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11 and ABC, INC.

12 SUPERIOR COURT OF CALIFORNIA
13 FOR THE COUNTY OF LOS ANGELES

14 BETH GROSSBARD, an individual, BARRI
15 ROSENBLUM, an individual,

16 Plaintiffs,

17 v.

18 THE WALT DISNEY COMPANY, a Delaware
19 Corporation, ABC, INC., a Delaware
20 Corporation, ABC FAMILY, an unknown entity,
21 BETH MILLER, an individual, and DOES 1
22 through 20, inclusive,

23 Defendants.

24 CASE NO. BC499088

25 UNLIMITED JURISDICTION

26 [Assigned for all purposes to the Honorable
27 Ruth Ann Kwan]

28 NOTICE OF DEMURRER AND
DEMURRER BY DEFENDANTS TO
PLAINTIFFS' COMPLAINT

DATE: May 1, 2013
TIME: 8:30 a.m.
DEPT: 72

Complaint Filed: January 14, 2013
Discovery Cut-Off: None Set
Motion Cut-Off: None Set
Trial Date: None Set

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 1, 2013, at 8:30 a.m., or as soon thereafter
matter may be heard, in Department 72 of the above-entitled Court, located at
Angeles, California 90012, defendants International Family Entertainment, Inc., Beth Miller and
ABC, Inc. (collectively, "Defendants") will and hereby do demur, pursuant to California Code of
Civil Procedure § 430.10(e), to the following causes of action in the Complaint of plaintiffs Beth
Grossbard and Barri Rosenblum ("Plaintiffs"):

Fees paid on 2/19/13 \$1305.00
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CIT/CASE: BC499088
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- 1 (a) The Second Cause of Action for Breach of Confidence;
2 (b) The Third Cause of Action for Constructive Trust;
3 (c) The Fourth Cause of Action for Accounting.

4 Demurrer To Second Cause Of Action For Breach of Confidence

5 (Alleged Against All Defendants)

6 1. Defendants demur to Plaintiffs' Second Cause of Action for Breach of Confidence on
7 the ground that it fails to state facts sufficient to constitute a cause of action because (i) Plaintiffs do
8 not allege that their Idea was novel; (ii) Plaintiffs do not allege that they disclosed their Idea in
9 confidence; and (iii) no confidential relationship existed between Plaintiffs and Defendants.

10 [Code of Civil Procedure § 430.10(e)]

11 Demurrer to Third Cause of Action For Constructive Trust

12 (Alleged Against ABC, Inc.)

13 2. Defendant ABC, Inc. demurs to Plaintiffs' Third Cause of Action for Constructive
14 Trust on the ground that it fails to state facts sufficient to constitute a cause of action because (i) a
15 constructive trust is not an independent cause of action; (ii) the cause of action is redundant of
16 Plaintiffs' First Cause of Action for Breach of Implied-In-Fact Contract; (iii) if it is a disguised
17 quasi-contract or implied in law contract it is not recognized under California law; (iv) to the extent
18 it is a cause of action for unjust enrichment, it is preempted by the Copyright Act.

19 [Code of Civil Procedure § 430.10(e)]

20 Demurrer to Fourth Cause of Action for Accounting

21 (Alleged Against ABC, Inc.)

22 3. Defendant ABC, Inc. demurs to Plaintiffs' Fourth Cause of Action for Accounting on
23 the ground that it fails to state facts sufficient to constitute a cause of action because (i) an
24 accounting is not an independent cause of action, but merely a type of equitable remedy where no
25 adequate remedy at law exists; (ii) an adequate remedy at law exists for Plaintiffs' First Cause of
26 Action for Breach of Implied-In-Fact Contract; (iii) Plaintiffs' accounting claim cannot be a remedy
27 for Plaintiffs' Second and Third Causes of Action because those claims fail to state causes of action.

28 [Code of Civil Procedure § 430.10(e)]

1 This Demurrer is based on this Notice of Demurrer and Demurrer, the attached Memorandum
2 of Points and Authorities, the concurrently-filed Appendix of Non-California Authorities, the
3 pleadings, records and files in this action, such oral argument as may be presented at the hearing on
4 the motion, and such other and further evidence as the Court may deem necessary and proper.
5

6 DATED: February 27, 2013

LEOPOLD, PETRICH & SMITH
A Professional Corporation

7
8
9 By: 

LOUIS P. PETRICH
ROBERT S. GUTIERREZ
Attorneys for Defendants
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs allege that they developed a television movie concept entitled "I Hate Christmas"
4 that was based on the 1993 motion picture *Groundhog Day*. They refer to this television movie
5 concept as Plaintiffs' "Idea." They claim to have pitched their idea to defendant Beth Miller and an
6 ABC Family¹ development executive named Donna Ebbs, that Ms. Miller took extensive written
7 notes of Plaintiffs' Idea, and that Plaintiffs later sent Ms. Ebbs an eight-page written treatment of the
8 Idea. Plaintiffs allege that defendant ABC Family "passed" on the Idea (*i.e.*, decided it was not
9 interested in developing it), but then allegedly used the Idea in the ABC Family cable television
10 movie entitled "The 12 Dates of Christmas," which aired in December 2011.

11 Based on these allegations, Plaintiffs allege a First Cause of action for Breach of Implied-In-
12 Fact contract (against all Defendants), a Second Cause of Action for Breach of Confidence (against
13 all Defendants), a Third Cause of Action for Constructive Trust (against ABC, Inc.)², and a Fourth
14 Cause of Action for Accounting (against ABC, Inc.).

15 Defendants demur to the Second, Third and Fourth Causes of Action because none of these
16 causes of action state facts sufficient to constitute a cause of action.

17 Defendants demur to the Second Cause of Action for Breach of Confidence on the grounds
18 that (1) Plaintiffs do not allege that their Idea was novel; (2) Plaintiffs do not allege that they
19 disclosed their Idea in confidence; and (3) as a matter of law, no confidential relationship existed
20 between Plaintiffs and Defendants based on the alleged facts.

21 ABC, Inc. demurs to the Third Cause of Action for Constructive Trust on the grounds that
22 (1) a constructive trust is not an independent cause of action; (2) the cause of action is redundant of
23 Plaintiffs' First Cause of Action for Breach of Implied-In-Fact Contract; (3) if it is a disguised quasi-

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25
26 ¹ Plaintiffs named "ABC Family" as a defendant in this action. Because ABC Family is a dba of
27 International Family Entertainment, Inc. ("IFE"), IFE is appearing in this action as the proper legal
28 entity. The Walt Disney Company was dismissed from this action, without prejudice, pursuant to a
stipulation of the parties and subsequent Order of the Court entered on February 19, 2013.

² ABC, Inc. has absolutely no involvement with development, production or any other aspect of
ABC Family cable television programming – and hence had no involvement with *12 Dates of
Christmas* – a fact which will be established in later briefing by Defendants in this action.

1 contract or implied in law contract it is not recognized under California law; and (4) to the extent it
2 is a cause of action for unjust enrichment, it is preempted by the Copyright Act.

3 ABC, Inc. demurs to the Fourth Cause of Action for Accounting on the grounds that (1) an
4 accounting is not an independent cause of action, but merely a type of equitable remedy where no
5 adequate remedy at law exists; (2) an adequate remedy at law exists for Plaintiffs' First Cause of
6 Action for Breach of Implied-In-Fact Contract; and (3) Plaintiffs' accounting claim cannot be a
7 remedy for Plaintiffs' Second and Third Causes of Action because those claims fail to state causes of
8 action.

9 Accordingly, Defendants' demurrer to the Second, Third and Fourth Causes of Action should
10 be sustained in its entirety.

11 **II. THE LEGAL STANDARD FOR DEMURRER**

12 California Code of Civil Procedure ("C.C.P.") § 430.10(e) provides that a demurrer will lie
13 against a Complaint when the pleading does not state facts sufficient to constitute a cause of action.
14 A demurrer raises issues of law, not fact, regarding the content of the opposing party's pleading.
15 *Donabedian v. Mercury Ins. Co.*, 116 Cal.App.4th 968, 994 (2004). When a ground for objection to
16 a Complaint appears on the face of the Complaint, a demurrer on that ground is proper and should be
17 sustained. *Alfaro v. Community Housing Improvement Systems & Planning Association, Inc.*, 171
18 Cal.App.4th 263, 298 (2009).

19 **III. THE SECOND CAUSE OF ACTION FOR BREACH OF CONFIDENCE FAILS TO** 20 **STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION**

21 In Plaintiffs' Second Cause of Action for breach of confidence, Plaintiffs allege that "a
22 confidential *relationship* existed because an implied-in-fact contract existed" and that "a buyer/seller
23 relationship was created." Cmpt., ¶ 27 (emphasis added). These allegations confuse an action for
24 breach of a confidential relationship with an action for breach of confidence and, in any event, do
25 not save the claim from demurrer. As a matter of law, a confidential relationship does not arise from
26 the submission of ideas. *See Davies v. Krasna*, 14 Cal.3d 502, 511 (1975) (finding that a submission
27 of a script to a producer for sale does not create a confidential *relationship*). In *Davies*, the
28 California Supreme Court reasoned as follows:

1 Defendant was not [Plaintiff's] trusted friend or advisor; he was
2 a prospective purchaser or exploiter of Davies' idea, and the
3 transaction took place between men engaged in the business of
4 selling and exploiting ideas for movies. The circumstances of
5 that transaction may impose upon defendant a duty to refrain
6 from unauthorized disclosure of the idea, but they are
7 insufficient to impose upon him the fiduciary-like duties that arise
8 from a confidential relationship.

9 14 Cal.3d at 511.

10 The elements of a cause of action for breach of confidence are:

- 11 (1) disclosure by plaintiff to defendant of a *confidential* and *novel* idea;
- 12 (2) knowledge by the defendant that the information was being disclosed in confidence;
- 13 (3) an understanding between the defendant and the plaintiff that the confidence be
14 maintained; and
- 15 (4) disclosure or use by defendant in violation of the understanding.

16 4 M. & D. Nimmer, *Nimmer On Copyright* ("Nimmer"), § 19D.05[B][1] at 19D-64 to 65 (2012)
17 (citing California case law). See also *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*, 168
18 Cal.App.3d 455, 462-66 (1985) ("[t]o maintain a claim for breach of confidence, plaintiff must prove
19 that defendant received a novel idea from plaintiff with actual notice of its confidentiality and that
20 defendant voluntarily assumed the obligation to maintain that confidence"); *Faris v. Enberg*, 97
21 Cal.App.3d 309, 323 (1979) ("There must be evidence of the communication of the confidentiality
22 of the submission.").

23 Plaintiffs' breach of confidence claim also alleges that Plaintiffs conceived and developed an
24 "Idea" which they define as "a television movie concept entitled 'I Hate Christmas.'" Cmpt., ¶¶ 9,
25 26. Plaintiffs describe the "Idea" as "a girl's version of the film 'Groundhog Day' with its own
26 unique twist." These allegations also fail to save the claim from demurrer because Plaintiffs do not
27 allege that their Idea was novel, nor do they sufficiently allege that it was confidential.

28 Although Plaintiffs allege that "Plaintiffs' Idea was not known to the public" (Cmpt., ¶ 26),

1 the fact that the public may not have known that Plaintiffs had the idea to make a version of the film
2 *Groundhog Day* does not mean that the Idea was novel. “[N]ovel’ ideas are those that are new, in
3 the sense that they are not already being used in the industry for which they are proposed.” 4
4 *Nimmer*, § 19D.06[B][1] at 19D-76 (emphasis in original). See also *Random House Webster’s*
5 *Unabridged Dictionary* at 1327 (2001) (“novel” means “of a new kind, different from anything seen
6 or known before”). Here, Plaintiffs’ allegation that their Idea is a version of a prior film concedes
7 that their Idea is *not* novel.

8 Plaintiffs allege that their Idea “involves the repetition of Christmas Eve, time and again.”
9 Cmpt., ¶17. The popular film *Groundhog Day* starring actor Bill Murray featured, as its central
10 premise, a day that repeats itself. Plaintiffs’ allegation that their Idea is a girl’s version of that movie
11 – because it involves the central premise of a day that repeats itself – admits that Plaintiffs’ Idea is
12 not novel. The fact that the repeating day in Plaintiffs’ Idea may be Christmas Eve as opposed to
13 any other day of the year is not sufficient to make the Idea novel. Changing the setting does not
14 change the premise of a day that repeats itself. While Plaintiffs allege that their Idea contains “a
15 unique plot mechanism” in which a black woman’s “shpritz of perfume” is “[t]he repeated time
16 rewind device” (Cmpt., ¶ 17), Plaintiffs do not define their Idea as “a shpritz of perfume causing a
17 day to repeat itself” but rather as “a girl’s version of the film ‘Groundhog Day.’” Plaintiffs’
18 allegation that defendant Beth Miller stated that she thought the Idea was “unique” (Cmpt., ¶ 12)
19 does not change Plaintiffs’ concession that Plaintiffs’ Idea was to use an unprotectible idea already
20 employed in *Groundhog Day*. See *Arden v. Columbia Pictures Industries, Inc.*, 908 F.Supp. 1248,
21 1260 (S.D.N.Y. 1995) (dismissing copyright infringement claim against the movie *Groundhog Day*,
22 finding that “[a]ny similarities in structure stem directly from the idea of a repeating day and, hence,
23 are unprotectible”).

24 Plaintiffs also fail to allege that Defendants knew the Idea was being disclosed in confidence.
25 Plaintiffs allege that Defendants “understood that Plaintiffs’ submission of the Idea was confidential
26 by virtue of their position and experience at ABC Family,” and that “[t]he confidentiality of ideas
27 disclosed by television producers to television network executives at pitch meetings is well known to
28 be a component of the television industry custom and practice.” Cmpt., ¶ 27. These allegations do

1 not state a cause of action for breach of confidence. Plaintiffs do not allege that they ever told
2 Defendants that Plaintiffs were disclosing the Idea in confidence, nor do Plaintiffs allege that
3 Defendants ever told Plaintiffs that they understood that the Idea was being disclosed in confidence
4 or that Defendants would maintain the idea in confidence.

5 Instead, Plaintiffs simply allege that confidentiality of ideas was “well known to be a
6 component of the television industry custom and practice.” However, *constructive notice*, relied
7 upon by Plaintiffs’ Complaint, does not satisfy the element of a disclosure in confidence. Indeed, in
8 *Tele-Count Engineers, supra*, the Court approved a jury instruction that it was the plaintiff’s burden
9 to show, on a claim for breach of confidence, that the confidential nature of the information
10 disclosed was “made known” to the defendant by the plaintiff. The Court stated: “Mere
11 constructive notice – or a showing that the defendant *should have known* of the confidential nature
12 of the information imparted – would, in our view, improperly subject a defendant to liability without
13 the requisite understanding or voluntary acceptance of the confidence disclosure.” 168 Cal.App.3d
14 at 465 (emphasis added). Here, Plaintiffs’ failure to allege more than constructive notice of
15 disclosure in confidence renders their breach of confidence claim subject to demurrer for this
16 additional reason.

17 Defendants’ demurrer to Plaintiffs’ Second Cause of Action for Breach of Confidence should
18 be sustained.

19 **IV. THE THIRD CAUSE OF ACTION FOR CONSTRUCTIVE TRUST FAILS TO**
20 **STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION**

21 Plaintiffs’ Third Cause of Action is for constructive trust. A constructive trust is not an
22 independent cause of action but merely a type of remedy. *Batt v. City and County of San Francisco*,
23 155 Cal.App.4th 65, 82 (2007). Even if it were an independent cause of action, Plaintiffs’
24 constructive trust claim is redundant of Plaintiffs’ First Cause of Action for breach of implied-in-fact
25 contract. Plaintiffs allege that ABC, Inc. knowingly *misappropriated* Plaintiffs’ Idea and benefitted
26 by allegedly making a cable television movie from it and receiving monies from it. Cmpt., ¶ 33.
27 Plaintiffs allege that ABC, Inc. knew or should have known that Plaintiffs are entitled to fair
28 consideration and that ABC, Inc. would be *unjustly enriched* if it were allowed to keep the monies.

1 Cmpt., ¶ 34. Plaintiffs further allege that ABC, Inc. is holding property and profits in *constructive*
2 *trust* for Plaintiffs. Cmpt., ¶ 35. Because it is based on the allegation that ABC, Inc. used Plaintiffs'
3 Idea, Plaintiffs' Third Cause of Action is redundant of the First Cause of Action for breach of
4 implied-in-fact contract which alleges that "ABC found the Idea valuable and used the Idea to create
5 a movie of the week," "never compensated [Plaintiffs] and never gave [Plaintiffs] producer credits
6 for the use and *appropriation* of their Idea." Cmpt., ¶ 23 (emphasis added). Indeed, Plaintiffs'
7 Third Cause of Action expressly incorporates this same allegation. See Cmpt., ¶ 32 ("Plaintiffs
8 incorporate the foregoing allegations contained in paragraphs 1 through 31 as if fully set forth
9 herein."). See *Award Metals, Inc. v. Superior Court*, 228 Cal.App.3d 1128, 1135 (1991) (issuing
10 peremptory writ directing trial court to vacate order overruling demurrer to intentional tort cause of
11 action and to enter new order sustaining demurrer on ground that cause of action was duplicative of
12 another cause of action).

13 If, by their constructive trust claim, Plaintiffs are attempting to allege more than breach of an
14 implied-in-fact contract and are, in fact, alleging a separate cause of action for *misappropriation of*
15 *an idea*, it is a disguised quasi-contract or implied in law contract claim attempting to treat an idea as
16 property. Such a claim is not recognized under California law. Since 1947, "ideas" are not
17 protected under California law as property, and, therefore, an alleged unauthorized use of a
18 submitted idea is not protected by tort theories such as implied in law contract, quasi-contract,
19 misappropriation, plagiarism, or unjust enrichment. See *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 789
20 (1953) ("The 1947 amendment to section 980 has eliminated the protection formerly given to 'any
21 product of the mind'" such that "[t]he Legislature has abrogated the rule of protectibility of an
22 idea").

23 Finally, to the extent Plaintiffs' constructive trust claim is, in fact, a cause of action for unjust
24 enrichment (see Cmpt., ¶ 34 ["Defendants would be *unjustly enriched* if they were permitted to
25 retain the foregoing *property*, benefits, and consideration"] (emphases added)), it is preempted by
26 the Copyright Act because it asserts rights that are equivalent to a federal copyright claim. It is well
27 settled that unjust enrichment and quasi-contract claims alleging unauthorized use of a copyrighted
28 work are preempted by the Copyright Act. Such claims assert rights equivalent to those under

1 copyright and do not contain an “extra element” changing the nature of the action. *Del Madera*
2 *Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (claims of unjust
3 enrichment preempted by Copyright Act), *reversed on other grounds by Fogerty v. Fantasy, Inc.*,
4 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed. 2d 455 (1994); *Laws v. Sony Music Entertainment,*
5 *Inc.*, 294 F.Supp.2d 1160, 1161, 1165 (C.D. Cal. 2003) (California state law claim for constructive
6 trust preempted by Copyright Act); 1 *Nimmer*, “Constitutional Aspects,” § 1.01[B][1][g], at 1-51 (“a
7 state law cause of action for unjust enrichment or *quasi* contract should be regarded as an ‘equivalent
8 right’ and hence, pre-empted insofar as it applies to copyright subject matter”). *See also Klekas v.*
9 *EMI Films, Inc.*, 150 Cal.App.3d 1102, 1110-1111 (1984) (noting the proof required to recover on a
10 theory of implied-in-law contract, or “quasi-contract,” is the same as that required to prove the tort
11 of plagiarism, and holding that such claims are preempted by the Copyright Act).

12 A two-part test is employed to determine whether the Copyright Act preempts a state law
13 claim: (1) the work at issue falls within the subject matter of copyright; and (2) the rights granted
14 under state law are equivalent to those protected by the Act. 17 U.S.C. § 301; *Kabehie v. Zoland,*
15 102 Cal.App.4th 513, 520 (2002) ; *Fleet v. CBS, Inc.*, 50 Cal.App.4th 1911, 1918-1919 (1996).

16 Regarding the first prong, works fall within the subject matter of the Copyright Act when
17 they are “original works of authorship fixed in any tangible medium of expression” 17 U.S.C. §
18 102(a). “Works of authorship” are defined to include literary works, dramatic works, and motion
19 pictures. *Id.* Derivative works also fall within the subject matter of copyright. 17 U.S.C. § 103(a).
20 Plaintiffs allege that “during the one hour long meeting Ms. Gruska – alleged to be a feature film
21 writer who worked with Plaintiffs (Cmpt., ¶ 10) – gave Defendant Beth Miller an extremely detailed
22 oral pitch and covered the major story beats of “I Hate Christmas.” Cmpt., ¶ 12. Plaintiffs allege
23 that “Defendant Miller took *extensive written notes* during the pitch meeting.” *Id.* (Emphasis
24 added.) Plaintiffs also allege that, a few days after this meeting, Plaintiff “Grossbard hand delivered
25 to Ms. Ebbs³ office an eight page *written treatment for the Idea* entitled ‘I Hate Christmas’,
26 including several pages of dialogue.” (Emphasis added.) Thus, Plaintiffs have alleged that their
27
28

³ Plaintiffs allege that Donna Ebbs was a Vice President of Original Programming of movies and television for ABC Family. Cmpt., ¶ 10.

1 Idea was fixed in a tangible medium of expression, both in the form of the written treatment that was
2 allegedly submitted and in the form of the notes of the Idea that Plaintiffs allege were taken by
3 defendant Miller.

4 Also subject to preemption are claims which allege unauthorized use of "ideas," when those
5 ideas are contained in works within the subject matter of copyright. Although the Copyright Act
6 does not protect ideas, 17 U.S.C. § 102(b), a cause of action that alleges unauthorized use of "ideas"
7 is still be preempted because the scope of the Act's preemption is broader than the scope of its
8 protection. If a plaintiff asserts a claim for misuse of ideas contained in a work that falls within the
9 subject matter of copyright, and if the claim asserts rights equivalent to those under copyright, the
10 claim is preempted. *Melchior v. New Line Productions, Inc.*, 106 Cal.App.4th 779, 793 (2003)
11 (affirming trial court's dismissal of conversion claim on grounds of preemption by the Copyright Act
12 because ideas are within the subject matter of copyright and thus subject to preemption); *Maheu v.*
13 *CBS, Inc.*, 201 Cal.App.3d 662, 672 (1988) (affirming trial court's dismissal of conversion claims on
14 grounds of preemption by the Copyright Act and noting that the scope of copyright preemption and
15 protection are not synonymous).

16 Because Plaintiffs have alleged use of their Idea, and because Plaintiffs have alleged that
17 their Idea was reduced to writing (fixed in a tangible medium of expression), the first prong of the
18 preemption test is satisfied.

19 The second prong is satisfied whenever the rights sought to be protected by state law are
20 "equivalent" to the exclusive rights protected by the Copyright Act. Those rights include the rights
21 "to reproduce the copyrighted work," "to prepare derivative works based upon the copyrighted
22 work," "to distribute copies . . . of the copyrighted work to the public," "to perform the copyrighted
23 work publicly," and "to display the copyrighted work publicly." 17 U.S.C. § 106. In order to avoid
24 preemption, the state cause of action must protect rights which are qualitatively different from those
25 rights. *Kabehie, supra*, 102 Cal.App.4th at 520.

26 Plaintiffs' constructive trust claim alleges that ABC, Inc. "misappropriated the Plaintiffs'
27 Idea and benefitted from it by making a commercial cable television movie from it." Cmpt., ¶ 33.
28 The claim also incorporates the prior allegations of the Complaint. *See* Cmpt., ¶ 29 (alleging that

1 Defendants “ma[de] a television movie based on the idea and release[d] it to the general public, with
2 the permission of Plaintiffs, and without compensating the Plaintiffs for the exploitation of their
3 idea”); Cmpt., ¶ 23 (“ABC . . . used the Idea to create a movie of the week”). Plaintiffs have
4 therefore alleged rights that are equivalent to the exclusive rights protected by the Copyright Act,
5 *i.e.*, the right to reproduce Plaintiffs’ Idea (which Plaintiffs allege was reduced to written form), the
6 right to make derivative works, etc. Copyright Act, §§ 106(1)-(5); 17 U.S.C., §§ 106(1)-(5). The
7 second prong of the preemption test is therefore also satisfied.

8 Plaintiffs’ Third Cause of Action for Constructive Trust is therefore preempted. *See Nimmer,*
9 *Klekas, supra.*

10 **V. THE FOURTH CAUSE OF ACTION FOR ACCOUNTING FAILS TO STATE**
11 **FACTS SUFFICIENT TO CONSTITUTE A CAUSE ACTION**

12 Plaintiffs’ Fourth Cause of Action for Accounting incorporates all the prior allegations of the
13 Complaint and alleges that Plaintiffs need an accounting to determine the amount of money
14 allegedly due from ABC, Inc. Cmpt., ¶¶ 36-39. Like a constructive trust, an accounting is not an
15 independent cause of action, but merely a type of remedy, “and an equitable remedy at that.” *Batt,*
16 *supra*, 155 Cal.App.4th at 82. Where an adequate remedy at law exists, “no tool of equity [such as
17 an accounting] can be used to subvert or evade that remedy.” *Id.*

18 If Plaintiffs were to succeed in proving their First Cause of Action for breach of implied in
19 fact contract (which Defendants believe they will not), the remedy is the reasonable value of
20 Plaintiffs’ Idea. *See Stanley v. Columbia Broadcasting Sys.*, 35 Cal.2d 653, 667 (1950) (in idea
21 submission case (breach of implied-in-fact contract), “the proper measure of damages is generally its
22 actual value or its value to the owner”); *Golding v. R.K.O. Pictures, Inc.*, 35 Cal.2d 690, 700-701
23 (1950) (the proper measure of damages for unauthorized use is “the value of the play before the
24 infringement”); *Desny v. Wilder*, 46 Cal.2d 715, 733 (1956) (an idea submission plaintiff who
25 prevails is entitled to the “reasonable value” of the pitched ideas); *Blaustein v. Burton*, 9 Cal.App.3d
26 161, 178 (1970) (payment of reasonable value of submitted material is appropriate where studio uses
27 idea disclosed to it). Thus, an adequate remedy at law exists for Plaintiffs’ First Cause of Action.

28 Because Plaintiffs’ causes of action for breach of confidence and constructive trust fail to

1 state causes of action for the reasons detailed herein, Plaintiffs' accounting claim cannot be a remedy
2 for those claims.

3 Plaintiffs' Fourth Cause of Action for Accounting should therefore be dismissed.

4 **VI. CONCLUSION**

5 For all the foregoing reasons, Defendants respectfully submit that their demurrer to
6 Plaintiffs' Second, Third and Fourth Causes of Action should be sustained. Moreover, as the defects
7 appear incurable, the Court should sustain the demurrer without leave to amend.

8
9 DATED: February 27, 2013

LEOPOLD, PETRICH & SMITH
A Professional Corporation

10
11 By: 

12 LOUIS P. PETRICH
13 ROBERT S. GUTIERREZ
14 Attorneys for Defendants
15 INTERNATIONAL FAMILY
16 ENTERTAINMENT, INC.,
17 BETH MILLER and ABC, INC.
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DEADLINE

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274.**

On February 28, 2013, I served the foregoing document described as **NOTICE OF DEMURRER AND DEMURRER BY DEFENDANTS TO COMPLAINT** on the interested parties in this action.

by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

Stephen J. Goldberg, Esq.
LAW OFFICE OF STEPHEN J.
GOLDBERG
623 Levering Avenue
Los Angeles, CA 90024

Attorney for Plaintiffs

Tel: (310) 824-2447
Fax: (310) 209-1603
Email: Golds711@aol.com

BY REGULAR MAIL: I deposited such envelope in the mail at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY FACSIMILE MACHINE: I transmitted a true copy of said document(s) by facsimile machine, and no error was reported. Said fax transmission(s) were directed as indicated on the service list.

BY ELECTRONIC MAIL: I transmitted a true copy of said document(s) by electronic mail, and no error was reported. Said electronic mail transmission(s) were directed as indicated on the service list.

BY OVERNIGHT MAIL: I deposited such documents at the Federal Express Drop Box located at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was deposited with delivery fees thereon fully prepaid.

BY PERSONAL SERVICE: I caused such envelope(s) to be delivered by hand to the above addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 28, 2013, at Los Angeles, California.

Stella D. Pavluk

