JS-6

NOTE: CHANGES MADE BY THE COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

ROBERT PANTON,

Plaintiff,

v.

DANNY STRONG, DEBBIE ALLAN, LEE DANIELS, BRIAN CRAZER, PETER RICE, and FOX STUDIO,

Defendants.

CASE NO. 2:17-cv-00050-JFW (JEM)

STATEMENT OF DECISION GRANTING DEFENDANTS DEBBIE ALLEN'S AND LEE DANIELS' MOTIONS TO DISMISS WITH PREJUDICE AND REQUESTS FOR JUDICIAL NOTICE

Honorable John F. Walter

(Hearing Taken Off Calendar)
Date: February 26, 2018
Time: 1:30 p.m.
Ctrm: 7A, 350 W. 1st Street

STATEMENT OF DECISION

On January 24, 2018, Defendant Debbie Allen filed a Motion to Dismiss Plaintiff's First Amended Complaint or, in the alternative, Second Amended Complaint. On January 26, 2018, Defendant Lee Daniels filed a Motion to Dismiss Plaintiff's First Amended Complaint or, in the alternative, Second Amended Complaint on similar grounds. On February 20, 2018, Plaintiff Robert Panton ("Plaintiff"), who is proceeding pro se, filed a consolidated Opposition to Allen's and Daniels' (collectively, "Moving Defendants") motions, which the Court deemed timely. On March 5, 2018, Moving Defendants filed their Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter was appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's February 26, 2018 calendar, and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

On January 1, 2017, Plaintiff filed this action. On April 14, 2017, he filed a First Amended Complaint ("FAC"). On December 4, 2017, Plaintiff filed a Motion for Leave to Amend to File a Second Amended Complaint ("SAC").[1] In the SAC, Plaintiff alleges two claims against Moving Defendants, as well as the remaining defendants Danny Strong, Brian Grazer, Fox Studio, and Peter Rice (collectively, "Non-Moving Defendants"): (1) copyright infringement and (2) declaratory judgment. The basis of Plaintiff's claims is that the first season of the hit television series *Empire* infringes his alleged copyright in a screenplay titled *Can You Cross Over* ("*CYCO*") and, thus, he is entitled to a writing credit in connection with *Empire*. The Court concludes that Plaintiff's copyright

[1] Plaintiff failed to file his proposed Second Amended Complaint ("SAC") by the Court-ordered deadline of December 21, 2017 [Docket No. 50]. Notwithstanding, the Court considers the merits of Plaintiff's claim for declaratory relief, as pled in the SAC.

infringement claim fails because he cannot demonstrate that *Empire*'s creators—Daniels and Danny Strong—had access to *CYCO* before they created *Empire*, or that the works are substantially similar in protected expression. Plaintiff's claim for declaratory judgment for credit also fails because *Empire* does not infringe *CYCO*. In addition, Plaintiff cannot demonstrate that he made an independently copyrightable contribution to *Empire*, that the parties had a shared intent to create a joint work, or that he exercised control over the creation of *Empire*. Accordingly, the Court concludes that both of Plaintiff's claims against Moving Defendants fail as a matter of law.

I. FACTUAL BACKGROUND

A. ***Empire***

Plaintiff claims that Season One of *Empire* infringes *CYCO*. FAC ¶¶ 21–23; SAC ¶¶ 41–43. Daniels and Strong are the "Co-creators" of *Empire*. FAC ¶ 37; SAC ¶ 57. Allen was "a director" on the final episode of Season One. *Id.*; Opp. at 1; *see* Request for Judicial Notice ("RJN") Ex. 1, Ep. 12 (Who I Am), 51:14–16.

Empire is a soap opera-style family drama set in the modern-day world of hip hop. *Empire* centers on the intra-family power struggle among Lucious Lyon, a famous rapper-turned-music mogul; his ex-wife Cookie, who has been in prison for seventeen years; and their three adult sons. Lucious is the head of Empire Entertainment, a huge music and entertainment company on the verge of going public. RJN Ex. 1, Ep. 1 (Pilot), 4:38–6:42. Upon being diagnosed with Amyotrophic Lateral Sclerosis ("ALS"), Lucious tells his sons that he will choose one of them—Andre, a married businessman with bipolar disorder; Jamal, a gay singer rejected by the homophobic Lucious; and Hakeem, a talented but unfocused rapper—to be his successor. *Id.*, Ep. 1 (Pilot), 2:46–4:37, 6:43–8:05, 9:06–9:47, 10:23–11:15, 22:10–23:15, 24:42–26:00, 30:11–32:41, 34:19–35:26, 39:20–34; Ep. 10 (Sins of the Father), 0:53–3:49. This epic family saga heats up when

Lucious' ex-wife Cookie gets out of prison and demands half of the company. *Id.*, Ep. 1 (Pilot), 8:06–37, 14:04–17:19.

B. Plaintiff's Screenplay, *Can You Cross Over*

CYCO is "a 2hr. and 7 minute screenplay." FAC ¶ 22; SAC ¶ 42. *CYCO* tells the story of a man in his twenties named Donneekie (a/k/a "the Don") Brown and his life of crime, from a robber to a drug lord. Plaintiff alleges that he wrote *CYCO* in 1993, but that it was submitted for copyright in 1994 in his sister's name, Greta Clarke. FAC ¶¶ 25–26; SAC ¶¶ 45–46. The registration for a 130-page screenplay titled *Can you cross over?*, No. PAu002032153, shows the claimant as "Greta Clarke (employer-for-hire of Robert Parton)." RJN Ex. 3.[2]

Plaintiff alleges that about fifteen years ago, in or about 2003, he sent a copy of *CYCO* to one person—an inmate housed at a different prison named Guy Fisher, "for him to send it to Allen for sale or production inquiries." FAC ¶ 28; SAC ¶ 48. Plaintiff claims that, after he was transferred in 2004 to the prison in which Fisher was incarcerated, Fisher told him that "Allen received the screenplay CYCO, read it and suggested a few things from the script may need changing." FAC ¶¶ 33–34; SAC ¶¶ 53–54.

II. LEGAL STANDARD

To state a claim for copyright infringement, a plaintiff must plead facts plausibly showing (1) his ownership of a valid copyright; (2) that the creators of the defendant's work had access to his work; and (3) substantial similarity in protected expression between the two works. *See Berkic v. Crichton*, 761 F.2d 1289, 1291 (9th Cir. 1985); *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 826 (C.D. Cal. 2010), *aff'd*, 438 Fed. Appx. 587 (9th Cir. 2011). When considering a

[2] Exhibit A to the FAC and the SAC refers to another registration, No. PAu001923459. However, the Court concludes that number is incorrect because, as the registration shows (RJN Ex. 4), that number pertains to a 9-page treatment, not the "2hr. and 7 minute screenplay" (FAC ¶ 22) that Plaintiff claims was infringed.

motion to dismiss an infringement claim for lack of substantial similarity, a court may "take judicial notice of generic elements of creative works" as well as "documents [such as copies of works] which are not physically attached to the complaint but 'whose contents are alleged in [the] complaint and whose authenticity no party questions.'" *Zella v. The E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1128-29 (C.D. Cal. 2007) (citation omitted).

Moving Defendants have requested judicial notice of the works at issue, as well as copyright registrations and judicial decisions, which are the proper subjects of judicial notice. Moreover, Plaintiff does not dispute the authenticity of these exhibits. The Court therefore grants Moving Defendants' RJN.[3]

III. PLAINTIFF'S COPYRIGHT INFRINGEMENT CLAIM FAILS

A. Plaintiff Has Failed To Plead Access

Plaintiff's claim fails because he has failed to plead facts that plausibly show that the creators of *Empire*, Daniels and Strong, had reasonable access to *CYCO*. Plaintiff merely asserts that an inmate—Fisher—allegedly said in 2004 that he had sent *CYCO* to Allen. However, a "bare possibility" of access or "mere speculation or conjecture" is legally insufficient. *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) ("slight chance" that the defendant's employee saw the plaintiff's dolls at county fair legally insufficient); *see also Schkeiban v. Cameron*, 2012 WL 12895721, at *1 (C.D. Cal. July 20, 2012) (allegation that intermediary indicated that he had passed the work to the defendant was mere conjecture). Moreover, for the Court to infer access, there must be an overlap in subject matter between a plaintiff's dealings with the alleged

[3] Plaintiff argues RJN Ex. 1 is not complete because it only contains Season One of *Empire* and not the subsequent seasons. However, none of Plaintiff's complaints, liberally construed, alleges any claim as to any season other than Season One. Plaintiff also requests that the Court take judicial notice of page 34 of his screenplay [Docket No. 78]. The Court denies Plaintiff's request because the document is not judicially noticeable under Federal Rule of Evidence 201. However, the Court has reviewed the contents of the document and concludes that the document would not change the Court's ruling.

intermediary and the intermediary's dealings with the creator of a defendant's work. *See Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). The requisite overlap is not present in this action: Plaintiff alleges that Fisher sent *CYCO* to Allen as part of a prison creative writing program in 2004 (FAC ¶ 29), which had nothing to do with *Empire*, Daniels, or Strong.

In addition, Plaintiff has not pled any facts demonstrating a reasonable possibility that, even if Fisher sent *CYCO* to Allen, Allen gave it to Daniels or Strong a decade later. "An inference of access 'requires more than a mere allegation that someone known to the defendant possessed the work in question.'" *Batts v. Adams*, 2011 WL 13217923, at *3 (C.D. Cal. Feb. 8, 2011). That Allen later directed the final episode does not show that she was supervising Daniels and Strong or contributing creative ideas to them *before* they created *Empire*. *See Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1054 (C.D. Cal. 2000) (access must be "*before* the creation of the allegedly infringing work"); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-56 (C.D. Cal. 1984) (intermediary must be "in a position to transmit it to the copier," such as "a supervisor with responsibility for the defendant's project, [or a person who] was part of the same work unit as the copier, or contributed creative ideas or material to the defendant's work"). Plaintiff's failure to plead access, by itself, compels dismissal of his claim.

B. *Empire* and *CYCO* Are Not Substantially Similar

Plaintiff's claim also fails because the works clearly are not substantially similar in protected expression under the extrinsic test. *See Funky Films, Inc. v. Time Warner Entm't, Inc.*, 462 F.3d 1072, 1077 (9th Cir. 2006); *Zella*, 529 F. Supp. 2d at 1133 n. 8. All of Plaintiff's alleged similarities consist of non-protectable generic ideas, which are not probative of similarity. *See Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (the court must "filter out and disregard the non-protectable elements [of each work] in making [a]

substantial similarity determination"). Indeed, in his Opposition, Plaintiff did not even address plot, characters, pace, sequence of events, or themes, and, therefore, failed to carry his "burden to identify the sources of the alleged similarity" between the works. *Gadh v. Spiegel*, 2014 WL 1778950, at *4 (C.D. Cal. Apr. 2, 2014). Notwithstanding, Plaintiff's claim fails an analysis of every element of the extrinsic test.

Plot. Even at the most abstract, unprotectable level, the plots of the works are not similar. *Empire* is a modern take on the *King Lear* succession story set in a music empire. *Empire* "focuses on the family dynamics and conflict" amongst the Lyon family in their battle for control of a music empire. *Newt v. Twentieth Century Fox Film Corp.*, 2016 WL 4059691, at *4 (C.D. Cal. July 27, 2016) (same), *appeal dismissed sub nom. Newt v. Daniels*, 2017 WL 3923362 (9th Cir. Jan. 3, 2017). In contrast, *CYCO* is a story about a drug kingpin. With law enforcement after him, the kingpin is forced to try living a legitimate life but as a fugitive.

Plaintiff alleges that both works are about a "black male drug dealer and a black gangster girl, making money from drugs and investing into a music studio and record label, to legitimize their life." FAC ¶¶ 22–23; SAC ¶¶ 42–43. Even if that characterization were accurate (and it is not), Plaintiff cannot claim ownership of such a general idea. *See Newt*, 2016 WL 4059691, at *4 ("the basic plot idea of 'pursuing dreams of music careers is not protectable'"). In fact, Plaintiff "conceeds [sic] that he has no monoply [sic] on" this idea. Opp. at 8. Plaintiff also mischaracterizes the works. *Empire* is not about Lucious Lyon dealing drugs or struggling to build a record label; when *Empire* opens, Lucious is already a music mogul. "While *Empire* contains brief flashbacks to Lucious' struggled past (which included drug dealing), *Empire* focuses on family dynamics and conflict among Lucious' three adult sons competing to take over Lucious' music company because Lucious believes he is suffering from [ALS]." *Id.* In *CYCO*, the main character

Donneekie is a drug dealer for nearly the entire screenplay. He is barely involved with the studio and does not cross over into "legitimate" life when he buys it as an investment. RJN Ex. 2, p. 32. Rather, he continues to build up his drug operations and only leaves that life when agents come after him. *Id.*, p. 125. *See Merrill v. Paramount Pictures Corp.*, 2005 WL 3955653, at *10 (C.D. Cal. Dec. 19, 2005) (work that ended hinting at character's future success as singer not substantially similar to work whose character's successful music career made up substantial portion of story).

Characters. There is no similarity in characters. *Empire*'s Lucious and *CYCO*'s Donneekie are dramatically different, even in their broad outlines. Lucious is middle-aged, with an ex-wife and three grown children. He is a recording artist-turned-business magnate. Donneekie is in his twenties and has a wife and no children. He is a robber-turned-drug kingpin, and he is not a musician or the head of a large corporation. "The allegation that both characters are African-American men who rise from poverty and lives of crime to become successful is too general to show substantial similarity." *Tanksley v. Daniels*, 259 F. Supp. 3d 271, 291 (E.D. Pa. 2017), *appeal docketed*, No. 17-2023 (3d Cir. May 8, 2017). Nor are *Empire*'s Cookie Lyon and *CYCO*'s Teresa, or *Empire*'s Anika Calhoun and *CYCO*'s Suany Brooks, remotely similar in any protectable element. Furthermore, *Empire* has many characters with no counterparts in *CYCO*, including central characters such as Andre, Jamal, and Hakeem, and conversely, *CYCO* has many key characters with no counterparts in *Empire*. *See Funky Films*, 462 F.3d at 1079 (emphasizing characters from one work not in other work).

Setting. Plaintiff contends that the settings are similar because the works primarily take place in New York City; because there are scenes in the "ghetto" involving drugs; and because the characters have luxury homes and "tricked out" cars. Opp. at 17–18. However, a setting in the same city is "not protectable under copyright law," *Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056,

2017 WL 4081885, at *12 (C.D. Cal. Sept. 13, 2017), and drug-related scenes and luxurious homes are non-protectable *scenes à faire* naturally flowing from the basic plot idea of a character who sells drugs and becomes rich. *See Cavalier*, 297 F.3d at 824 ("scenes-a-faire . . . cannot support a finding of substantial similarity").

In fact, the settings of *Empire* and *CYCO* are vastly different. *Empire* is set in the present day, much of it in the opulent but professional corporate offices of Empire, and glamorous nightclubs and concert venues where musical performances occur. In contrast, *CYCO* is set in the early nineties, as evident from the fact that the characters use beepers and car phones. RJN Ex. 2, pp. 27, 85. Much of *CYCO* takes place in seedy "crack" and "dope" spots, and in college.

Dialogue. Although Plaintiff argues that the works are strikingly similar in dialogue, he cannot cite a single instance of substantially similar expression. Opp. at 16. Plaintiff's examples reveal no similarity at all or, at most, share a single ordinary word like "pimp," which is not copyrightable. *See Narell v. Freeman*, 872 F.2d 907, 911–12 (9th Cir. 1989). Furthermore, even if single words could be copyrighted, the alleged similarities would not remotely approach the "extended similarity of dialogue needed to support a claim of substantial similarity." *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988).

Mood. The moods of the works are not similar. *Empire* is a nighttime soap opera that aired on primetime network television. The scenes are full of glitz and glamour, and the tone is mostly upbeat and bright, with musical performances as a central element of each episode. In contrast, *CYCO* is a dark crime drama, with numerous beatings and shootings. It is extremely violent, with scenes involving the use of torture gadgets and severing of genitalia. *See Newt*, 2016 WL 4059691, at *8 (no similarity because "[a]lthough *Empire* contains some violent scenes, those scenes are not the primary focus of *Empire* and are less graphic than the violent scenes depicted in Plaintiff's works"); *Bissoon-Dath v. Sony Comp. Entm't Am., Inc.*, 694 F. Supp. 2d 1071, 1083 (N.D. Cal. 2010) (no similarity where "dark

and extremely violent" mood pervaded plaintiffs' works and defendant's work only contained "some dark scenes"), *aff'd*, 653 F.3d 898 (9th Cir. 2011).

Pace. The pace of the two works is markedly different. *Empire* "is a television series which spans over a time period of several months in twelve 1-hour long episodes, and takes place in present day with periodic flashbacks into the characters' past." *Newt*, 2016 WL 4059691, at *9. *Empire* explores the lives of the numerous main characters in great depth, and each episode covers multiple subplots. In contrast, *CYCO* is "a 2hr. and 7 minute screenplay." FAC ¶ 22; SAC ¶ 42. *CYCO* presents a more linear narrative about the life of a drug dealer and spans a period of over a year. *See Bernal*, 788 F. Supp. 2d at 1070 (works not substantially similar in pace where one was "paced as a feature film" whereas the other work was "paced as [a] television series with multiple hour-long episodes").

Sequence of Events. Plaintiff does not allege that the works have similar sequences of events. Plaintiff ignores nearly all of the actual events in each work, as well as their sequence, which are important to the works' narratives. The events in *Empire* pertain to the family's conflicts and power struggle over the music empire—none of which appear in *CYCO*. *See Cavalier*, 297 F.3d at 823 (no similarity where works did not "share any detailed sequence of events").

Themes. The theme of *CYCO* is whether a criminal can cross over into a legitimate life. Such a stock theme is not protectable. *See Newt*, 2016 WL 4059691, at *7 ("The concept of a bad person turning his life around . . . is unprotectable."). And even if it were protectable, that is not the theme of *Empire*, which opens with Lucious as a music mogul. *Empire* involves the dynamics and conflicts amongst family members battling for control of a music company. *Id.*

Because there is no similarity in any objective criteria under the extrinsic test, Plaintiff relies on a random list of alleged similarities. Such compilations, however, are "inherently subjective and unreliable" and do not support a finding of substantial similarity. *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).

Not only does Plaintiff's list skew the works and take elements out of context, the alleged "random similarities . . . have no qualitative significance to the works." *Gable*, 727 F. Supp. 2d at 841. At best, they consist of minor and generic plot ideas, which "are not protected by copyright law" and which the respective works express in completely different ways. *Funky Films*, 462 F.3d at 1081.

In sum, the works at issue are not substantially similar as a matter of law.[4]

IV. PLAINTIFF'S CLAIM FOR DECLARATORY JUDGMENT FAILS AS A MATTER OF LAW

For the same reasons, Plaintiff's claim for "declaratory judgment of credit as a Co-creator of television series 'Empire' . . ." also fails. SAC p. 5. Plaintiff alleges that Allen "surreptitiously" produced *CYCO* into *Empire* without his permission, and thereby was an infringer. *Id.* Because Plaintiff cannot state a claim for infringement, he cannot state a claim for credit on that basis.

Any claim of joint authorship also fails for numerous, independently sufficient reasons. First, Plaintiff's allegation that *Empire* infringes *CYCO* defeats any such claim. *See Oddo v. Ries*, 743 F.2d 630, 632–33 (9th Cir. 1984). Second, such a claim fails because Plaintiff did not "make an independently copyrightable contribution to" *Empire*, which is not similar to *CYCO* in protected expression. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000). Third, Plaintiff's allegations establish that he had no control over *Empire*. *See id.* at 1232–34 (co-author must have "superintend[ed] the whole work," acting as a "master mind" with "creative control"). Fourth, in alleging that Defendants secretly created *Empire* without his permission, Plaintiff admits that neither he nor Twentieth Century Fox Film Corporation, the author of *Empire*, made any "objective

[4] The "inverse ratio" doctrine is inapplicable because Moving Defendants do not concede Plaintiff's speculative access allegations. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003). And even if Plaintiff could prove direct copying, he still would have to establish substantial similarity in protected expression. *See Bensbargains.Net, LLC. v. Xpbargains.Com*, 2007 WL 2385092, at *3 (S.D. Cal. Aug. 16, 2007). At any rate, the works are not similar under any standard.

manifestations of a shared intent to be coauthors." *Id.* at 1234; *see* RJN Ex. 5. Fifth, Plaintiff cannot allege facts showing that he intended to create a joint work when he allegedly wrote *CYCO* in 1993 or even when he allegedly sent *CYCO* to Fisher in 2003; to the contrary, he asserts that "his intent when script was given to Debbie Allen was for sale or production inquires." Opp. at 18; *see* SAC ¶ 48. Sixth, Plaintiff's claim fails against Allen and Daniels because they are not the authors of *Empire*, as the *Empire* copyright registrations show. RJN Ex. 5.

V. AMENDMENT WOULD BE FUTILE

The Court concludes that it would be futile to permit Plaintiff to amend his copyright infringement claim. Where, as here, the contents of the works cannot be altered by allegations, where, as here, substantial similarity is absent, courts typically dismiss, with prejudice, the copyright claim and all derivative claims. *E.g.*, *Campbell v. The Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010). The Court also concludes that amendment is futile as to Plaintiff's declaratory relief claim because the absence of substantial similarity establishes that Plaintiff did not make an independently copyrightable contribution to *Empire*, and because his other allegations defeat that claim. *See Cox v. Reliance Standard Life Ins. Co.*, 2014 WL 896985, at *6 (E.D. Cal. Mar. 6, 2014) (leave to amend improper where plaintiff "cannot cure . . . deficiencies without adding inconsistent allegations").

VI. CONCLUSION

For the foregoing reasons, Moving Defendants' motions to dismiss are **GRANTED**. All of Plaintiff's claims against Moving Defendants are **DISMISSED, without leave to amend**. In light of the Court's ruling on the merits of Plaintiff's claims and because identical issues of access and substantial similarity apply to all of the defendants, the Court also concludes that the Non-Moving Defendants—Danny Strong, Brian Grazer, Fox Studio, and Peter Rice—are entitled to dismissal of all of Plaintiff's claims against them. Therefore, the

Court exercises its discretion and *sua sponte* **DISMISSES**, **without leave to amend**, all of Plaintiff's claims against Non-Moving Defendants. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d (9th Cir. 1987) ("A trial court may dismiss a claim sua sponte under Fed[eral Rule of Civil Procedure] 12(b)(6). . . Such a dismissal may be made without notice where the claimant cannot possibly win relief."); *see also Bonny v. Society of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993) ("A court may grant a motion to dismiss even as to nonmoving defendants where the nonmoving defendants are in a position similar to that of moving defendants or where the claims against all defendants are integrally related."). Accordingly, this action is **DISMISSED, with prejudice**.

DATED: March 14, 2018 By: _____
Hon. John F. Walter
United States District Judge