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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SCOTTISH AMERICAN MEDIA, LLC et al., Plaintiffs and Appellants, v. NBC UNIVERSAL, INC. et al., Defendants and Respondents.	B205344 (Los Angeles County Super. Ct. No. BC349074)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Horvitz & Levy, Mitchell C. Tilner; Kulik, Gottesman, Mouton & Siegel and Glen L. Kulik for Plaintiffs and Appellants.

Katten Muchin Rosenman, Zia F. Modabber, Joel R. Weiner and Gregory S. Korman for Defendants and Respondents.

INTRODUCTION

Plaintiffs Scottish American Media, LLC and Maurice Fraser appeal from a summary judgment in favor of defendants NBC Universal, Inc. and Ben Silverman Productions LLC doing business as Reveille 1 and Reveille 2. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background: The Hit Television Show Eurovision*

Eurovision is an annual televised song competition among the countries of Europe. Each participating country sends a musical group to compete in a two-episode song competition. The public votes via telephone for the winning country. That country hosts the next year's televised competition.

Eurovision is widely known and popular in Europe. It has been televised for over 50 years. It has helped to launch the careers of such performers as Olivia Newton-John, Abba and Celine Dion. The 2005 televised competition had approximately 100 million viewers. *Eurovision* is owned by the European Broadcasting Union (EBU).

B. *The Parties*

1. Plaintiffs Maurice Fraser and Scottish American Media, LLC

Maurice Fraser (Fraser) is the principal of plaintiff Scottish American Media, LLC. Fraser lived in Great Britain and France, where he had a successful career in government, journalism and business. Fraser had no prior experience in the television or motion picture industry. He has known about *Eurovision* since the 1950's and is reasonably familiar with its format.

2. Defendant Ben Silverman Productions LLC Doing Business as Reveille 1 and Reveille 2

Ben Silverman (Silverman) worked as a talent agent for the William Morris Agency (WMA). He spent four years in London, managing WMA's international television business. He looked for television shows from around the world that could be packaged and sold in the United States. Some of the shows he participated in bringing to the United States included *Survivor*, *Big Brother*, *Who Wants to be a Millionaire*, *Queer as Folk*, and *The Weakest Link*.

In 2002, Silverman formed Ben Silverman Productions LLC doing business as Reveille 1 and Reveille 2 (collectively Reveille) to develop and produce television shows for domestic and foreign distribution. Reveille looked for successful foreign television shows that could be adapted for the United States. Among the shows that Reveille acquired the rights to and adapted for the United States are *The Office* and *Ugly Betty*.

Reveille also produced a musical competition television show, *Nashville Star*, for USA Network. On the show, contestants performed original and cover songs before record industry hosts. Members of the public cast votes for their favorite performers, and contestants were eliminated over an eight-week period. The winner received a recording contract and other prizes.

3. Defendant NBC Universal, Inc.

NBC Universal, Inc. (NBC), owner of the NBC television network, has a "First Look Deal" with Reveille. This gives NBC the first opportunity to obtain television shows created or obtained by Reveille.

Craig Plestis (Plestis) was a development executive in NBC's Alternative Programming Department, which is responsible for reality television. He reported to the head of the department, Jeff Gaspin (Gaspin). When Gaspin was promoted in late 2005 or early 2006, Plestis became head of the department.

Plestis looks for successful foreign television shows that NBC can acquire for domestic use. Some of the programs NBC has acquired from foreign producers include *Deal or No Deal*, *The Weakest Link*, and *The Office*. Plestis, who had known about *Eurovision* since he was a child, had explored the possibility of adapting *Eurovision* for the United States.

C. *Silverman's Interest in Acquiring Eurovision and Adapting it for United States Television*

Silverman was familiar with *Eurovision* from his time in London with WMA. Since the late 1990s, he had discussed with his colleagues and others in the television industry the possibility of acquiring the rights to the show and adapting it for the United States. For example, since late 1996 he had discussed *Eurovision* with WMA associate Mark Itkin. Between 1999 and 2002, he discussed importing *Eurovision* with Hans Schiff (Schiff), WMA's Senior Vice President of the Television Division.

Silverman discussed *Eurovision* with David Lyle (Lyle) beginning in 1999 and more recently in 2004 at the National Association of Television Program Executives (NATPE) conference in Las Vegas. Lyle is a television producer and was President of Entertainment at FremantleMedia, the producer of such shows as *American Idol*, *The Price is Right*, and *Family Feud*. Silverman and Lyle discussed co-producing an American version of *Eurovision* as a 50-state song competition.

Silverman also discussed his idea with independent producer Philip Gurin (Gurin) at the 2004 NATPE conference. Gurin had previously pitched his own 50-state song competition to Fox without success. Silverman and Gurin discussed creating their own 50-state song competition or importing *Eurovision*.

Curt Northrup (Northrup), a reality television producer with Granada America, pitched his own company's 50-state song competition, *The Greatest American Song Contest*, to Fox and CBS in late 2003. WMA's Schiff was one of Granada America's representatives. Neither Fox nor CBS was interested in the television show. Northrup

later discussed his pitch with Silverman and let him know that Fox and CBS had passed on the show.

Silverman also discussed *Eurovision* with NBC. Silverman and Plestis discussed acquiring *Eurovision* at a television convention in Europe some years prior to 2005. Silverman pitched *Eurovision* to Gaspin about 2002 as competition for *American Idol*. He continued to mention it to Gaspin about once a year.

D. *Fraser's Idea for a 50-State Song Competition*

1. Fraser's Idea

In 2003, Fraser moved from Europe to Southern California, where his children were pursuing careers in the entertainment industry. In 2004, Fraser wrote a treatment (i.e., an outline) of a television show, a song competition among the states entitled *Battle of the States*. The show would feature original songs, the public would select the winner by a telephone vote, and the winning state would host the finals the following year. Fraser believed the show could revive the American music scene and compete successfully with *American Idol*.

In April 2004, Fraser applied for three trademark registrations for his show, described as "television and/or radio music talent contests . . . exhibiting the performances of winning representatives from the states of the United States who have battled for titles and awards for their state and for themselves." The three names he sought to trademark were *Battle of the States*, *American Hero*, and *American Champion*.

2. Fraser Seeks to Pitch His Idea

Fraser contacted Bill Carter (Carter), a New York Times reporter who covered the television industry. Fraser asked if Carter could identify people to whom he could pitch his show. Carter identified Schiff, Silverman, Plestis and CBS and ABC television executives.

In June 2004, Fraser contacted Schiff. He said he had a musical competition to "take down American Idol" and asked Schiff to be his agent. He described his show as a 50-state competition featuring original songs. Based on his previous experience, Schiff did not think anyone would want the show. He declined to represent Fraser.

Fraser attempted to pitch his show to the CBS and ABC executives identified by Carter. He was unsuccessful.

In early June 2004, Fraser spoke to Plestis by telephone, giving him the "general thrust" of his show. His attempts to meet with Plestis in person were unsuccessful.

Fraser then contacted Silverman, who agreed to meet with him under the mistaken belief that Fraser was a friend of Carter. Fraser sent Reveille a copy of his treatment. On June 16, 2004, Fraser met with Silverman and Reveille development executives Chris Grant (Grant) and Todd Cohen (Cohen) at Reveille's office.

Silverman pointed out that Fraser's idea was similar to *Eurovision*. On June 23, 2004, Silverman sent an email to Fraser to let him know Reveille was not interested in his show. He also sent a letter to Fraser telling him that while he loved the idea of "an American version of *Eurovision*," the show was not appropriate for Reveille at that time.

Fraser considered his show different from, and better than, *Eurovision*. After Silverman rejected his idea, Fraser sent Silverman an email suggesting that he "reconsider the battle of the states idea." He claimed his show would "put Eurovision to shame—it has degenerated anyway." He explained that the European voters "vote in blocks to exclude one another," and "most of the music is the same."

According to Fraser, on August 17, 2004, he met Meredith Ahr (Ahr) in a hallway at NBC. Ahr was a new trainee in the Alternative Programming Department. He gave a copy of his treatment to Ahr, who said she would show it to Plestis, even though she knew NBC would not be interested in it. Ahr did not recall meeting Fraser, however, and Plestis did not recall reading Fraser's treatment.

After his pitch to Reveille and his contact with Ahr, Fraser did not pitch his television show to anyone else.

E. ***NBC and Reveille Agree to Develop a Television Show Based On Eurovision***

1. NBC Contacts Reveille About Developing a Television Show to Compete With *American Idol*

Due to the success of Fox's *American Idol*, other networks were trying to develop music shows that could compete against it. In June 2005, after *American Idol* finished its third season, Plestis began looking for a foreign music show that could be adapted for the United States and could compete successfully against *American Idol*. Since *Eurovision* had just completed its 50th anniversary season and was still a hit, he began considering adapting it. On June 20, 2005, Silverman spoke to NBC Chairman Jeff Zucker about an American version of *Eurovision*. Silverman told Plestis that Jeff Zucker "loved" the idea, and Plestis told Silverman to pursue it.

Silverman immediately began looking into ownership of the rights to *Eurovision*. Reveille staff, recalling Fraser's treatment, asked Silverman if he wanted Fraser's treatment as well as *Eurovision* for a show for NBC. Silverman responded, "I need one of them asap, either one." Reveille staff thereafter confirmed that Reveille could acquire the North American rights to *Eurovision*. Silverman, however, thought it might be better to go with Fraser's treatment. It would probably be less expensive, would not require adherence to *Eurovision*'s specific rules and would allow Reveille to market the show worldwide.

On June 21, 2005, Grant and Cohen contacted Fraser and asked him whether he was still interested in the show he had pitched. When he said he was, they told him they would schedule a meeting for the following week. They also asked Fraser for an email describing his show. He sent them one describing the show and listing his possible titles: *Battle of the States*, *American Champion*, and *American Heroes*. Grant and Cohen reported to Silverman that Fraser was still interested and could come to Los Angeles for a meeting the following week.

Silverman emailed Plestis, urging him to pursue the rights to Fraser's show rather than *Eurovision*. Silverman also contacted Gaspin, again championing Fraser's show.

He told Gaspin: "I know that the Eurovision Song Contest is available to us and we can go down that road if that's what you want, but I believe that we have a smarter and more unique show." He also mentioned Fraser's three trademarked show titles.

Talks between Reveille and NBC continued for five to six months. Plestis and Gaspin, however, said that NBC preferred *Eurovision* because of its proven success. When Fraser contacted Grant in November 2005 regarding the status of his show, Grant told him that Reveille was not going to "go forward" with it.

2. Reveille Obtains the Rights to *Eurovision* and Enters Into a Development Agreement with NBC

Reveille entered into an agreement with EBU, the owner of *Eurovision*, for the exclusive United States rights to *Eurovision*, effective December 1, 2005. On February 8, 2006, Reveille entered into a Development Agreement with NBC to develop an American version of *Eurovision*.

Under the Development Agreement, NBC agreed to invest up to $125,000 for the initial development of the television show. NBC obtained the exclusive right to order, broadcast and distribute the show. It obtained consultation and approval rights, and the right to a percentage of the show's gross receipts.

Reveille was required to obtain and pay for the rights to the music and obligations to third parties. It also was required to deliver to NBC a product it could broadcast.

On February 9, 2006, Fraser wrote to Plestis. He reminded Plestis that he "was in touch with you 18 months ago to offer you Battle of the States, a song programme which was meant to take on Idol and become part of American culture. I got no further than a lady assistant of yours. You might take another look at it. It wouldn't be the first time opportunities arise and slip through the net."

On February 10, 2006, Reveille and NBC issued a joint press release announcing their planned development of an "American Version of 'Eurovision Song Contest,'" based on the "legendary series that has been a monster hit in Europe for 50 years." The

press release was headed: "NBC Seeks America's Next Great Song with New Live Performance Talent Competition Series from Reveille Based on Wildly Popular European Singing Contest Show that Helped Launch the Careers of Celine Dion, Abba and Olivia Newton-John." The press release indicated that *Eurovision* would be adapted "to include a more uniquely American flavor." Silverman was quoted as saying he could not "'wait to tap into America's multicultural heritage and see our regional flavor come to life.'" The press release described the television show as a 50-state song competition, "open to amateurs and professionals—individual performers, duos or groups." The show would have a "multimedia format, combining both online and televised components." Each state would have an online competition, after which the states would compete against one another. The performer of the winning original song would "receive a recording contract" and would have the winning song "produced and released by a major record label."

F. ***Fraser's Lawsuit***

After Fraser saw the press release, he had his lawyer attempt to contact Silverman. When Silverman did not respond, the lawyer sent demand letters to Reveille and NBC. After neither responded, Fraser filed this action on March 16, 2006.

Fraser alleged causes of action for breach of implied contract, breach of confidence, intentional interference with contractual relations, intentional interference with prospective economic advantage, fraud and conspiracy to defraud.

G. ***Reveille's and NBC's Development and Abandonment of the American Version of Eurovision***

In early May 2006, Cohen began to work on the American version of *Eurovision*, tentatively called *American Anthem*. He reviewed materials provided by EBU and discussed his ideas with Silverman and other Reveille executives. None of them reviewed Fraser's treatment or discussed his ideas.

On May 8, 2006, Cohen prepared a treatment for *American Anthem* and sent copies of it to Silverman and other Reveille executives. Reveille sent a copy to EBU, who reviewed it to ensure it complied with EBU rules. EBU returned comments on the treatment as well as a copy of its "Bible," which detailed how *Eurovision* is conducted.

On May 9, 2006, NBC told Reveille that it would be ordering six episodes of the show for its initial season. The following day, NBC told Reveille to get clearance to use *American Anthem* as the show's title.

About this same time, Mark Burnett (Burnett) investigated obtaining the right to produce an American version of *Eurovision*. Burnett's company, Mark Burnett Productions (MBP), has been responsible for a number of popular reality television shows, including *Survivor*, *The Apprentice*, *The Restaurant, The Casino, Rock Star*, and *The Contender*. Burnett learned that Reveille already held the American rights for *Eurovision*.

Burnett approached Silverman about coproducing the television show. The two never discussed Fraser or his treatment; Burnett had never heard of Fraser or seen Fraser's treatment. They ultimately agreed to be equal partners in the production of the show. A June 2006 memorandum of understanding documented their agreement.

MBP created an episodic breakdown of the television show, showing the number of episodes and what would happen on each one. It also created a DVD to pitch the show, now titled *America's Song Contest*.

While MBP and Reveille were negotiating with NBC over production of the show, ABC launched a music talent show entitled *The One*. It was what Plestis called the worst reality television disaster in history, and it was cancelled a week later. NBC thereafter decided not to proceed with the American version of *Eurovision*.

In September 2006, NBC informed Fraser's counsel that NBC had decided not to proceed with the show and requested that Fraser's lawsuit be dismissed. Fraser declined to dismiss the lawsuit.

MBP and Reveille pitched their show to other networks, including ABC and CBS, but none was interested. MBP and Reveille abandoned the project, and Reveille's rights to *Eurovision* expired on June 1, 2007.

H. ***Defendants' Motion for Summary Judgment***

Defendants moved for summary judgment, or in the alternative, summary adjudication. The gravamen of their motion was that their "independent creation of their idea to adapt *Eurovision* to the United States negates the essential element of 'use' or copying required to support each of Plaintiffs' Causes of Action," and they "have not produced any show based on *Eurovision*, or, as Plaintiffs' allege, based on Plaintiffs' ideas, further negating the essential element of 'use' or copying required to support each of Plaintiffs' Causes of Action."

The trial court granted defendants' motion for summary judgment. It first reviewed the undisputed facts, noting that "[p]laintiff does not actually dispute any of the material facts. In each and every instance where he asserts a dispute, he does so either by responding with an irrelevant non-sequitur that has nothing to do with the facts presented, or he attempts to create factual disputes by contradicting his previous sworn testimony, which is not allowed."

The court then went on to explain: "Plaintiff simply has no case here. [¶] The recent case of *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.*, (May 31, 2007) 151 Cal.App.4th 631 is instructive, and eerily similar to the case at bar. [*Hollywood Screentest*] is another 'misappropriation of ideas' case. There, the Plaintiff[] was a corporate entity formed [] to develop and promote a television show known as 'Hollywood Screentest,' a reality show which would give ordinary people from all walks of life the chance to break into the close-knit Hollywood entertainment community. 151 Cal.App.4th at 633. The idea was similar to a television show of the same name that aired for many years in the 1940's and 1950s (as Plaintiff's idea here i[s] similar to Eurovision). It was also similar to another show entitled *Don Adams' Screen Test*, which

aired in the 1970s. Id. Recent television history is littered with so-called 'reality shows,' in which average people compete for the opportunity to become the next great pop star (*American Idol*, *Making The Band*, and *Popstars: USA*), the next great wrestler (*Tough Enough*), the next great model (*America's Next Top Model*), the next great comedian (*Last Comic Standing*), and the next great sports announcer (*Dream Job*). *Id*. at 634.

"The plaintiff contacted NBC, which indicated (through its then-president, Jeffrey Zucker) that it wanted to see the plaintiff's Powerpoint presentation of his idea. There were lots of e-mails between the parties, and the plaintiff provided various updates and variations on his ideas.

"Some months later, NBC announced that it was teaming up with a third party to do a show called 'Next Action Star,' a new competitive reality series in which the winners would star in a prime-time action movie. 151 Cal.App.4th at 636.

"The plaintiff sued, arguing as the Plaintiff does here that NBC stole his idea. However, the Court of Appeal ruled that the claims were barred by the 'independent creation' rule. There, as here, NBC presented evidence of its independent creation of the show. 151 Cal.App.4th 646-647.

"Here, NBC establishes two critical elements that doom Plaintiff's claims to failure. First, after NBC obtained the rights to Eurovision, it put together a team which developed the idea without using Plaintiff's materials. Secondly, since not even one episode of the show was ever produced, Plaintiff's ideas were necessarily not used to create any show. Defendants herein went to the real source—they acquired the rights to Eurovision, a program in which Plaintiff has no interest or claim. NBC and Reveille had every right to go to Eurovision and license its property. [¶] Since no show has been developed, it is completely impossible for Plaintiff to compare his treatment to a non-existent property."

DISCUSSION

A. *Standard of Review*

Summary judgment properly is granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.) The defendant must "demonstrate that under no hypothesis is there a material factual issue requiring a trial." (*Rosenblum v. Safeco Ins. Co*. (2005) 126 Cal.App.4th 847, 856; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The plaintiff may not rely on his or her pleadings to meet this burden (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849), except to the extent they are uncontested by the opposing party (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 626). All doubts as to the propriety of granting the motion are resolved in favor of the opposing party. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Inasmuch as the grant or denial of a motion for summary judgment strictly involves questions of law, we must reevaluate the legal significance and effect of the parties' moving and opposing papers. (*Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.) We must uphold the judgment if it is correct on any ground,

regardless of the reasons the trial court gave. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.)

B. *Breach of Implied Contract*

A cause of action for breach of implied contract may lie where plaintiff has conveyed an idea to defendant with the expectation that the defendant will pay the plaintiff for the idea if he uses it, and he uses the idea but fails to compensate plaintiff for its use. (*Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 181-182.) The idea need not be novel, or one which defendant could not have come up with on his own, to be protected. (*Id*. at pp. 183-184.) Thus, plaintiff's ideas could be the subject of a breach of implied contract cause of action if defendants used them without compensating plaintiff.

Where plaintiff conveys an idea to defendant, and defendant produces a product similar to plaintiff's idea, an inference arises that defendant used plaintiff's idea. (*Hollywood Screentest of America, Inc. v. NBC Universal, Inc.*, *supra*, 151 Cal.App.4th at p. 646 (*Hollywood Screentest*).) The inference may be dispelled by evidence of independent creation of defendant's product. (*Ibid*.)

As the trial court noted, in *Hollywood Screentest*, *supra*, the plaintiff was "a corporate entity formed . . . to develop and promote a television show known as *Hollywood Screentest*, a reality show which would give ordinary people from all walks of life the chance to break into the close-knit Hollywood entertainment community." (151 Cal.App.4th at p. 633.) The idea was "similar to a television show of the same name that aired for many years in the 1940's and 1950's. It was also similar to another show entitled *Don Adams' Screen Test*, which aired in the 1970's." (*Ibid*.) Recently, "there have been many reality shows of the same genre, in which average people compete for the opportunity to become the next great pop star (*American Idol*, *Making The Band*, and *Popstars: USA*), the next great wrestler (*Tough Enough*), the next great model (*America's Next Top Model*), the next great comedian (*Last Comic Standing*), and the next great sports announcer (*Dream Job*)." (*Id*. at p. 634.)

The plaintiff's president contacted Jeff Zucker, who was then president of NBC Entertainment, with his idea. They and others corresponded back and forth by email and by letter for almost a year, with the plaintiff's president presenting NBC with various versions of his show. Eventually, Gaspin informed plaintiff that NBC was "'not looking for this type of program right now.'" (*Hollywood Screentest, supra*, 151 Cal.App.4th at pp. 634-635.) Plaintiff's president continued to contact NBC, but his ideas were rejected. (*Id*. at p. 635.)

Shortly after the final rejection, NBC issued a press release announcing it would be teaming up with a third party to present a new competitive reality series entitled *Next Action Star*. The winners of the competition would star in a prime-time action movie. (*Hollywood Screentest, supra*, 151 Cal.App.4th at p. 636.)

The plaintiff observed a number of similar elements in both *Hollywood Screentest* and *Next Action Star*. (*Hollywood Screentest, supra*, 151 Cal.App.4th at p. 636.) It sued NBC, alleging causes of action for breach of written and implied contracts, breach of the covenant of good faith and fair dealing, breach of confidence, unjust enrichment/quantum meruit, accounting, misappropriation of intangible property interests and unfair competition. (*Id*. at p. 638.)

NBC moved for summary judgment on the ground of independent creation. (*Hollywood Screentest, supra*, 151 Cal.App.4th at p. 638.) It presented evidence showing that *Next Action Star* was "independently created by individuals and entities completely unrelated to NBC." (*Id*. at p. 636.)

In affirming a summary judgment in favor of NBC, the court "found that NBC has successfully shown undisputed evidence of independent creation by entities unrelated to NBC and unassisted by NBC." (*Hollywood Screentest, supra*, 151 Cal.App.4th at p. 647.) The question therefore was whether the plaintiff "provided any evidence that calls into question the evidence supporting independent creation." The court concluded that it had not. (*Id*. at p. 648.)

The court observed that the plaintiff "point[ed] to no evidence that NBC actually used their ideas. Instead, they [asked the court to] draw inferences based on general similarities and timing. They argue[d] that a fact question exist[ed] as to whether *Next Action Star* was independently created by virtue of (1) the numerous similarities between *Hollywood Screentest* and *Next Action Star*; (2) the modifications of *Next Action Star* from its original 'stuntman' concept to the 'actor' concept previously provided to NBC by [plaintiff]; and (3) NBC's simultaneous and suspicious acceptance of the modified *Next Action Star*'s concept and . . . final rejection of *Hollywood Screentest*." (*Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 648.)

The court concluded that the plaintiff's "speculation as to NBC's use is insufficient to create a disputed issue of fact. An inference of use sufficient to challenge NBC's 'clear, positive and uncontradicted evidence' of independent creation may not be drawn from '"'suspicion alone, or . . . imagination, speculation, supposition, surmise, conjecture or guesswork…' [Citation.]"'" [Citation.] Thus, the similarities and timing are insufficient to create a disputed issue of fact." (*Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 648.)

Here, plaintiffs contend that the evidence, viewed in the light most favorable to it (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 843), shows that "defendants had *access* to Fraser's 'Battle of the States' ideas and incorporated strikingly *similar* ideas into the treatment for their own proposed show, 'American Anthem.' This evidence created an inference that defendant's stole Fraser's idea." Assuming this is true, the trial court found that the inference was dispelled by defendants' evidence of independent creation. Specifically, it found that NBC presented evidence that after it "obtained the rights to Eurovision, it put together a team which developed the idea without using Plaintiff's materials. . . . Defendants herein went to the real source—they acquired the rights to Eurovision, a program in which Plaintiff has no interest or claim. NBC and Reveille had every right to go to Eurovision and license its property."

Plaintiffs argue that "[a]bundant evidence" controverts defendants' evidence of independent creation. They claim that viewed in the light most favorable to plaintiffs, the evidence "clearly showed that defendants *combined* the two concepts—they used Fraser's ideas to tailor 'Eurovision' to an American audience."[1] Plaintiffs further argue that because Silverman preferred Fraser's ideas to *Eurovision*, Silverman "turned to Fraser's ideas. [¶] At least *ten* different ideas Fraser had personally presented, orally and in writing, to Silverman and Cohen resurfaced in the 'American Anthem' treatment, to which both Silverman and Cohen contributed."

As in *Hollywood Screentest*, plaintiffs' argument is based not on evidence controverting defendants' evidence of independent creation, but rather on similarities between the two programs. A comparison of Fraser's ten ideas with *Eurovision* shows that many were identical. Inferably, Fraser adopted these elements from *Eurovision* for *Battle of the States*. As defendants point out, in the similar context of copyright law, the law's "'protection does not extend to . . . material traceable to common sources.'" (*Chase-Riboud v. Dreamworks, Inc.* (C.D.Cal. 1997) 987 F.Supp. 1222, 1226.)

Additionally, the similarities must be "'something more than mere generalized idea or themes.'" (*Walker v. Time Life Films, Inc.* (2d Cir. 1986) 784 F.2d 44, 48-49.) A number of elements of *Battle of the States* are just that: generalized themes. There are any number of reality shows that feature musical competitions, judging by celebrity judges, or public voting by telephone. That both plaintiffs' and defendants' shows feature these elements does not support a conclusion that defendants used plaintiffs' ideas.

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1 We reject defendants' argument that plaintiffs cannot raise an "unpleaded theory that [defendants] 'combined' his idea with *Eurovision*." That defendants "combined" Fraser's ideas with *Eurovision* for their own use is not a different legal theory than that defendants took Fraser's ideas for their own use; either way, plaintiffs sought to impose liability under a breach of implied contract theory based on defendants' use of the ideas without compensation. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.)

The following table shows Fraser's "*ten* different ideas," and their similarity to *Eurovision* and defendants' *America's Song Contest/American Anthem*:

BATTLE OF THE STATES	***EUROVISION***	***AMERICA'S SONG CONTEST/AMERICAN ANTHEM***
1. MUSICAL COMPETITION.	MUSICAL COMPETITION.	MUSICAL COMPETITION.
2. FOCUSED ON SONGWRITING.	FOCUSED ON SONGWRITING.	SONGWRITING PLUS PERFORMANCE OF OTHERS' WORK.
3. ONLY NEW, ORIGINAL MUSIC.	ORIGINAL SONG COMPETITION.	ONE ORIGINAL SONG; FINALISTS WOULD ALSO PERFORM WELL-KNOWN AMERICAN SONGS.
4. PERFORMED BY INDIVIDUAL, DUO OR GROUP.	PERFORMED BY INDIVIDUAL, DUO OR GROUP.	PERFORMED BY INDIVIDUAL, DUO OR GROUP.
5. ANY MUSICAL GENRE.	ANY MUSICAL GENRE.	ANY MUSICAL GENRE.
6. EACH OF THE 50 STATES HOLDS A COMPETITION TO SELECT ITS STATE CHAMPION.	EACH COUNTRY HOLDS A COMPETITION TO SELECT ITS CHAMPION.	EACH OF THE 50 STATES, PLUS WASHINGTON, D.C. AND PUERTO RICO, HOLDS A COMPETITION TO SELECT ITS STATE CHAMPION.
7. ONLY RESIDENTS OF THE STATE VOTE IN THE COMPETITION.	ONLY RESIDENTS OF THE COUNTRY VOTE IN THE COMPETITION.	ONLY RESIDENTS OF THE STATE, D.C. OR PUERTO RICO VOTE IN THE COMPETITION.
8. THE CHAMPIONS PERFORM THEIR SONGS BEFORE A PANEL OF MUSIC INDUSTRY JUDGES, WHO NARROW THE FIELD TO 20 STATE REPRESENTATIVES.	JUDGES VOTE IN THE FIRST ROUND.	JUDGES VOTE IN THE FIRST ROUND.
9. EACH OF THE REMAINING CHAMPIONS INTRODUCES A SECOND ORIGINAL SONG, AND THE PANEL OF JUDGES NARROWS THE FIELD TO 10 STATE REPRESENTATIVES.	NO SECOND ORIGINAL SONG IS INTRODUCED; THE PUBLIC VOTES IN THE NEXT SIX ROUNDS VIA MULTIMEDIA AND HIGH TECH METHODS.	NO SECOND ORIGINAL SONG IS INTRODUCED; THE PUBLIC VOTES ONLINE IN THE NEXT SIX ROUNDS.
10. THERE IS A FINAL COMPETITION IN WHICH THE PUBLIC CHOOSES THE WINNER BY TELEPHONE VOTE.	TELEVISED SEMI-FINAL AND FINAL; PUBLIC VOTES FOR THE WINNER BY TELEPHONE.	ALL SEVEN ROUNDS ARE TELEVISED.

As defendants point out, there were a number of differences between Fraser's show and those of *Eurovision* and defendants' show. For instance, Fraser proposed televised state competitions, whereas *Eurovision* and defendants' shows would not have televised local competitions. Fraser proposed that the prizes include a donation to children with disabilities and a televised one-hour tourism documentary on the winning state. He proposed a monetary prize for the winning musicians but no recording contract, while defendants would award a recording contract.

Plaintiffs also complain that the trial court erroneously gave credit to defendants' "self-serving denials" that they used Fraser's ideas, in that "[a] jury could disbelieve defendants' denials in light of the abundant evidence of access to Fraser's ideas and similarity between the parties' respective treatments." However, on summary judgment, credibility is not the issue. The question is whether plaintiffs "provided any evidence that calls into question the evidence supporting independent creation." (*Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 648.) Plaintiffs point to none.

Plaintiffs add that "defendants' denials do not answer the evidence that Silverman touted Fraser's ideas, including his three suggested program titles, to NBC long *before* Silverman and Cohen sat down to write 'American Anthem,' or the evidence that Reveille and NBC incorporated Fraser's ideas in their February 2006 press release, long *before* NBC secured the American rights to 'Eurovision' from EBU. The ideas touted by Silverman and incorporated in the press release came from Fraser, not from a third party."

In fact, defendants' evidence shows that Silverman discussed importing *Eurovision* with others in the entertainment industry since the late 1990's. Silverman pitched *Eurovision* to Gaspin about 2002 as competition for *American Idol*. Silverman and Plestis discussed acquiring *Eurovision* at a television convention in Europe some years prior to 2005. Fraser did not pitch *Battle of the States* to Silverman until 2004. Additionally, Reveille's agreement with EBU was effective December 1, 2005, before the February 2006 press release. Plaintiffs point to no evidence, other than the similarities

between *Battle of the States* and *America's Song Contest/American Anthem*, to demonstrate that the ideas in the press release came from Fraser rather than *Eurovision*.

Additionally, plaintiffs suggest the fact that Silverman pitched Fraser's ideas to NBC "*alone* precluded summary judgment on the independent creation defense." Plaintiffs cite no authority for this proposition. In *Hollywood Screentest*, the fact that the plaintiff previously pitched its idea to NBC did not preclude summary judgment based on evidence of independent creation. (*Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 647.)

In summary, plaintiffs presented evidence of similarity sufficient to raise an inference that defendants used Fraser's idea. (*Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 646.) Defendants dispelled the inference by presenting evidence of independent creation of defendant's show. (*Ibid*.) Plaintiffs failed to "provide[] any evidence that calls into question the evidence supporting independent creation." (*Id*. at p. 648.) The trial court therefore properly adjudicated summarily plaintiffs' cause of action for breach of implied contract. (*Ibid*.)[2]

C. *Breach of Confidence*

A cause of action for breach of confidence will lie where plaintiff offers an idea to defendant in confidence, with the understanding that it is not to be disclosed to others or used without plaintiff's permission, and defendant discloses or uses the idea, damaging plaintiff. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 510; *Faris v. Enberg* (1979) 97 Cal.App.3d 309, 323.)

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[2] In light of this conclusion, we need not address the other basis for the trial court's ruling—that there was no use of plaintiffs' ideas in the absence of a completed television show. We also need not address defendants' arguments that (1) no implied contract was formed, in that Fraser was proposing a joint venture, not the sale of his ideas; and (2) Fraser did not expect compensation unless his show aired.

Plaintiffs argue that defendants breached Fraser's confidence when they disclosed his ideas in their February 2006 press release. Plaintiffs also argue that it is not barred from raising this cause of action by Fraser's disclosure of his ideas in his applications for trademark protection.

As discussed in connection with plaintiffs' breach of implied contract cause of action, defendants did not disclose Fraser's ideas. They disclosed their own, independently created, ideas. Plaintiffs presented no evidence to the contrary. Accordingly, there is no triable issue of fact as to the breach of confidence cause of action, and the trial court properly adjudicated it summarily. (Cf. *Hollywood Screentest*, *supra*, 151 Cal.App.4th at p. 646.)

D. *Fraud*

The elements of a cause of action for fraud are a representation, its falsity, defendant's knowledge of that falsity, intent to deceive, and plaintiff's reliance on the representation with resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Plaintiffs note that although the complaint alleged numerous fraudulent statements by defendants, they will focus on "only one to demonstrate that summary judgment was improper: the November 2005 statement by Reveille's Chris Grant to Fraser that Reveille was not proceeding with Fraser's show."

According to plaintiffs, the evidence showed that at the time Grant made the statement, it was false, in that Reveille was still considering using Fraser's ideas, as evidenced by defendants' subsequent incorporation of Fraser's ideas into their proposed television show. Fraser relied on the representation by failing to insist on participating in the development of the show. He was damaged because he was prevented from earning a percentage of the development fee for the show.

As discussed above, defendants did not incorporate Fraser's ideas into their show. Plaintiffs therefore were not damaged by the loss of a development fee. Absent damage, plaintiffs have no cause of action for fraud, and the trial court did not err in summarily

adjudicating that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 849.)[3]

E. *Interference With Contractual Relations*

The elements of a cause of action for interference with a contractual or business relationship are: (1) A valid contract, or an economic relationship with the probability of future economic benefit to plaintiff, between plaintiff and a third party; (2) defendant's knowledge of the contract or economic relationship; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual or economic relationship; (4) actual breach or disruption of the relationship; and (5) resulting damage. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 and fn. 2.)

Plaintiffs contend there is a triable issue of material fact as to whether NBC interfered with the implied contract between Fraser and Reveille. As discussed above, there was no breach of that contract. Absent an actual breach of the contract, plaintiffs have no cause of action for interference with contractual relations. (*Pacific Gas & Electric Co. v. Bear Stearns & Co., supra*, 50 Cal.3d at p. 1126 and fn. 2.) Summary adjudication of the cause of action therefore was proper. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 849.)

F. *Conclusion*

As the trial court found, defendants' independent creation of their television show, based on *Eurovision*, for which Reveille obtained the American license, effectively doomed all of plaintiffs' causes of action. Summary judgment therefore was proper.

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[3] Moreover, the record does not establish that Grant's statement was false. In his deposition, when Grant was asked whether, by November 2005, "Reveille had made the decision not to do business with Mr. Fraser, he answered, "I wouldn't put it like that." He went on to state: "NBC had decided they wanted the Eurovision song contest *so we had decided to go down that road and retain those format rights*. We had not made a decision to not be in business with Mr. Fraser." (Italics added.)

(Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.