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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KELLY MONROE KULLBERG, an	)	CASE NO. CV 16-3949-R
individual, and MICHAEL LANDON, JR., an	)	
individual,	)	ORDER GRANTING DEFENDANTS
	)	PURE FLIX ENTERTAINMENT LLC
Plaintiffs,	)	AND DAVID A.R. WHITE'S MOTION
	)	TO DISMISS [13]
v.	)	
	)	
PURE FLIX ENTERTAINMENT LLC, a	)	
California limited liability company, and	)	
DAVID A.R. WHITE, an individual,	)	
	)	
Defendants.	)	

Before the Court is Defendants' Motion to Dismiss, which was filed on August 10, 2016. (Dkt. No. 13). Having been thoroughly briefed by both parties, this matter was taken under submission on September 26, 2016.

On a motion to dismiss, the trial court takes all well-pleaded facts in the complaint to be true and determines whether, based upon those facts, the complaint states a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). See *Alperin v. Vatican Bank*, 410 F. 3d 532, 541 (9th Cir. 2005). To state a claim, the complaint must contain factual assertions which make the claimed relief not merely possible, but "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009);

1 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although factual assertions are taken  
2 as true, the court does not accept legal conclusions as true. *Id.*

3 Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper only when a complaint  
4 exhibits either a “(1) lack of a cognizable legal theory or (2) the absence of sufficient facts alleged  
5 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F. 2d 696, 699 (9th Cir.  
6 1988). Under the heightened pleading standards of *Twombly* and *Iqbal*, a plaintiff must allege  
7 “enough facts to state a claim to relief that is plausible on its face,” so that the defendant receives  
8 “fair notice of what the...claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at  
9 570. The plaintiff must plead factual content that allows the court to draw the reasonable  
10 inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. The  
11 court will not accept “threadbare recitals of the elements of a cause of action, supported by mere  
12 conclusory statements. . . .” *Id.* In resolving a Rule 12(b)(6) motion, the court must: (1) construe  
13 the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual  
14 allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a  
15 claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F. 3d 336, 337-38 (9th Cir.  
16 1996).

17 Plaintiffs’ sole cause of action is for copyright infringement. Plaintiffs assert that  
18 Defendants infringed Plaintiffs’ exclusive rights in their copyright to Plaintiffs’ *Rise* screenplay, in  
19 violation of Title 17 U.S.C. § 106, by preparing unauthorized derivative works, namely  
20 Defendants’ *God’s Not Dead* (“*GND*”) screenplay and motion picture. Plaintiffs allege that as a  
21 result of Defendants’ copyright infringement, Plaintiffs were prevented from making the *Rise* film  
22 and each receiving their 50% interests.

23 “To establish infringement, two elements must be proven: (1) ownership of a valid  
24 copyright, and (2) copying of constituent elements of the work that are original.” *Feist*  
25 *Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). For purposes of this Motion,  
26 Plaintiffs’ ownership of the copyright is not disputed—therefore, two issues remain: (1) whether  
27 Defendants in fact copied from Plaintiffs’ work; and (2) if so, whether what Defendants copied  
28 constituted original *protected* expression. *Id.* “Absent evidence of direct copying, proof of

1 infringement involves fact-based showings that the defendant had access to the plaintiff's work  
2 and that the two works are substantially similar." *Funky Films, Inc. v. Time Warner Entm't Co.*,  
3 462 F. 3d 1072, 1076 (9th Cir. 2006) (internal quotation marks omitted). For the purposes of this  
4 Motion, Defendants do not dispute access, therefore the Court need only address whether the two  
5 works are substantially similar.

6 In determining whether the works are substantially similar, "court[s] compare[], not the  
7 basic plot ideas for stories, but the actual concrete elements that make up the total sequence of  
8 events and the relationships between the major characters. *Id.* (internal quotation marks omitted).  
9 It is an objective test that focuses on the articulable similarities of specific expressive elements  
10 such as, plot, themes, dialogue, mood, setting, pace, characters, and sequence of events. *Benay v.*  
11 *Warner Bros. Entm't, Inc.*, 607 F. 3d 620, 624 (9th Cir. 2010).

12 Plaintiffs assert that the works' plots and sequences of events are substantially similar.  
13 This Court disagrees. While both *Rise* and *GND* share the general premise of an atheist professor  
14 challenging a Christian student's religious beliefs, the two works tell materially different stories.  
15 *Rise*, at base, is a story, spanning a four-year time period, about a young Christian woman who  
16 attends college and undergoes a transformation into a person "harder" and "sexier" before  
17 reconnecting with her religion and her earlier self. *GND*, on the other hand, is a story, spanning a  
18 two-week time period, primarily about a Christian college student who, on the first day of his  
19 freshman year, is challenged by his atheist philosophy professor to convince his classmates that  
20 God is not dead. While at a very high level of generality *Rise* and *GND* share certain plot  
21 similarities, "general plot ideas are not protected by copyright law; they remain forever the  
22 common property of artistic mankind." *Benay*, 607 F. 3d at 629. The similarities identified by  
23 Plaintiffs are ones arising merely from the works' general shared premise and scenes-a-faire—  
24 such similarities are unprotected by copyright. Plaintiffs' overly broad examination of the two  
25 works does not merit a different conclusion. Moreover, *Rise* contains highly controversial themes,  
26 such as sexuality and adultery, which are completely absent from *GND*. Consequently, *Rise* also  
27 exhibits a more serious mood throughout.

28 The lack of substantial similarities between the two works is best illustrated by an analysis

1 of the works' main characters: (1) Emma and Josh; and (2) Professor Hawkins and Professor  
2 Radisson. While Plaintiffs point to various similarities between the two sets of characters, there  
3 exist only a few similarities that have significance under copyright law—most similarities  
4 identified by Plaintiffs are either generic character traits or traits that flow naturally from the  
5 works' shared premise. *See Benay*, 607 F. 3d at 626 (noting that only distinctive characters are  
6 protectable, not characters that merely embody unprotected ideas).

7 First, Plaintiffs fail to establish that Emma and Josh share significant similarities under  
8 copyright law. Both characters are Christian students whose religious beliefs are challenged by an  
9 atheist professor—this similarity unequivocally flows naturally from the works' shared premise.  
10 Plaintiffs further contend that both characters are “devout,” “kind,” “loyal,” “free-thinking,”  
11 “courageous,” “bright and studious, and demonstrate a command and appreciation of the powers  
12 of logic and reason.” However, to the extent any of these similarities are significant under  
13 copyright law, they too flow naturally from the works' shared premise. In fact, the works'  
14 depiction of these characters is strikingly different. Emma goes through a personal transformation  
15 throughout *Rise*. She leaves her family's farm and arrives at Harvard as a devout Christian  
16 woman. During her freshman year, a fellow student takes advantage of her sexually after a night  
17 she had too much to drink. When the story flashes forward two years, Emma is “harder, sexier,  
18 wearing make-up, and [is] barely recognizable.” She then temporarily has an inappropriate  
19 relationship with Hawkins. Subsequently, after spending time at The Ark and preparing for the  
20 debates against Hawkins, she reconnects with her religious beliefs and the person she was prior to  
21 attending Harvard. No such transformation occurs with Josh whose character consistently remains  
22 the same throughout *GND*.

23 Second, Plaintiffs likewise fail to establish that Hawkins and Radisson share significant  
24 similarities under copyright law. Other than the fact that both Hawkins and Radisson are atheist  
25 professors—unprotected traits that flow naturally from the works' shared premise—the two  
26 characters share no other significant similarities. In *Rise*, Hawkins is famous and is frequently  
27 described as being charming. Additionally, Hawkins is an adulterer, best demonstrated by his  
28 pursuit of Emma despite being married. None of these character traits apply to Radisson.

1 Plaintiffs further contend that at the conclusion of the debates, both characters are inspired to  
2 question their atheist beliefs and, ultimately, turn back to God. While it is clear that Radisson  
3 does in fact turn back to God as he is dying, it is unclear whether Hawkins chooses to do the same.  
4 Plaintiffs base their contention on the final scene of *Rise* where Hawkins, still in the auditorium  
5 after the debate, looks up at the highlighted Veritas shield. This scene provides no indication that  
6 Hawkins was accepting God—at best, the scene leaves the matter ambiguous. On the contrary,  
7 Radisson overtly accepts God as he is speaking with Reverend Dave seconds before his death.  
8 There is simply no basis for Plaintiffs’ contention that these two sets of characters are substantially  
9 similar. Likewise, Plaintiffs’ assertions as to alleged similarities of other characters are equally  
10 unavailing.

11 Because Plaintiffs fail to demonstrate that the works are substantially similar, no basis  
12 exists for their claim of copyright infringement.

13 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss is GRANTED. (Dkt.  
14 No. 13).

15 Dated: October 12, 2016.



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18 MANUEL L. REAL  
19 UNITED STATES DISTRICT JUDGE

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