

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-02231 RGK (RZx)	Date	August 13, 2010
Title	<i>SHERI H. GILBERT v. NEW LINE PRODUCTIONS, INC., et al.</i>		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE		
	Sharon L. Williams	Not Reported	
	Deputy Clerk	Court Reporter / Recorder	
	Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
	Not Present	Not Present	
Proceedings:	(IN CHAMBERS) Order re: Defendants’ Motions for Summary Judgment (DE 510, 519, & 535) and other related matters		

I. INTRODUCTION

Plaintiff Sheri G. Gilbert (“Plaintiff”) alleges that Nineteen Defendants named in the Second Amended Complaint (collectively, “Defendants”) willfully copied her screenplay, “When Mom Is the Other Woman” in writing several unauthorized screenplays entitled “Monster in Law.” Plaintiff alleges that Defendants’ screenplays infringe on each one of her works or a combination thereof in violation of the Copyright Act of 1976, 17 U.S.C. 101, et seq. Plaintiff also claims that Defendants engaged in a pattern of racketeering activity related to copying her work and sharing the profits in violation of the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. 1962, et seq.

Before the Court are various Motions for Summary Judgment on Plaintiff’s copyright and RICO claims under Fed. R. Civ. P. 56. The Court consolidates Defendants’ Motions for the purposes of this Order. For the reasons set forth below, the Court **GRANTS** Defendants’ Motion for Summary Judgment based on a lack of substantial similarity between the parties’ works and dismisses Plaintiff’s claims in their entirety.

II. FACTUAL BACKGROUND

From 1998 to 2001, Plaintiff, a North Carolinian screenwriter, wrote four versions of a motion picture screenplay entitled “When Mom’s the Other Woman” (“The Other Woman”). Plaintiff registered the Second version of her screenplay with the U.S. Copyright Office in May 2000, the Third and Fourth versions on May 12, 2008, and the First version on May 26, 2010.

Shortly after January 2006, Plaintiff saw the feature film “Monster-in-Law” (“the Movie”) and found it to bear several similarities to her screenplays. On May 13, 2008, Plaintiff filed suit for copyright infringement against thirty-four defendants in the Eastern District of North Carolina, alleging

Defendants' Movie and Defendants' screenplays, upon which the Movie is based, infringed upon the Second version of Plaintiff's screenplay. Three months later, Plaintiff filed the First Amended Complaint. (Dkt 173.)

On March 31, 2009, Plaintiff's case was transferred to this district. Subsequently, Plaintiff filed several requests to file a Second Amended Complaint, and on August 4, 2009, the Court approved Plaintiff's request and permitted her to include claims for infringement on the Third and Fourth versions of her screenplay. Then on November 16, 2009, the Court granted Defendant's consolidated Motion to Dismiss for Failure to State a Claim, finding that Plaintiff could not establish substantial similarity between the Movie and the Second, Third, or Fourth versions of her screenplay. The Court then dismissed the case in its entirety.

Plaintiff filed a motion for reconsideration of the Court's Nov. 16 Order, arguing that a viable copyright claim remained as they alleged that Defendants' screenplays, not the Movie alone, also infringed upon Plaintiff's works. On February 17, 2010, the Court agreed with Plaintiff and re-opened the case allowing Plaintiff to litigate the screenplay claims as separate and independent allegations. (Dkt 421.) Since the Court had already decided that the Movie did not infringe upon Plaintiff's work, fifteen of the original thirty-four defendants were dismissed, since their alleged infringing conduct was related only to the Movie. (Dkt 497.)

Subsequently, only Nineteen Defendants remained, all of whom filed motions for summary judgement. On June 21, 2010, twelve defendants filed a motion for summary judgement on Plaintiff's claims due to a lack of substantial similarity between the works. Shortly thereafter, six defendants filed a motion for summary judgement for lack of access, and the remaining defendant filed a similar motion based on Plaintiff's RICO claims.

III. JUDICIAL STANDARD

Summary judgment is proper where "the pleadings, deposition, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence for a reasonable jury to find for the nonmoving party, and a fact is "material" when it may affect the outcome of the case under the substantive law that provides the claim or defense. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party is without the ultimate burden of persuasion at trial, it may either produce evidence negating an essential element of the opposing party's claim, or demonstrate that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Insurance Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets this initial requirement, the burden then shifts to the opposing party to go beyond the pleadings and set forth specific facts that establish a genuine issue of material fact remains for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

In granting summary judgment, a district court is not entitled to weigh the evidence and resolve disputed underlying factual issues. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). Rather, courts are required to view all inferences to be drawn from "the underlying facts . . . in the light most favorable to the party opposing the motion." *Id.* (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

IV. DISCUSSION

Defendants contend they are entitled to summary judgement as to all of Plaintiff's claims as there is no genuine issues of material fact and Plaintiff is unable to demonstrate a valid copyright claim. The Court agrees with Defendants' assertions.

To successfully establish a copyright infringement claim, Plaintiff must demonstrate (1) ownership of the copyright, (2) the defendant's access to the copyrighted work, and (3) substantial similarity between the copyrighted work and the allegedly infringing material. *Berkic, v. Crichton*, 761 F.3d 1289, 1291-92 (9th Cir. 1985). Here, the matter before the Court is whether there are substantial similarities between the protected elements of Plaintiff's screenplays and comparable elements in Defendants' screenplays.¹

"When the issue is whether two works are substantially similar, summary judgement is appropriate if no reasonable juror could find substantial similarity of ideas and expressions." *Funky Films v. Time Warner*, 607 F.3d 620, 624 (9th Cir. 2010) (citation omitted). Substantial similarity requires a fact specific inquiry, but it "may often be decided as a matter of law." *Benay v. Warner Bros. Entm't*, 607 F.3d 620, 624 (9th Cir. 2010) (quoting *Sid & Marty Krofft Television Prods., Inc., v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)). The Ninth Circuit has frequently affirmed summary judgement decisions in favor of copyright defendants on the issue of substantial similarity. *Id.* (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990)).

To prevail on a copyright infringement claim, a plaintiff must prove substantial similarity under both the extrinsic and intrinsic tests. *Funky Films*, 462 F.3d at 1077. The extrinsic analysis is objective and based on "specific criteria which can be listed and analyzed." *Id.* The intrinsic analysis is subjective and focuses on whether a reasonable person would find the work substantially similar. *Id.* In a motion for summary judgement, courts only apply the extrinsic test, leaving the intrinsic test to trier of fact. *Id.* If the court finds that the plaintiff failed to satisfy the extrinsic test, such a finding will be fatal to the plaintiff's copyright case. *Id.*

The extrinsic test compares the "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." *Id.* (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir. 1994)) (citations omitted). A court must only inquire whether the "protect[able] elements, standing alone, are substantially similar." *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). "Copyright law only protects expression of ideas, not the ideas themselves." *Benay*, 607 F.3d at 614 (quoting *Cavalier*, 297 F.3d at 625). General themes and familiar stock scenes that are "staples of literature are not protected." *Id.* "Scenes of faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement." *Id.*; *Walker v. Time Life Films*, 784 F.2d 44, 50 (2nd Cir. 1986) (holding that drunks, derelict cars, morale problems, the familiar figure of Irish cop, and other elements are all reoccurring themes in police fiction, and thus are not protectable).

Here, at the outset, the Court notes that Plaintiff attempts to manufacture substantial similarities between the parties' works by mixing and matching various elements that exist in different screenplays without attention to their origin or context. This tactic is wholly flawed. Plaintiff cannot simply selectively filter elements from Defendants' draft screenplays and summarily compare them to various elements of her screenplays. The works must be assessed individually and not manipulated for any

¹ The parties' do not dispute that each party validly owns valid copyrights to their respective screenplays or the authenticity of the screenplays themselves. The Court assumed the element of access for purposes of summary judgement. *Funky Films*, 462 F.3d at 1075.

parties' own benefit.

There are eighteen screenplays by Defendants and four by Plaintiff. Plaintiff alleges that one, multiple, or maybe all of Defendants' works infringe one or all of her screenplays. The record before the Court for summary judgment contained all four versions of Plaintiff's screenplay, as well as fourteen of the eighteen Movie screenplay drafts. Rather than providing an analysis of all eighteen of Defendants' drafts, both parties presented analyses of three to five selected drafts completed between 2003 and 2004 for comparison to Plaintiff's work. For the purposes of summary judgement, the Court considered Plaintiff's four versions, as well as five of Defendants' drafts dated Jan. 5, 2003; Nov. 4, 2003; Feb. 3, 2004; Mar. 28, 2004; and July 24, 2004.²

After reviewing the parties' works, the Court finds that no genuine issue of material fact exists regarding the substantial similarity of the works. Defendants have successfully established that the works are not substantially similar. Plaintiff has at best pointed to general similarities between the screenplays, which are not protected under federal copyright law. Any similarities between the works are far outweighed by the significant differences in the plot, sequence of events, characters, mood, theme, settings, and dialogue.

The Court will start its analysis below by comparing Plaintiff's Second screenplay to Defendants' Jan. 2003 draft. After concluding that the two works are not substantially similar, the Court will explain how the remaining works cannot create a genuine issue of material fact for trial.

A. Plaintiff's Second Screenplay is Not Substantially Similar to Defendants' January 2003 Screenplay

The Court first compares Plaintiff's Second version of her screenplay to Defendants' Jan. 2003 screenplay, Defendants' earliest submitted screenplay draft. The two works are not without similarities. The two mother in law characters ("Barbara" in Plaintiff's work and "Viola" in Defendants') are controlling personalities that come between their sons ("Kyle" in Plaintiff's work and "Kevin" in Defendants') and respective girlfriends ("Julia" in Plaintiff's work and "Charlie" in Defendants'). Despite this generic similarity in the plots (and some other similarities discussed below), a comparison of the screenplays' plot, sequence of events, characters, mood, theme, settings, and dialogue, reveal an extraordinary number of differences. The Court highlights just some of the most glaring and important differences in the discussion below.

1. Plot

The plots of the parties' works develop into very different stories. Plaintiff's screenplay is about how Julia, unable to stand-up to Barbara's efforts to breakup her relationship with Kyle, copes with the stress and frustration of Barbara's disapproval. From the outset, Julia refuses to confront Kyle or retaliate against Barbara. Instead the plot follows Julia as she sheepishly accepts Barbara's abuse and seeks solace through others, obtaining advice from friends, family, and group therapy. Along the way, Julia learns about the relationships of many other characters' with their respective mothers or mothers in law.

In contrast, Defendants' Jan. 2003 screenplay is about how Charlie, angered by Viola's attempts to drive the couple apart, fiercely retaliates against Viola's schemes in order to save her pending

² Defendants' January 2003 draft is the earliest full screenplay submitted to the Court. Filming of the Movie began on May 2, 2004.

marriage. Unlike Julia in Plaintiff's screenplay, Charlie refuses to just accept Viola's abuse. As a result, Charlie and Viola quickly engage in a head-to-head battle of who can outwit, out-frustrate, and outlast the other leading up the wedding day. The plot focuses on the series of comedic schemes and tricks that the two women play on each other, in order to drive the other away.

Additionally, Plaintiff's plot is more complex than Defendants' plot, as it features more characters and contains several subplots not present in Defendants' screenplay. One major subplot involves Julia feeling that she has been wrongfully denied a promotion to television anchorwoman at her workplace and her determination to become one. (*Id.* at 8-10, 42-44, 125-128, 137-138.) Another subplot revolves around a cover-up of a corporate scandal. (*Id.* at 8-10, 77-78, 127-129, 137-139.) Finally, in Plaintiff's screenplay, the characters spend several scenes seeking advice from a psychic hotline to help resolve their problems with their mothers in law. (*Id.* at 18-19, 49-50, 59, 101-102.) Defendants' screenplay does not have these comparable subplots, focusing almost exclusively on the relationship between Julia, Kevin, and Viola. Hence, the parties' plots are not similar as they develop very differently.

2. Sequence of Events

The parties' works differ significantly in their sequence of events. Plaintiff's screenplay unfolds as a flashback, where as Defendants' screenplay evolves chronologically. Plaintiff's screenplay opens with a courtroom scene where Julia, appears crying while she testifies to a court about her marriage to Kyle. The story then flashes-back to a scene where Julia and Kyle have already met and have been dating for some time. Later, the couple get engaged after spending a disastrous Valentine's day with Barbara. In contrast, Defendants' screenplay opens with Charlie as a single woman, going on several failed dates with different suitors. (Dkt 516, Ex. 4, 415-417.) Charlie accidentally meets Kevin, and after a few months of courtship the couple becomes engaged. (*Id.* at 425-438.) Unlike Julia, Charlie had never met Viola formally as Kevin's girlfriend prior to the couple's engagement.

The tactics that the mothers in law use to antagonize the girlfriends also vary in many ways. In Plaintiff's screenplay, Barbara tries to derail the relationship by monopolizing her son's time, intruding on the couple's Valentine's Day celebrations, and lying to Julia that Kevin wants to end the couple's relationship. (Dkt 516, Ex. 1, 7, 21, 67-69.) On the other hand, Viola's tactics include trying to "buy-off" Charlie with \$ 75,000, constantly entering the couple's apartment unannounced, and making outlandish wedding demands. (Dkt 516, Ex. 4, 453-458, 498.)

As discussed above, Julia and Charlie respond to Barbara and Viola's respective tactics in different ways. In Plaintiff's screenplay, Julia silently accepts Barbara's behavior and never confronts Kyle about his mother's abusive behavior until a climactic moment near the end of the screenplay. In stark contrast to Julia, Charlie confronts Kevin at three times about her concerns about Viola prior to the wedding day. (*Id.* at 448-450, 458-459, 470-472.) Charlie retaliates against Viola by entering Viola's apartment when she is not at home in search of hidden secrets; inviting Viola's secret lover, to the rehearsal dinner party; and poisoning Viola's pet parrot.

Finally, the climatic scenes when the mothers in laws schemes are revealed to the sons and when the couples' engagements are called off are also different. In Plaintiff's work the climax occurs abruptly and almost accidentally. During an intimate moment, Julia brings up her concerns to Kyle about his mother. Kyle, in disbelief, accuses to Julia of being jealous of his relationship with his mother and motions as if he is about to hit her. (Dkt 516, Ex. 1, 122-123.) Their heated argument is interrupted when he receives a call that Barbara was taken to the hospital and he is forced to leave. The relationship ends when Barbara, unbeknownst to Kyle, goes to Julia's home to collect Kyle's possessions, telling Julia that Kyle had asked Barbara to collect his things.

Conversely, in Defendants' screenplay, the climax occurs purposefully and as the result of immense tension when Viola in one last effort to derail the marriage, wears a sexy, white dress rather than her assigned maid-of-honor dress. A physical fight between Viola and Charlie ensues, with Kevin walking in. Charlie then insists that he chooses between the two women, but Kevin feeling torn, fails to act. Upset at this, Charlie concedes and walks out of her own wedding unmarried. These illustrations and several others indicate that the sequences of events between the two screenplays are incredibly different, thus weakening any claims of substantial similarity.

3. Characters

The characters in the parties' screenplays are presented very differently. Julia in Plaintiff's work is a successful, career-driven television journalist, who is determined to become an anchorwoman. Her investigative efforts to uncover a corporate scandal, eventually garners her the coveted anchorwoman role near the end of the story. She lives alone in a nice home, drives a luxury car, and comes from a wealthy family. (*Id.* at 11, 41-43, 93.) On the other hand, Charlie in Defendants' work is a dog-walker, lives in an apartment with two other women, and comes from a middle class family. (*Id.* at 417-421.) She does not have the same professional characteristics of her counterpart in Plaintiff's work. Moreover, as described above, apart from their professions, the two women also differ in their personalities: Julia patiently tolerates the abuse from her mother in law; Charlie ferociously responds in kind.

As to the other principal characters, the Court incorporates many of the same distinctions made in the Nov. 16 Order. Kyle in Plaintiff's screenplay is a man who is under the control of his mother, leaving Julia at Barbara's every whim, even during intimate moments. (Dkt 516, Ex. 1, 7-8.) While in Defendants' screenplay, Kevin is still independent and often sides with Julia rather than Viola during disagreements. (Dkt 516, Ex. 4, 471-472, 493-495, 511.) The mother-in-law characters are also quite different. Plaintiff's work depicts Barbara, as an unhappy, "big woman" that lives in a poor neighborhood and appears in a sweat suit when Julia arrives at her home. (Dkt 516, Ex. 2, 11.) In contrast, Viola lives in an upscale neighborhood and is obsessed with her appearance never appearing in public without designer clothes and make-up. (Dkt 516, Ex. 4, 424, 440, 450.) Based on their differences in personalities, professions, and other characteristics, the characters in the parties' screenplays are distinctive.

4. Mood

Plaintiff and Defendants' screenplays have drastically different moods. As the Court noted in the Nov. 16 Order and consistent with the screenplays, Plaintiff's work is a rather dark drama, as evidenced by the characters fighting, crying, and frequent use of expletives throughout the screenplay. There is a scene which Kyle gestures as if he is about to hit Julia. (Dkt 516, Ex. 1, 122-123.) Barbara's attempts to derail the marriage are dark-hearted and psychological. (*Id.* at 47-48, 68-69, 100.) Julia tolerates the abuse until she can no longer stand it and then leaves the relationship. There is a subplot involving the murder of a person who filed a lawsuit against a corporation who Kyle, a lawyer, represents. Kyle suspects his client may be involved in the murder. All of these elements give Plaintiff's work a heavy theme and a dark mood.

Defendants' work in contrast, is a comedy. Viola designs outrageous plans to derail her son's relationship. She puts strawberries in Charlie's food the night before the wedding, even though she knows Charlie is allergic to them. (Dkt 516, Ex. 4, 501, 509.) To add to the comedy, Charlie fights back with her own plans by meeting with Kevin's past girlfriends who have been driven away by Viola and making Viola wear a hideous maid-of-honor dress (*Id.* at 467-468, 475-476.) These events and many more give Defendants' screenplay a light mood and a comic genre, unlike Plaintiff's dark and dramatic mood.

5. Theme

The predominate theme in the parties' works are distinctive and develop in different ways. In Plaintiff's screenplay, the predominate theme is 'Mothers in law: a common problem in modern relationships', demonstrated by the various dysfunctional mother-son-girlfriend relationships featured in the screenplay. In contrast, Defendants' general theme is 'Personal courage triumphs over adversity', demonstrated by how Julia, the lower-class girlfriend finds the courage to fight back and triumphs over Viola, the classist, mean-spirited mother in law.

The two different thematic concepts also developed in different ways. Plaintiff's theme is developed by examining not only Julia's relationship with Kyle and Barbara, but spends considerable time examining at least ten other mother-son-girlfriend relationships. Great emphasis is placed on other characters' relationships. There are several subplots and scenes, such as the group therapy sessions, where other characters share at length their tense and sad stories about their relationships. (Dkt 516, Ex. 1, 61-63, 71-73, 88-92, 103-106, 113-121.) Thus, Plaintiff's screenplay takes a more societal rather than individual perspective on the matter.

Unlike Plaintiff's societal investigation, Defendants' primary theme of courage triumphing over adversity is explored almost exclusively through the interactions between Charlie, Viola, and Kevin. Defendants' screenplay delves into the main characters' relationships in much greater depth than in Plaintiff's screenplay. Specifically, the relationship between Charlie and Viola is the dominant vehicle to develop the theme. Hence, a comparison of the opposing works reveal that they have different themes that ultimately develop in different ways.

6. Settings

The settings are also very dissimilar. For example, the general settings are different; Barbara lives in a poor neighborhood in Washington, D.C., while Viola lives in an wealthy neighborhood in San Francisco, California. Critical events also occur in different settings. In Plaintiff's work, Kyle proposes to Julia privately in their hotel room during a romantic weekend getaway, while Defendants' couple is engaged in public at a local restaurant. In Plaintiff's screenplay, Barbara informs Julia of her disapproval of the couple's engagement in Julia's home; whereas in Defendant's screenplay, Viola reveals her disapproval while the two women are having lunch at a high-end hotel. Each work also features settings unique to their screenplays. Plaintiff's unique settings include a courtroom, protagonist's parents home, and the set of the Jerry Springer talk show. Defendants' unique settings include a spa and the wedding venue.

7. Dialogue

The dialogues also differ, as the dialogue in Plaintiff's screenplay is noticeably more abrasive than the comedic language in Defendants' screenplay. In Plaintiff's screenplay, Julia frequently uses expletives in daily conversation, as does several over other characters, whereas Defendants' characters use virtually none. This distinction is particularly apparent at the climatic moments. In Plaintiff's screenplay, the climatic dialogue uses expletives repeatedly and other slang language. In Defendants' screenplay, despite the characters' anger and physical fighting, the dialogue remains void of expletives, and maintains its comedic demeanor. *Compare* Plaintiff's dialogue Dkt 516, Ex. 1, 122-123 to Defendants' dialogue Dkt 516, Ex. 1, 122-123.

8. The Differences Significantly Outweigh the Similarities

The Court recognizes that some similarities exist. For example, in both screenplays, the mothers incessantly call their sons, fake illnesses to draw their sons away, bring back their sons' ex-girlfriends,

and hire a private investigator to search into Julia and Charlie's past. They also do their sons' laundry and live in the same building as their sons. Both Julia and Charlie seek advice from friends and therapists as they struggle with the mothers in law. There are also some shared generic themes of family, relationships, and love, as well as a similar narrative pace.

The majority of the asserted similarities, however, flow from the screenplays' shared generic plot of mothers who scheme to derail their sons' pending marriage to women who the mothers disapprove of. *See Benay*, 607 F.3d at 625 (holding that similarities, such as "fish-out-of water" theme and physical settings, arise naturally out of the opposing works' shared plot of an American war veteran who travels to Japan to fight Samurai). Thus, most of the similarities cannot be taken into consideration when determining whether the works are substantially similar.

Removing these irrelevant similarities from the Court's consideration, the remaining similarities are insufficient to overcome the differences in order to satisfy the extrinsic test. In *Funky Films*, the parties' opposing works shared a common storyline about a small funeral home run by two brothers who take over their family business in the wake of their father's death. 462 F.3d at 1077. Despite a shared plot and numerous other similarities, the Ninth Circuit held that the works were not substantially similar. The Ninth Circuit found the differences so overwhelming and significant as to overcome the numerous similarities. Here, similar to the comparison in *Funky Films*, the remaining similarities pale in far comparison to the vast differences in plot, sequences of events, pace, characters, themes, mood, and dialogue between the screenplays as discussed above.

In summary, any similarities between Plaintiff's Second version of her screenplay, and Defendants' Jan. 2003 screenplay exist at a high level of generality and are thus not protected under federal copyright law. *Benay*, 607 F.3d at 629. Plaintiff's work is complex drama about how a woman tolerates and copes with her emotionally abusive mother-to-be. Defendants' work is strikingly dissimilar as it is a comedic story of one-upmanship between a bride-to-be and her outrageous mother in law. The parties' works are not substantially similar in their plot, sequence of events, characters, mood, theme, settings, or dialogue.³ Therefore, the extrinsic test is not met, and the Court dismisses Plaintiff's copyright infringement claims with respect to the Second version of her screenplay.

B. Plaintiff's Second Screenplay is Substantially Similar to Defendants' Subsequent Screenplays

Even if Defendant's Jan. 2003 screenplay did not infringe upon Plaintiff's Second screenplay, Plaintiff nonetheless alleges that one of Defendants' eighteen draft screenplays, provided by Defendants in discovery, infringed upon Plaintiff's work. In copyright actions, courts are not required to review each of the defendant's alleged infringing work; courts need only review the infringing works to the point that a reasonable determination about whether substantial similarity exists may be made. *Funky Films*, 462 F.3d at 1076. In *Funky Films*, the Ninth Circuit reviewed only the first three episodes of the defendants' multi-season television series to determine that the defendants' television series was not substantially similar to the plaintiff's screenplay. *Id.*

Here, the Court reviewed all five of Defendants' submitted screenplays. The Court finds that Defendants' subsequent drafts are not substantially similar to Plaintiff's Second screenplay because

³ The extrinsic test can also be satisfied if there are "so many generic similarities" between the two works appear in a "particular sequence" in both works. *Metcalf v. Bocho*, 294 F.3d at 1073-1074 (9th Cir. 2002). Here, after reviewing the similarities, the Court did not find so many significant generic similarities to exist in the same sequence of events to warrant finding substantial similarity between the two works. *See* Dkt 421, 3, n.1.

Defendants' general storyline remains the same throughout the various drafts. Furthermore, changes from draft-to-draft are generic or are made to elements that are not protectable. For example, many of the changes in Defendants' subsequent drafts revolve around the characters' professions and the natural events that flow from those professions. Defendants' mother in law character in the Nov. 2003 draft is a retiring fashion magazine executive, who in later drafts is a television talk show host. The mother in laws' confidante character evolves from draft-to-draft from Viola's lover, to a rich socialite, then from a humble housekeeper to a sarcastic personal assistant.

New or additional scenes added to subsequent drafts simply enhance the battle between Viola and Charlie, but does not alter the premise of the story. In Defendant's Nov. 2003 and subsequent drafts, Viola does not live in the same building as her son, but makes an excuse to comes to live with the couple for several weeks. In Defendants' Feb. 2004 draft, Viola organizes a lavish black-tie event, which she purposefully uses to embarrass Charlie by having Kevin auctioned off in a live auction as an "eligible bachelor", even though she knows Kevin is engaged to Charlie. Due to these immaterial changes between the drafts, the Court finds Plaintiff's Second screenplay and Defendants' submitted screenplays are not substantially similar.

This analysis also leads the Court to believe that a further investigation of Defendants' drafts beyond the five already reviewed would have no bearing on the outcome of this decision. The drafts reviewed ranged from Defendants' earliest submitted full screenplay through to a draft from two months after filming began, and several intermittent drafts in between. A review of the changes from draft-to-draft reveal most changes were made to elements that are not copyright protectable, and thus immaterial to the substantial similarity analysis. Based on this trend, it follows that changes to Defendants' other drafts would also be insignificant. Further, Plaintiff failed submit any additional reasons or analysis to persuade the Court to conclude otherwise.⁴ Therefore, the Court finds that Plaintiff is unable to establish substantial similarity between Plaintiff's Second version of her screenplay and Defendants' subsequent screenplays.

C. Plaintiff's Third and Fourth Versions of her Screenplay Are Not Substantially Similar to Defendants' Screenplays

As the Court noted in its Nov. 16 Order, the Third and Fourth versions of Plaintiff's screenplay contains the same basic story of the second version. "Yet, a series of subplots and secondary characters take the later versions to an entirely new direction . . ." (Dkt 421, 5-6.) This results in even greater distinctions between Defendants' screenplays, and Plaintiff's Third and Fourth versions, than the comparison to Plaintiff's Second version yielded above. (*Id.*) Since the Court already established that Plaintiff's Second version and Defendants' screenplays are not substantially similar, it follows that Plaintiff's Third and Fourth versions are also not substantially similar to Defendants' screenplays

Plaintiff's Third version includes a more prominent corporate scandal. It also include two

⁴ Even a cursory review of additional drafts and treatments of Defendants screenplay, beyond the five reviewed in this decision, reveals that the parties' works are very different. For example, reviewing Defendants' earliest submitted document, the May 2001 screenplay treatment (summary), demonstrates apparent differences. (Dkt 584-7, Ex. 17.) The story features the girlfriend and boyfriend deciding to marry mainly because the girlfriend becomes pregnant. The mother-in-law character infuriated by the engagement frames the girlfriend for murder of her boyfriend's other lover, and conspires with several people to send the girlfriend to prison. After spending several years in prison, the girlfriend miraculously escapes and becomes wealthy, and then exacts revenge on all those who conspired to send her to prison. This story is in stark contrast to Plaintiff's basic story as described *infra* and *supra*. From draft-to-draft, Defendants' storyline evolves, but consistently remains distinct from Plaintiff's works.

additional scenes of violent crime: a stabbing scene; and a car theft scene in which two “thugs” shoot one of the characters at short range. (Dkt 516, Ex. 2, 143, 254-255.) The Fourth version features a gruesome suicide scene: a man shoots himself in the head through his mouth; blood spatters everywhere, even on his wife’s face. (Dkt 516, Ex. 3 286-286.) The police wrongfully arrests his wife charging her with murder. The main couple - a journalist and an attorney - then team together to free the innocent wife. (Dkt 516, Ex. 3 403-405, 406-410.) The Court finds the subplots and the secondary characters in the Third and Fourth versions of Plaintiff’s screenplay too far apart from Defendants’ screenplays to warrant additional discussion of substantial similarity. Therefore, as a matter of law, Plaintiff will not be able to establish that Defendants have infringed upon the copyrights of her Third and Fourth versions of her screenplay.

D. The Court Finds it Unnecessary to Review Plaintiff’s First Screenplay

Plaintiff claims that Defendants’ works also infringed upon the First version of her screenplay. Based on upon Plaintiff’s dilatory actions in pursuing these claims, the Court finds it unnecessary to review the First version of her screenplay for alleged acts of copyright infringement.

Prior to filing her Complaint, Plaintiff had ample opportunity to register her First version, since she completed it in 1998. Yet, Plaintiff waited nearly *twelve years* after completing the First version and two years after filing the Original Complaint (May 13, 2008) to register it on May 26, 2010. This behavior stands in stark contrast to her treatment of the other versions of her screenplay. She completed the Second version in Spring 2000 and registered it immediately thereafter; she then registered the Third and Fourth versions on May 12, 2008, one day prior to filing her original Complaint. Plaintiff’s treatment of the Second, Third, and Fourth versions demonstrates that she understood the legal significance of registration. Despite this understanding, she found it unnecessary to register her First version until two years after this litigation started, suggesting that the Second, Third, and Fourth version presented the strongest claims of infringement.

Plaintiff also had ample opportunities to include claims related to her First version in the Complaint. Yet, Plaintiff intentionally chose not to file such claims either in her Original Complaint (May 13, 2008) or her First Amended Complaint (October 3, 2008). Plaintiff did not file claims related to First version, even after the Court granted Plaintiff leave to file a Second Amended Complaint (August 21, 2009) for the purpose of adding claims related the Third and Fourth versions of her screenplay. Plaintiff’s conduct highlights either a serious lack of diligence or the weakness in her claims related to her First version.

Plaintiff ultimately filed an Ex Parte Application to Amend the Complaint, a third time, in part to add these claims, but the Court denied Plaintiff’s request on June 3, 2010. The Court found the application to be untimely. Moreover, Plaintiff failed to state why the facts or claims that she sought to add could not have been asserted in the first place, or at least when the Court reopened the case in Feb. 2010. (Dkt 497, 2.) Similar the June 3, 2010 Order, the Court finds that a review of the First version of Plaintiff’s screenplay would be futile. Plaintiff unreasonably delayed pursuing her claims and provided no explanation for her dilatory actions. Therefore, based on her failure to diligently pursue these claims, the Court declines to review Plaintiff’s First version of screenplay and dismisses Plaintiff’s claims in their entirety.

In any event, even if Plaintiff filed her claims expeditiously, the First version of her screenplay and Defendants’ screenplays are not substantially similar. The corporate scandal sub-plot is much more dominant in the First version than in either the Second or Third versions of Plaintiff’s screenplay. (Dkt 579- 4, Ex. C.) The focus on the corporate scandal takes Plaintiff’s story is a very different direction than Defendants’ works. More emphasis is placed on the relationship between Julia and Crystal, the corporate whistler-blower. There are several additional scenes including a murder, a police

