawicky contends the moods of the two
 9 works are similar but only generally characterizes the mood as "inspiration[al] and positiv[e]." The
 10 general idea of creating an uplifting mood is unprotectable.

11 Finally, Sawicky contends that the works share an identical theme. In her PowerPoint,
 12 Sawicky writes that *SotL* will "provide hope when all hope seems lost" and "provide the world
 13 with content that actually makes people think about their place in life and how they...like anyone
 14 else...can make a change." A picture of Gandhi also appears. The idea of creating a show that is
 15 hopeful, inspirational, and positive does not constitute protectable expression. Moreover, *GUHH*
 16 is not objectively hopeful or positive, instead focusing on the romantic and personal drama of its
 17 cast.

18 In sum, Sawicky does not meet the extrinsic test because *SotL* and *GUHH* do not share any
 19 protectable similarities. Accordingly, the works are not substantially similar as a matter of law,
 20 and the copyright claim fails.

21 Unfair Competition

22 Second, Sawicky alleges unfair competition under California Business and Professions
 23 Code Section 17200. AMC argues the claim is preempted by the Copyright Act.

24 Courts in the Central District routinely hold that "[c]laims for unfair competition are
 25 preempted when they are essentially claims for copyright infringement." *Micro/sys v. DRS Techs.,*
 26 *Inc.*, 2015 U.S. Dist. LEXIS 190099, at *15-16 (C.D. Cal. Feb. 18, 2015); *Bethea*, 2005 U.S. Dist.
 27 LEXIS 46944, at *40; *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236,
 28 1239-40 (C.D. Cal. 1987).

² One such biography is copied verbatim from the individual's Wikipedia page. Mot., Ex. B at 15-16.

1 Here, Sawicky's unfair competition claim is essentially a claim for copyright infringement.
2 Sawicky claims AMC violated Section 17200 by "appropriat[ing] and us[ing] Sawicky's
3 copyrighted works at little or no cost," without "authorization or consent," leading to "business
4 loss and injury." The misappropriation of intellectual property without permission is at the heart
5 of a copyright claim. Therefore, the unfair competition claim is preempted by the Copyright Act.

6 **Breach of Contract**

7 Third, Sawicky alleges breach of contract. She claims that she and AMC entered into a
8 nondisclosure agreement ("NDA"), which AMC breached when it aired *GUHH*. The NDA states
9 that AMC's obligations "do not extend to information that is...publicly known at the time of
10 disclosure or subsequently becomes publicly known through no fault of [AMC]."

11 Sawicky's own admissions demonstrate that the information covered by the NDA was
12 already publicly known. Sawicky alleges she filed her *SotL* synopsis with Copyright Office in
13 February 2013, well before AMC signed the July 2014 NDA. See *KEMA, Inc. v. Koperwhats*, 658
14 F. Supp. 2d 1022, 1030-31 (N.D. Cal. 2009) (information becomes public upon submission to the
15 Copyright Office). She further admits that several third parties were aware of *SotL*, and a
16 proposed cast member even posted the concept to his public social media page. These admissions
17 demonstrate that any public knowledge of *SotL* was not AMC's fault, and any information AMC
18 might have used was already publicly known. Thus, Sawicky's breach of contract claim fails.

19 **Breach of Implied Contract**

20 Fourth, Sawicky alleges breach of implied contract. AMC argues this claim fails because
21 the NDA is an express agreement that supersedes any purported implied contract.

22 Under California law, contracts may be formed expressly or by implication. *Guz v.*
23 *Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 336 (2000). "[I]t is well settled that an action based on an
24 implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express
25 contract covering the same subject matter." *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44
26 Cal. App. 4th 194, 203 (1996).

27 Here, Sawicky's claim fails because the NDA and alleged implied contract cover the same
28 subject matter. The NDA prohibits AMC from using or disclosing confidential information

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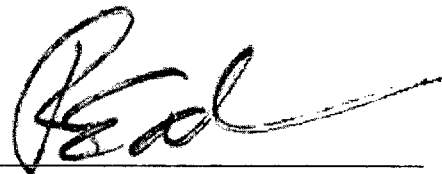
1 related to *SotL* without Sawicky's authorization. Sawicky alleges that the implied contract
2 similarly prohibits AMC from disclosing or using confidential information related to *SotL* without
3 Sawicky's permission. Because both contracts cover identical subject matter, the breach of
4 implied contract claim fails.

5 **Breach of Confidence**

6 Fifth, Sawicky alleges breach of confidence. To prevail on a claim for breach of
7 confidence under California law, a plaintiff must demonstrate that she conveyed "confidential and
8 novel" information to the defendant. *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002).
9 As discussed above, Sawicky's idea was public and therefore not confidential. Thus, her breach of
10 confidence claim fails.

11 **IT IS HEREBY ORDERED** that AMC's Motion for Judgment on the Pleadings is
12 GRANTED. (Dkt. 33).

13 Dated: July 11, 2018.

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17 MANUEL L. REAL
18 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV-18-114-R

Date: June 8, 2018

Title CHRISTINE SAWICKY -V.- AMC NETWORKS INC., et al.

Present: The Honorable: MANUEL L. REAL, UNITED STATES DISTRICT JUDGE

Christine Chung
Deputy Clerk

N/A
Court Reporter / Recorder

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

**Proceedings: (IN CHAMBERS) ORDER GRANTING DEFENDANT AMC NETWORKS
INC.'S MOTION TO STAY OR SUSPEND DISCOVERY PENDING
RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS
PURSUANT TO FED. R. CIV. P. 12(C) (DCKT. NO. 35)**

Before the Court is Defendant AMC Networks Inc.'s ("AMC") Motion to Stay or Suspend Discovery Pending Ruling of the Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c). (Dkt. 35). Having been thoroughly briefed by both parties, this Court took the matter under submission on May 31, 2018.

Under Rule 26, a court may issue a protective order regarding discovery for good cause, such as preventing undue burden or expense. Fed. R. Civ. P. 26(b)(1)–(c)(1). This is consistent with the Ninth Circuit's articulation that a court has the discretion to stay discovery as part of its "inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972). This discretion is "broad" when district courts are deciding motions to stay discovery via a protective order pending resolution of a potentially dispositive motion. *United States ex rel. Modglin v. DJO Global Inc.*, 2014 U.S. Dist. LEXIS 179514, at *5 (C.D. Cal. Feb. 20, 2014).

The Ninth Circuit has not issued a decision articulating which factors a court should consider in deciding a motion to stay discovery while a dispositive motion is pending. *FTC v. AMG Servs., Inc.*, 2012 U.S. Dist. LEXIS 121935, at *13 (D. Nev. Aug. 28, 2012). However, federal district courts in the circuit have created several tests and utilize various factors when considering how to rule on such a motion. For example, the Northern and Eastern Districts of California have applied a two-part test when evaluating whether discovery should be stayed. *Id.* at *13. Those courts determine if (1) the pending motion is potentially dispositive of the entire

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV-18-114-R

Date: June 8, 2018

Title CHRISTINE SAWICKY -V.- AMC NETWORKS INC., et al.

case, and (2) whether the pending dispositive motion can be decided without additional discovery, which involves a consideration of the merits of the case. *Id.* at *13-14. Other courts within the Central District consider factors such as the type of motion, the nature and complexity of the action, whether counterclaims or cross-claims have been interposed, the posture or stage of litigation, potential prejudice caused by a delay, the convenience to the court and the public interest. *Top Rank, Inc. v. Haymon*, 2015 U.S. Dist. LEXIS 164671, at *4 (C.D. Cal. Sept. 17, 2015); see *Skellerup Indus. v. City of L.A.*, 163 F.R.D. 598, 601 (C.D. Cal 1995).

Here, the pending Motion for Judgment on the Pleadings is potentially dispositive, as AMC is the only defendant named in the suit, and there are no cross-claims or counterclaims. Further, the motion, by its very nature, must be resolved only on the pleadings, and no evidence obtained through discovery may be used to decide it. After considering the merits of the case as well as all other relevant factors, and in the interest of preventing undue burden or expense to both parties, the Court concludes that a stay of discovery is warranted for good cause until the Motion for Judgment on the Pleadings has been ruled on.

IT IS HEREBY ORDERED that Defendant's Motion to Stay or Suspend Discovery Pending Ruling on Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) is GRANTED. (Dkt. No. 35).

IT IS FURTHER ORDERED that Plaintiff's Request for Leave to File a Sur Reply is DENIED.

IT IS SO ORDERED.

Initials of Preparer

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LARRY S. JOHNSON and BLAKE
KELLER,

Plaintiffs,

v.

DAVID KNOLLER, et al.,

Defendants.

) CASE NO. CV 16-7761-R
)
) ORDER GRANTING DEFENDANTS'
) MOTION FOR JUDGMENT ON THE
) PLEADINGS
)
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)

Before the Court is Defendants' Motion for Judgment on the Pleadings, which was filed on July 24, 2017. (Dkt. No. 75). Having been thoroughly briefed by both parties, this matter was taken under submission on August 16, 2017.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Motions under Federal Rules of Civil Procedure 12(b) and 12(c) are "functionally identical." *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Dismissal under Rule 12(b)(6) is proper only when a complaint exhibits either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). Under the *Twombly* and *Iqbal* heightened pleading standards, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," so the defendant has

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1 “fair notice of what the...claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*
 2 *Twombly*, 550 U.S. 544, 570 (2007). On a Rule 12(c) motion, “the allegations of the non-moving
 3 party must be accepted as true,” and judgment on the pleadings is proper only when “the moving
 4 party clearly establishes on the face of the pleadings that no material issue of fact remains....” *Hal*
 5 *Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Courts
 6 may also consider materials submitted with the complaint and documents the complaint relies on.
 7 *Spy Optic, Inc. v. Alibaba.com, Inc.*, 163 F. Supp. 3d 755, 764 (C.D. Cal. 2015).

8 Rule 12(c) motions are proper “[a]fter the pleadings are closed—but early enough not to
 9 delay trial.” Plaintiffs filed their First Amended Complaint (“FAC”) on June 22, 2017.
 10 Defendants filed their Answer on July 6, 2017, and their Motion for Judgment on the Pleadings on
 11 July 24, 2017. Trial is set for October 31, 2017. Therefore, Defendants filed their Motion for
 12 Judgment on the Pleadings less than three weeks after filing their Answer and over three months
 13 before trial. Defendants’ Motion for Judgment on the Pleadings is procedurally sound.

14 Plaintiffs allege three claims: (1) copyright infringement, (2) fraud, and (3) breach of
 15 contract. As to the copyright claim, Plaintiffs assert that Defendants infringed on Plaintiff
 16 Johnson’s copyright in his novels, *Tribulation of a Ghetto Kid* and *Tribulation of a Ghetto Kid:*
 17 *Part II* (“*Tribulation*”), in violation of the Copyright Act, by adapting protected elements of the
 18 novels into the television series, *Power*.

19 On a motion for judgment on the pleadings, a court may compare two works to determine
 20 copyright infringement. *See Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal.
 21 2007). “To establish infringement, two elements must be proven: (1) ownership of a valid
 22 copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns,*
 23 *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Copying is established by proof that (1) the
 24 defendant had access to the work and (2) the works are substantially similar in their protected
 25 elements. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). Here, Plaintiff
 26 Johnson’s copyright ownership is not disputed—thus, two issues remain: (1) whether Defendants
 27 had access to *Tribulation*, and (2) whether *Tribulation* and *Power* are substantially similar.

28 To prove access, a plaintiff must show beyond “mere speculation” that there was more

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1 than a “bare possibility” the defendant viewed the plaintiff’s work. *Three Boys Music Corp. v.*
2 *Bolton*, 212 F.3d 477, 482 (9th Cir. 2000). The plaintiff must establish that (1) the defendant had
3 access to the work by a chain of events, or (2) the work was widely disseminated. *Art Attacks Ink,*
4 *LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). Chain of events is shown where
5 the plaintiff gave his work to an intermediary who could have passed the work to the creator of the
6 allegedly infringing work. *Loomis v. Cornish*, No. CV 12–5525 RSWL, 2013 WL 6044349, at *4
7 (C.D. Cal. Nov. 13, 2013). The plaintiff must show a “sufficient nexus between the [intermediary]
8 and the creator.” *Gable v. Nat’l Broad. Co.*, 727 F. Supp. 2d 815, 826 (C.D. Cal. 2010).

9 Here, Plaintiffs have not met their pleading burden of showing more than a bare possibility
10 that Defendants had access to *Tribulation*. In relevant part, the FAC alleges only the following:
11 Defendant Turner was Plaintiff Johnson’s agent; Defendant Turner was working for Defendant
12 Jackson’s book company at the time; the book company developed material similar to *Tribulation*;
13 on information and belief, Defendant Turner gave a copy of *Tribulation* to Defendant Jackson; on
14 information and belief, Defendant Jackson, one of several executive producers on *Power*, shared
15 *Tribulation* with the other producers approximately ten years later. The FAC fails to allege facts
16 sufficient to demonstrate chain of events. Plaintiffs’ bare allegations that Defendant Turner gave
17 Defendant Jackson a copy of *Tribulation* who then shared the work with co-producers ten years
18 later are merely speculative. Accordingly, Plaintiffs have not shown a sufficient nexus between
19 Defendant Turner and any other Defendant. Moreover, Plaintiffs do not allege that *Tribulation*
20 was widely disseminated. Therefore, Plaintiffs have not met their burden of showing access.

21 In determining whether works are substantially similar, courts compare the “concrete
22 elements that make up the total sequence of events and the relationships between the major
23 characters.” *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006)
24 (citation omitted). This objective test focuses on the articulable similarities of specific expressive
25 elements, such as plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.
26 *Benay v. Warner Bros. Entm’t, Inc.*, 607 F. 3d 620, 624 (9th Cir. 2010). “Protectable expression
27 includes the specific details of an author’s rendering of ideas.” *Funky Films*, 462 F.3d at 1077.
28 However, “*scenes a faire*, which flow naturally from generic plot-lines, are not protectable.” *Id.*

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1 Plaintiffs assert that the plots of *Tribulation* and *Power* are substantially similar. This
2 Court disagrees. While both works share some general similarities such as a drug dealer from the
3 inner city transitioning into legitimate business, they tell materially different stories. *Tribulation*
4 chronicles the lives of multiple protagonists after three murders following a gambling dispute. It
5 tells the story of dueling characters that plan revenge and follows a teenager struggling to cope
6 with the murder of his mother. *Power*, in contrast, follows the story of a Manhattan drug kingpin,
7 Ghost, who hopes to become a legitimate nightclub owner but encounters difficulty escaping the
8 drug trade. It does not tell the story of revenge. The similarities identified by Plaintiffs merely
9 arise from the works' general shared premise and are not protected by copyright law. *Tribulation*
10 also exhibits a more somber mood throughout and entirely different vernacular.

11 The characters in the works also share no significant similarities under copyright law.
12 Only characters who are "especially distinctive" receive copyright protection. *See Olson v. Nat'l*
13 *Broad. Co., Inc.*, 855 F.2d 1446, 1452 (9th Cir. 1988). Here, Prince in *Tribulation* and Ghost in
14 *Power* share no protectable similarities. Plaintiffs allege that both are smart, wear the same
15 hairstyle and goatee, and desire to leave the drug trade. Beyond these non-distinctive similarities,
16 the characters are nothing alike. Prince, a supporting character, has retired from the drug trade, is
17 loyal to his friends, and is deeply in love with his girlfriend. Ghost, the central protagonist in
18 *Power*, still controls his drug empire and pursues an extramarital affair. He neglects his family
19 and friends to pursue his own goals. Plaintiffs also fail to show that any other characters share
20 similarities under copyright law. Plaintiffs allege that "Angie" appears in both works, yet the
21 characters share no similarities besides beauty. Plaintiffs allege that both works feature a Miami
22 drug supplier named "Pedro." In fact, the drug supplier in *Power* is Felipe Lobos, the charismatic
23 target of a federal investigation. In *Tribulation*, Pedro appears once in a flashback. No other
24 characters bear resemblance. Thus, Plaintiffs have not shown the works are substantially similar.

25 Because Plaintiffs have not alleged facts sufficient to support access, and the works are not
26 substantially similar as a matter of law, Plaintiffs' copyright infringement claim is baseless. This
27 Court declines to exercise supplemental jurisdiction over the state law claims. Therefore, this case
28 cannot be sustained against any of the Defendants, including Defendant Turner.

Appendix E
#16a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 23 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTINE SAWICKY,

Plaintiff-Appellant,

v.

AMC NETWORKS INC., a Delaware
corporation,

Defendant-Appellee.

No. 18-56067

D.C. No. 2:18-cv-00114-R-MRW
Central District of California,
Los Angeles

ORDER

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Sawicky's petition for panel rehearing (Docket Entry No. 30) and petition for rehearing en banc (Docket Entry No. 31) are denied.

No further filings will be entertained in this closed case.

Appendix D

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