

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:12-cv-8961-SVW-RZ	Date	February 13, 2013
Title	Angela L. Wilder v. CBS Corporation, et al.		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE		
Paul M. Cruz	N/A		
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
N/A	N/A		
Proceedings:	IN CHAMBERS ORDER Re MOTIONS TO DISMISS and MOTION TO STRIKE [20] [21] [22]		

I. INTRODUCTION

On October 17, 2012, Plaintiff Angela Wilder (“Plaintiff”) filed her Complaint against defendants CBS Corporation; CBS Studios, Inc.; Relativity REAL, LLC; Relativity Media, LLC; Tom Forman, Relativity REAL, LLC’s Chief Executive Officer (collectively, the Court refers to these five defendants as the “CBS Defendants”); Sony Pictures Television Inc. (“Sony”); Sony Pictures Entertainment Inc.;¹ and Sony Pictures Television Senior Vice-President of Reality and Syndication Programming Holly Jacobs. (Dckt. 1.). Plaintiff alleged seven causes of action: 1) breach of implied contract against Sony; 2) breach of confidence against Sony and Jacobs; 3) breach of the implied covenant of good faith and fair dealing against Sony; 4) tortious interference with contract against Jacobs and the CBS Defendants; 5) tortious interference with prospective economic relationship against Jacobs and the CBS Defendants; 6) unfair competition against all Defendants, in violation of California Business and Professions Code §§ 17200, *et seq.*; and, 7) civil conspiracy against Jacobs and the CBS Defendants.

¹ In her opposition to their motion to dismiss, Plaintiff consented to dismissal of Sony Pictures Entertainment Inc. Therefore, the Court DISMISSES Sony Pictures Entertainment Inc. WITHOUT PREJUDICE.

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On December 14, 2012, the CBS Defendants brought their motion to dismiss Plaintiff’s claims against them; on the same day, Sony and Jacobs, in a separate motion from the CBS Defendants, brought their motion to dismiss Plaintiff’s claims against them. (Dckt. 20, 21.) For the reasons put forward in this Order, the Court DISMISSES Plaintiff’s tortious inference with contract and prospective economic advantage, civil conspiracy, and breach of the implied covenant of good faith and fair dealing claims WITH PREJUDICE and DISMISSES Plaintiff’s unfair competition claim to the extent it relies on Plaintiff’s allegations of tortious interference and civil conspiracy. However, it DENIES Sony and Jacobs’s motion to dismiss as to Plaintiff’s breach of implied contract, breach of confidence, and unfair competition claim premised on the alleged breach of confidence. Furthermore, the Court GRANTS the CBS Defendants’ special anti-SLAPP motion to strike (Dckt. 22).

II. FACTUAL BACKGROUND

Between 2004 and 2006, Plaintiff created a treatment entitled “The Mothers’ Hood” (hereinafter, “the Treatment”).² Compl. ¶¶ 43-44. The Treatment described a one-hour daily talk show “dedicated solely to the interests of mothers and the myriad issues of motherhood,” to be taped in front of a live audience. Compl. ¶¶ 45, 47. It proposed three to five hosts, each mothers, at least two of whom would be “well known established celebrities with household name recognition,” who would share their parenting experiences and be featured in regular segments “interacting with their own children.” Compl. ¶¶ 48-50.³

In December of 2008, Plaintiff had a “pitch meeting” with Jacobs. Compl. ¶ 54. At the meeting, Wilder gave Jacobs a “very detailed” pitch of “The Mothers’ Hood,” and handed her two copies of the Treatment. Compl. ¶ 56. During the pitch, Wilder “emphasized that she not only wanted payment for the Treatment, but that if Sony decided to make the show, she would remain very involved in the development as an executive producer, writer, and co-host.” Compl. ¶ 57. Though appearing to be interested in the Treatment throughout the pitch meeting, at its conclusion Jacobs told Plaintiff that she was going to “pass” on “The Mothers’ Hood,” and expressly told Plaintiff that neither she nor Sony wanted to turn her idea into a show. Compl. ¶¶ 58, 59.

² A treatment is a condensed version of a screenplay: it presents the major features of the full project, and is usually prepared before a creator invests time in developing a full screenplay, often for the purpose of pitching the idea to potential financial backers.

³ Plaintiff registered the treatment with the United States Copyright Office on May 23, 2006. Compl. ¶ 44. However, she does not assert a copyright infringement cause of action.

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In October of 2010, CBS aired “The Talk,” a show “dedicated to motherhood and the issues faced by mothers in their everyday lives.” Compl. ¶ 63. “The Talk” has a “number of remarkable similarities to the Treatment,” including the subject matter (motherhood and the issues relating to it); the format (a one-hour daily show taped before a live audience); the hosts (five hosts, some of whom are celebrities). Compl. ¶ 64. The show was produced by CBS in partnership with RelativityREAL, LLC and its CEO, Tom Forman. Compl. ¶ 65.

Plaintiff alleges that Jacobs and Forman had “very close ties” between December 2008 and the October 2010 debut of “The Talk,” giving the CBS Defendants “direct and easy access” to the Treatment. Compl. ¶¶ 66-71. Plaintiff alleges that Jacobs provided the CBS Defendants with her Treatment and “other confidential information and materials,” from which the CBS Defendants produced “The Talk.” Compl. ¶ 72.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A complaint that offers mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002). Accordingly, while a court is not required to accept a pleader’s legal conclusions as true, the court must “draw all reasonable inferences in favor of the plaintiff, accepting the complaint’s [factual] allegations as true.” *Kniewel v. ESPN*, 393 F.3d 1068, 1080 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and

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(5) whether plaintiff has previously amended his Complaint.” Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

IV. DISCUSSION

A. Breach of Implied Contract

Under California law, when “an idea is furnished by one party to another, a contract sometimes may be implied even in the absence of an express promise to pay.” Grosso v. Miramax Film Corp., 383 F.3d 965, 967 (9th Cir. 2004) (citing Desny v. Wilder, 46 Cal. 2d 715 (1956)). Such a contract exists where “the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise to pay[.]” Grosso, 383 F.3d at 967 (quoting Desny, 46 Cal. 2d at 738).⁴

To establish a so-called “Desny” claim, a plaintiff must show that she “prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” Grosso, 383 F.3d at 967. Here, Plaintiff adequately

⁴ Breach of implied contract claims are common in the film and television industry: writers often pitch scripts or concepts to producers “with the understanding that the writer will be paid if the material is used.” Montz v. Pilgrim Films & Television, Inc., 649 F.3d 975, 979 (9th Cir. 2011) cert. denied, 132 S. Ct. 550, 181 L. Ed. 2d 410 (U.S. 2011). If the ideas and concepts pitched are used without compensating the writer, the writer cannot find recourse under copyright law, because ideas cannot be copyrighted. See id. (“Since an idea cannot be copyrighted, a concept for a film or television show cannot be protected by a copyright.”) (citing 17 U.S.C. § 102). Breach of implied contract claims provide writers a remedy for using the ideas communicated during a pitch meeting without paying the writer. Id.

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alleges each element of her Desny claim. First, she alleges that she created the Treatment between 2004 and 2006, and describes in detail the ideas and concepts in the Treatment in her complaint. See Compl. ¶¶ 43-50. She further alleges that she disclosed the work to Sony (through Jacobs) for sale at the December 2008 pitch meeting, not only by orally communicating to Jacobs her ideas, but also by giving Jacobs two copies of the Treatment. Compl. ¶¶ 55-58. Finally, she alleges that circumstances from which it could be concluded that Sony accepted the Treatment “knowing the conditions on which it was tendered”: Plaintiff alleges that during the December 2008 pitch meeting, she told Jacobs that she “not only wanted payment for the Treatment, but that if Sony decided to make the show, she would remain very involved in the development as an executive producer, writer, and co-host.” Compl. ¶ 57. Such complaints plainly state a claim under Desny. See Montz v. Pilgrim Films & Television, Inc., 649 F.3d 975, 977-78 (9th Cir. 2011) cert. denied, 132 S. Ct. 550 (U.S. 2011) (holding that plaintiffs stated a Desny claim upon alleging that they pitched their idea for a television show “for the express purpose of offering to partner with the Defendants in the production, broadcast and distribution of the Concept”); Grosso, 383 F.3d at 967 (holding that a plaintiff asserted a Desny claim upon alleging that “the idea was submitted by Plaintiff to Defendants with the understanding and expectation, fully and clearly understood by Defendants that Plaintiffs would be reasonably compensated for its use by Defendants”).

Sony attempts to distinguish Desny and Grosso by arguing that, in those cases, the defendant who produced the show based on those plaintiffs’ original work was the same defendant to whom the plaintiff had made the pitch. Here, Sony argues that because it did not produce the show (CBS did) it cannot be liable under Desny; however, this is a distinction without a difference. In Montz, the plaintiffs alleged that the defendant to whom they pitched their idea for a television show partnered with another production company to make a show allegedly based on plaintiffs’ original ideas; the Ninth Circuit found that the plaintiff had stated a claim against *both* the company to whom the plaintiffs had made the pitch as well as its partner company. See 649 F.3d at 978. Similarly, Plaintiff here alleges that Sony breached the implied contract by “assisting others in producing and distributing ‘The Talk.’” Compl. ¶ 86. The alleged breach was sharing the information with the CBS Defendants and assisting them in producing The Talk without properly compensating Plaintiff, an allegation that plainly states a Desny claim.

B. Breach of Confidence

“To prevail on a claim for breach of confidence under California law, a plaintiff must demonstrate that: (1) the plaintiff conveyed ‘confidential and novel information’ to the defendant; (2) the defendant had knowledge that the information was being disclosed in confidence; (3) there was an understanding between the defendant and the plaintiff that the confidence be maintained; and (4) there was a disclosure or use in violation of the understanding.” Berkla v. Corel Corp., 302 F.3d 909, 917 (9th

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Cir. 2002) (internal citations and quotation marks omitted); see also Tele-Count Engineers, Inc. v. Pac. Tel. & Tel. Co., 168 Cal. App. 3d 455, 462-465 (1985). Plaintiff has adequately alleged each element: she conveyed confidential and novel information when she discussed the Treatment and handed two copies of it to Jacobs during the December 2008 pitch meeting, see Compl. ¶ 56; based on standard industry and custom, Jacobs and Sony knew that Plaintiff was disclosing her ideas in confidence and that confidence was to be maintained, see Compl. ¶ 73; and Sony and Jacobs subsequently used the information in partnership with the CBS Defendants to produce The Talk, see Compl. ¶ 72. Sony argues that these allegations are insufficient to survive Twombly's requirements; however, post-Twombly decisions have found similar allegations sufficient to state a claim for breach of confidence. See Montz, 649 F.3d at 977-78 (holding that plaintiffs stated a breach of confidence claim upon alleging that they disclosed their idea for a television show "pursuant to the standard custom and practice in the industry," including that "Plaintiffs' disclosure of their ideas and concepts was strictly confidential [and] that Defendants would not disclose, divulge, or exploit the Plaintiffs' ideas and concepts without obtaining the Plaintiffs' consent").

Jacobs argues that, as Sony's agent, she cannot be liable for a breach of confidence claim. Jacobs is wrong as a matter of law: in California, an agent is "always liable for his [or her] own torts, whether his [or her] employer is liable or not." Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 107 Cal. App. 4th 54, 68 (2003) (internal citations and quotation marks omitted). Thus, if "a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not . . . exonerate the agent from liability." Id. (internal citations and quotation marks omitted).

C. Breach of Implied Covenant of Good Faith and Fair Dealing

"Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement." Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393 (1990) (internal citations and quotation marks omitted). However, allegations that "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action" are to be "disregarded as superfluous[.]" Id. at 1395; see also Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 352, 8 P.3d 1089, 1112 (2000) ("A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous.").

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Here, Plaintiff’s allegations for breach of the implied duty of good faith and fair dealing contains nothing more than a recitation of her breach of implied contract claim, and the remedies she seeks for this alleged breach are exactly the damages for her breach of contract claim. See Compl. ¶¶ 87, 110-102. Thus, Plaintiff’s breach of the implied covenant of good faith and fair dealing claim is superfluous, and is therefore DISMISSED. See Agosta v. Astor, 120 Cal. App. 4th 596, 608, 15 Cal. Rptr. 3d 565, 573 (2004) (dismissing a claim for breach of the implied covenant of good faith and fair dealing where the plaintiff sought only the “losses associated with the termination of his contract benefits”).

D. Plaintiff’s Unfair Competition Claim Arising out of Her Breach of Confidence Claim

California Business & Professions Code Section 17200 prohibits “any unlawful, unfair, or fraudulent” business practices. Cal Bus. & Prof. Code § 17200; see also Sprewell v. Golden State Warriors, 266 F.3d 979, 992 (“To state a claim under the Unfair Practices Act, [Plaintiff] must demonstrate that the [Defendant] engaged in a business practice that was unlawful or unfair.”). Section 17200 “borrows violations of other laws and treats them as unlawful practices.” Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). Unlawful acts are “anything that can properly be called a business practice and that at the same time is forbidden by law ... be it civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made[.]” Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008) (internal citations and quotation marks omitted). In other words, Sony’s unfair competition liability is co-extensive with its tort liability. As discussed above, Plaintiff has adequately alleged a breach of confidence claim against Sony and Jacobs; thus, she has adequately alleged an unfair competition claim against them, to the extent that it arises out of the alleged breach of confidence. See Berkla v. Corel Corp., 66 F. Supp. 2d 1129, 1151 (E.D. Cal. 1999) (“[T]he summary judgment result for the unfair competition claim . . . is the same as the breach of confidence.”).

E. Plaintiff’s Tortious Interference, Civil Conspiracy, and Related Unfair Competition Claims

Plaintiff’s remaining four causes of action, asserted against the CBS Defendants and Jacobs, are: 1) tortious interference with contract; 2) tortious interference with prospective business relationships; 3) unfair competition (a violation of California’s Business and Professions Code §§ 17200, *et seq.*); and, 4) civil conspiracy. See Compl. ¶¶ 103-125. These Defendants contend that each cause of action is preempted by the Copyright Act of 1976.

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17 U.S.C. § 301(a) provides that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title . . . [and] no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.” See also Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1150 (9th Cir. 2008) (“The Copyright Act explicitly preempts state laws that regulate in the area of copyright.”). The Ninth Circuit has adopted a “two-part test to determine whether a state law claim is preempted by the Act.” Laws v. Sony Music Entm’t, Inc., 448 F.3d 1134, 1137-38 (9th Cir. 2006). First, a court must determine “whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.” Id. (footnotes omitted). If it does, a court must then determine “whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.” Id. (citing Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003 (9th Cir. 2001)).

1. Subject Matter

Section 102 and 103 of the Act “identify the works of authorship that constitute the ‘subject matter’ of copyright.” Laws, 448 F.3d at 1139. Section 102(a) extends copyright protection to “original works of authorship fixed in any tangible medium of expression . . . from which they can be . . . reproduced, . . . either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). Although copyright *protection* does not extend to *ideas* fixed in a tangible medium, see 17 U.S.C. § 102, “[f]or *preemption* purposes, ideas and concepts that are fixed in a tangible medium [*i.e.* written down] fall within the scope of copyright.” Montz v. Pilgrim Films & Television, Inc., 649 F.3d 975, 979 (9th Cir. 2011) cert. denied, 132 S. Ct. 550, 181 L. Ed. 2d 410 (U.S. 2011) (emphasis added); see also id. (“The shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”) (internal citations and quotation marks omitted).

Plaintiff does not dispute that the subject matter of her claims—the Treatment—is an idea “fixed in a tangible medium,” and therefore falls within the subject matter of the Copyright Act for preemption purposes. Thus, the first-prong of the preemption test is satisfied.

2. Equivalent Rights

To satisfy the “equivalent rights” part of the preemption test, the Ninth Circuit has held that the alleged misappropriation

“must be equivalent to rights within the general scope of copyright as specified by section 106 of the Copyright Act. Section 106 provides a copyright owner with the exclusive rights of

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reproduction, preparation of derivative works, distribution, and display. To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights. The state claim must have an extra element which changes the nature of the action.”

Laws, 448 F.3d at 1143 (quoting Del Madera Props. v. Rhodes & Gardner, 820 F.2d 973 (9th Cir. 1987), overruled on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)).

a. *Plaintiff’s Tortious Interference and Conspiracy Claims*⁵

To the extent that tortious interference claims rely on an allegation that an original idea has been used, these causes of action fall within the “large variety of [pre-empted state law] causes of action.” NIMMER ON COPYRIGHT, §§ 19D.03[B], [B][2] (hereinafter, “NIMMER”).⁶ In essence, such claims

⁵ Under California law, the elements of intentional interference with contract are: “(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1105 (9th Cir. 2007) (quoting Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55 (1998)). The elements of the tort of intentional interference with prospective economic advantage are: “(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [wrongful] acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.” Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008) (quoting Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003)).

⁶ A claim of civil conspiracy in California is not an independent tort; rather, it depends on the existence of an underlying tort. See Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511, 869 P.2d 454 (1994) (“Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.”); see also Sprewell v. Golden State Warriors, 266 F.3d 979, 992 (“[T]o sustain a claim of civil conspiracy, [plaintiff] must prove that [defendants] have committed an underlying tort.”). Here, the tort claims alleged against the CBS Defendants are intentional interference of contract and intentional interference with prospective business advantage; thus, to the extent these claims are preempted, so too is Plaintiff’s civil conspiracy claim.

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seek recovery for “the alleged encroachment on one’s exclusive right to profit from sale or reproduction of one’s original work(s) of authorship,” and therefore are not “qualitatively different” from those rights protected by copyright. Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129, 1193 (C.D. Cal. 2001), aff’d in part, dismissed in part on other grounds, 90 F. App’x 496 (9th Cir. 2003); see also NIMMER § 1.01[B][1][a][ii] (“Insofar as unauthorized reproduction, distribution, performance, or display causes the plaintiff to lose the benefits that would flow from an actual or prospective contract do not appear to differ qualitatively from rights under copyright,” as copyright “also contemplates loss of actual or prospective contract benefit by reason of such unauthorized acts.”). Courts considering claims of intentional interference with contract and intentional interference with prospective economic advantage have held them both preempted when based on an allegation that a defendant used a plaintiff’s idea without her authorization. See Sybersound, 517 F.3d at 1151 (holding that “to the extent an alleged wrongful act by the Corporation Defendants is based on copyright infringement, it is preempted”); Wild v. NBC Universal, Inc., 788 F. Supp. 2d 1083, 1110-11 (C.D. Cal. 2011) (finding a claim of intentional interference with prospective economic advantage preempted when the plaintiff alleged that the defendants “were aware of certain unspecified continuing and advantageous economic relationships and intended to interfere with and disrupt them by wrongfully incorporating themes, story lines, plots, characters, and locations of [the plaintiff’s work] into [the defendant’s work]”); Idema, 162 F. Supp. 2d at 1193 (finding a claim of intentional interference with prospective economic advantage preempted when the plaintiff alleged that the defendants copied the contents of plaintiff’s original work); see also See Stromback v. New Line Cinema, 384 F.3d 283, 306 (6th Cir. 2004) (“Generally, tortious interference claims (with contract or prospective economic advantage) are held to be preempted because the rights asserted in such claims are not qualitatively different from the rights protected by copyright.”); Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 201 (2d Cir. 1983) rev’d on other grounds, 471 U.S. 539 (1985) (holding that a tortious interference with contract claim was preempted by the Act where the claim alleged an “unauthorized publication”).

Here, Plaintiff’s tortious interference and conspiracy claims each arise out of her allegation that Defendants took Plaintiff’s “confidential and original work and exploit[ed] it for their own gains when they produced and distributed ‘The Talk.’” Compl. ¶¶ 106, 112, 123. This allegation amounts to nothing more than a claim that Defendants encroached upon Plaintiff’s exclusive right to profit from sale or reproduction of Plaintiff’s original work, and therefore, like the claims in Idema and Wild, are not “qualitatively different” from those guaranteed by the Copyright Act. These claims are thus preempted by the Copyright Act.

Plaintiff argues that her tortious interference with contract claim is not preempted because the claim involves her “contractual rights”—that is, the benefits that “would have flown from the

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performance of her implied contract with Sony.” In support of this assertion, she relies upon a case from the Northern District of California, Brackett v. Hilton Hotels Corp., 619 F. Supp. 2d 810, 822 (N.D. Cal. 2008), which in turn relied upon the Ninth Circuit’s decision in Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079 (2005). Altera dealt with a materially different right: the right of a contracting party to limit the *use* of a product licensed to its customers. The plaintiff in Altera licensed software that created a file called a bitstream; the bitstream, in turn, was used to design computer chips individually tailored to meet a customer’s needs. Id. at 1081-82. In order to use the software, customers were required to employ the plaintiff in manufacturing the chips designed by the bitstream. Id. at 1082. The plaintiff alleged that the defendant offered to manufacture chips for plaintiff’s customers with the bitstream, thereby inducing the customers to intentionally breach their agreement with plaintiff. Id. Under these facts, the Ninth Circuit held that the plaintiff’s claim of intentional interference with contractual relationships was not preempted by the Copyright Act because the right at issue was the “use of the bitstream”—a right guaranteed by the contract—not the “reproduction of the software.” Id. at 1189. In other words, the claim against the defendant was that they induced the customers to use the software in a manner proscribed by the explicit terms of the contract, *not* that they took the software, copied it, and reproduced it for sale.

Here, by contrast, Plaintiff’s alleges a run-of-the-mill copyright claim: that Defendants *copied* and *reproduced* her original work without her permission. Unlike the plaintiff in Altera, Plaintiff does not allege that defendants *used* an end-product in a way proscribed by the implied contract, but rather that they *copied*, *reproduced* and *distributed* her work without her permission. Other courts considering the issue have similarly drawn the use/reproduction distinction. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996) (holding that an impermissible use of copyrighted data supported a claim for tortious interference with contract that was not preempted by the Copyright Act); Nat’l Car Rental Sys., Inc. v. Computer Associates Int’l, Inc., 991 F.2d 426, 432 (8th Cir. 1993) (holding that a claim based on an allegation that a use exceeding a software license was not preempted by the Copyright Act); G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 904 (9th Cir. 1992) (noting that a plaintiff’s complaint about an improper use of a document was not preempted by the Copyright Act, but that were he claiming “an exclusive right to copy the [documents], his claim would surely be preempted by the Copyright Act.”).⁷

⁷ Plaintiff further cites to the Ninth Circuit’s decisions in Montz and Grosso for the proposition that “contractual rights are qualitatively different from the rights arising under the Copyright Act.” These two decisions involved an entirely different cause of action—breach of implied contract, a claim asserted by Plaintiff which no party contends is preempted.

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Case No.	2:12-cv-8961-SVW-RZ	Date	February 11, 2013
Title	Angela L. Wilder v. CBS Corporation, et al.		

Plaintiff next contends that both of her tortious interference claims are not preempted because they each include “extra elements” that are not part of a copyright claim. As to her intentional interference with contract claim, Plaintiff argues that the requirements that a valid contract exist, and that Defendants knew of, intentionally interfered, and disrupted the contract, are “extra elements” that bring her claim outside of the Copyright Act’s preemption. However, as Nimmer explains, these additional elements “merely mean[] that the state-created right is narrower than its copyright counterpart, not that it is qualitatively different so as to preclude preemption.” NIMMER § 1.01[B][1][a][ii] (footnotes omitted). Courts have routinely rejected similar arguments. See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1164-65 (1st Cir. 1994) abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) (noting that “a state claim of tortious interference with contractual relations may require elements of awareness and intentional interference not necessary for proof of copyright infringement. And yet, such an action is equivalent in substance to a copyright infringement claim where the additional elements merely concern *the extent to which* authors and their licensees can prohibit unauthorized copying by third parties.”); Harper & Row, 723 F.2d at 201 (“[T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim, goes merely to the scope of the right; it does not establish a qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.”); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 111 (D. Mass. 2001) (holding that a claim of intentional interference with contract was preempted and noting that the elements of awareness and intentional interference did not establish a “fundamentally or qualitatively different element.”).

Similarly, the “extra elements” of intentional interference with prospective economic advantage of showing an economic relationship between the plaintiff and a third party that a defendant knew of, intentionally designed to disrupt, and actually disrupted are not “qualitatively different” elements, and these additional requirements do not bring such a claim outside the scope of Copyright Act preemption. See Idema, 162 F. Supp. 2d at 1193 (“Plaintiffs merely claim that Defendants copied the contents of Idema's Story *with the intent* of interfering with some unspecified possibilities that Plaintiffs would be able to sell that story to one or more potential buyers. This is merely a restatement of Plaintiffs’ copyright claim, and on that basis is preempted.”); Worth v. Universal Pictures, Inc., 5 F. Supp. 2d 816, 822 (C.D. Cal. 1997) (rejecting the argument that an additional element of intent in an interference with economic advantage claim is “qualitatively different” for preemption purposes); Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (“Elements such as awareness or intent may alter the scope of the action but not its nature [Therefore, plaintiffs’] causes of action for intentional and negligent interference with prospective business advantage are preempted by federal law.”).

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A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Code Civ. Proc. § 425.16(b)(1). The statute is to "be construed broadly," Cal. Code Civ. Proc. § 425.16(a), and entitles a prevailing defendant to "recover his or her attorney's fees and costs." Cal. Code Civ. Proc. § 425.16(c)(1). Moreover, the statute applies in federal court. See DC Comics v. Pac. Pictures Corp., 11-56934, 2013 WL 119716, at *2 n.5 (9th Cir. Jan. 10, 2013) ("We have held that [an anti-SLAPP motion] is available against state law claims brought in federal court.") (citing Thomas v. Fry's Electronics, 400 F.3d 1206, 1206 (9th Cir. 2005)).

Anti-SLAPP motions are subject to a two-step analysis with shifting burdens. "First, the defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech. Second, once the defendant has made a prima facie showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims." Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 595 (9th Cir. 2010) (internal citations and quotation marks omitted). The defendant "need not show that the plaintiff's suit was brought with the intention to chill the defendant's speech or that any speech was actually chilled." Id. (internal citations and quotation marks omitted).

A. Protected Act

In order to prevail on their anti-SLAPP motion, Defendants bear the burden of making a "threshold showing" that "the act or acts of which the plaintiff complains were taken in furtherance of [their] right of petition or free speech under the United States or California Constitution in connection with a public issue or an issue of public interest." Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010) (quoting Equilon Enters., LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 67 (2002)). Although this first step is "somewhat amorphous," Hilton, 599 F.3d at 903, in most cases it involves a three-step analysis: first, determining what activity underlies the cause of action; second, determining whether that activity was in furtherance of defendants' right of free speech; and third, whether the activity is in "connection with a public issue" or an issue of public interest. See Tamkin v. CBS Broad., Inc., 193 Cal. App. 4th 133, 142-43 (2011) ("A cause of action arises from protected activity within the meaning of section 425.16, subdivision (e)(4) if (1) defendants' acts underlying the cause of action, and on which the cause of action is based, (2) were acts in furtherance of defendants' right of petition or free

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speech (3) in connection with a public issue.”); see also Hilton, 599 F.3d at 903-905 (noting that to make the requisite threshold showing, a defendant must demonstrate that the activity that gives rise to the plaintiff’s claims must be “in furtherance” of the exercise of free speech rights, and that the activity must be “in connection with a public issue or an issue of public interest”).

1. The Activity⁸

In determining which acts form the basis of a plaintiff’s claims, a court “focus[es] on the specific nature of the challenged protected conduct, rather than the generalities that might be abstracted from it.” Tamkin, 193 Cal. App. 4th at 143 (internal citations and quotation marks omitted). The California Supreme Court has cautioned that the “anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” Robles v. Chalilpoyil, 181 Cal. App. 4th 566, 575 (2010) (internal citations and quotation marks omitted); see also In re Episcopal Church Cases, 45 Cal. 4th 467, 477, 198 P.3d 66, 73 (2009) (“In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity.”) (internal citations and quotation marks omitted). Here, the activities underlying Plaintiff’s claims against the CBS Defendants were their development, production, and subsequent distribution of the “The Talk”: these actions, according to Plaintiff, were intended to and did induce Sony and Jacobs to breach their contract and/or prospective business relationship with Wilder. See Compl. ¶¶ 106, 112.

Plaintiff asserts that the activity in question is only the “stealing” of her ideas, not the subsequent production and distribution of “The Talk.” However, integral to the alleged scheme was the CBS Defendants’ offer and subsequent production of “The Talk”: Jacobs (and Sony) would not have been induced to break their implied contract with Plaintiff had the CBS Defendants not produced and distributed the show. In short, *what* induced Jacobs and Sony to breach their implied contract is central

⁸ In deciding whether a claim arises from an activity taken in furtherance of the exercise of free speech rights, courts consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” Navellier v. Sletten, 29 Cal. 4th 82, 89 (2002) (internal citations and quotation marks omitted).

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to Plaintiff’s allegations against CBS Defendant: and here, the offer to, and subsequent production of, “The Talk” was what induced them to do so.⁹

2. In Furtherance of The Exercise of Free Speech Rights

“An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right.” Tamkin, 193 Cal. App. 4th at 133. Moreover, “[t]he creation of a television show is an exercise of free speech.” Id. Under California law, the actions giving rise to Plaintiff’s claims against the CBS Defendants—the production and distribution of “The Talk”—are clearly “in furtherance” of the right to free speech. See id. (“Here, defendants’ acts helped to advance or assist in the creation, casting, and broadcasting of an episode of a popular television show.”); Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 166 (2003) (finding newsgathering to be in furtherance of the right to free speech); see also Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 807-08 (2002) (finding on-air radio discussion of plaintiff’s participation in a reality show protected activity); Olson v. Cohen, No. B221956, 2011 WL 4014478, at *8 (Cal. Ct. App. Sept. 12, 2011) (finding actions taken in the making of a film to be in furtherance of making the movie and “thusly entitled to constitutional protection.”).

Plaintiff attempts to distinguish Tamkin, arguing that the conduct in question in that case related to the creation and broadcast of a single episode rather than the concept of a show. For anti-SLAPP purposes, this is a distinction without a difference: the CBS Defendants’ efforts to produce and distribute “The Talk” are clearly actions *in furtherance* of the ultimate broadcast of show. Just as newsgathering was held to be in furtherance of the ultimate broadcast (and therefore, in furtherance of the right to speech) in Lieberman, so too are the production and distribution efforts in furtherance of the broadcast of the “The Talk.” Moreover, imposing such a limitation on the anti-SLAPP statute’s reach flies in the face of the California legislature’s command that the statute is to be “construed broadly.” Cal. Civ. Proc. Code § 425.16(a). Similarly, Plaintiff’s argument that anti-SLAPP does not apply to the activity in question because the conduct was taken in furtherance of an entertainment, as opposed to a news, broadcast is unavailing: “The constitutional guarantees of freedom of expression apply with equal force

⁹ Moreover, Plaintiff’s protestations that she has no quarrel with the broadcast of “The Talk,” but only wants to be paid for it, does not alter the Court’s analysis. “The defendant need not show that plaintiff’s suit was brought with the intention to chill defendant’s speech; the plaintiff’s ‘intentions are ultimately beside the point.’” Bosley Med. Inst., Inc. v. Kremer, 403 F.3d 672, 682 (9th Cir. 2005) (quoting Equilon Enters., LLC, 29 Cal. 4th at 67).

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to the publication whether it be a news report or an entertainment feature.” Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264, 296 (2006); see also Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) (“There is no doubt that entertainment, as well as news, enjoys First Amendment protection.”). Finally, Plaintiff’s argument that her claim is merely a “contract dispute” that renders anti-SLAPP inapplicable is a misstatement of California law: the California Supreme Court has held that “conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning.” Navellier v. Sletten, 29 Cal. 4th 82, 92 (2002).

3. In Connection with a Public Issue

An issue of public interest is “any issue in which the public is interested. In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.” Nygaard, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1042 (2008). “[T]his requirement, like all of section 425.16, is to be “construed broadly” so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest.” Seelig, 97 Cal. App. 4th at 808. As Plaintiff concedes, this broad definition clearly includes shows such as “The Talk,” which discusses motherhood, pop culture, current events, and includes celebrity interviews. California courts have routinely found such matters to be “in connection with a public issue” under the anti-SLAPP statute. See Tamkin, 193 Cal. App. 4th at 143 (finding the creation and broadcasting of an episode of the fictional television show *CSI* an issue of public interest “because the public was demonstrably interested in the creation and broadcasting of that episode, as shown by the posting of the casting synopses on various Web sites and the ratings for the episode”); Seelig, 97 Cal. App. 4th at 808 (finding discussion of a plaintiff’s appearance the reality television show *Who Wants to Marry a Millionaire* to be “in connection with an issue of public interest”).

B. Plaintiff’s Probability of Prevailing on Her Claims Against the CBS Defendants

Because the CBS Defendants have made a threshold showing that the activity of which Plaintiff complains were taken in furtherance of their right to free speech in connection with a public issue or an issue of public interest, the burden shifts to Plaintiff to demonstrate a probability of prevailing on her claims. To meet her burden, Plaintiff “must that the complaint is legally and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” Price v. Stossel, 620 F.3d 992, 1000 (9th Cir. 2010) (internal citations and quotation marks omitted); see also Navellier, 29 Cal. 4th at 89 (same). As discussed above, Plaintiff cannot prevail on her claims against the CBS Defendants because they are preempted by the Copyright Act; therefore, she cannot

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carry her burden of demonstrating a probability of prevailing on her claims against them. See Cusano v. Klein, 473 F. App'x 803, 804 (9th Cir. 2012) (“[The plaintiff] has not met his burden of showing a probability of prevailing on his state law right of publicity claim because that claim is preempted by federal copyright law.”) (internal citations and quotation marks omitted).

VI. CONCLUSION

For the reasons put forward in this Order, the Court **DISMISSES** Plaintiff’s tortious inference with contract and prospective economic advantage, civil conspiracy, and breach of the implied covenant of good faith and fair dealing claims **WITH PREJUDICE** and **DISMISSES** Plaintiff’s unfair competition claim to the extent it relies on Plaintiff’s allegations of tortious interference and civil conspiracy. However, it **DENIES** Sony and Jacobs’s motion to dismiss as to Plaintiff’s breach of implied contract, breach of confidence, and unfair competition claim premised on the alleged breach of confidence. Finally, the Court **GRANTS** the CBS Defendants’ anti-SLAPP motion.

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