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FOX FILM CORPORATION; LEE  
7 DANIELS; DANNY STRONG;  
TERRENCE HOWARD; AND  
8 MALCOLM SPELLMAN

9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

12 RON NEWT,  
13  
14 Plaintiff,

15 v.

16 TWENTIETH CENTURY FOX FILM  
CORPORATION; LEE DANIELS;  
17 DANNY STRONG; TERRENCE  
HOWARD; MALCOLM SPELLMAN,  
18 and DOES 1-10, inclusive,  
19 Defendants.

Case No. 2:15-CV-2778-CBM-JPR

**NOTICE OF MOTION AND  
MOTION OF LEE DANIELS,  
DANNY STRONG, TERRENCE  
HOWARD, AND MALCOLM  
SPELLMAN TO DISMISS FIRST  
AMENDED COMPLAINT WITH  
PREJUDICE PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(6);  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**[[Proposed] Order; Declaration of  
Kelly L. Perigoe; Request for Judicial  
Notice and [Proposed] Order filed  
concurrently herewith]**

The Honorable Consuelo B. Marshall

Date: November 24, 2015  
Time: 10:00 a.m.  
Courtroom: 2

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 24, 2015 at 10:00 a.m. or as  
3 soon thereafter as this matter may be heard, in the courtroom of the Honorable  
4 Consuelo B. Marshall, located in the United States Courthouse, 312 N. Spring  
5 Street, Courtroom 2, Los Angeles, CA 90012, Defendants Lee Daniels, Danny  
6 Strong, Terrence Howard, and Malcolm Spellman (collectively, “Defendants”) will  
7 and hereby do move this Court to dismiss Plaintiff’s First Amended Complaint  
8 (“FAC”) with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), on  
9 the following grounds:

- 10 • Plaintiff’s first cause of action for copyright infringement fails because,  
11 as a matter of law, the works at issue are not substantially similar to  
12 Defendants’ television series in a manner protected by copyright law.  
13 Plaintiff’s claim for copyright infringement based on his screenplay and  
14 DVD fails for the additional reason that the copyright application  
15 attached to the FAC is defective as a matter of law.
- 16 • Plaintiff’s second cause of action for breach of implied contract fails as  
17 to Defendants Daniels, Strong, and Spellman because Plaintiff fails to  
18 plead facts showing that Defendants Daniels, Strong, or Spellman had  
19 or could have had contractual privity with Plaintiff, and fails as to all  
20 Defendants because Plaintiff fails to allege that *any* Defendant actually  
21 used the works.
- 22 • Because the defects in Plaintiff’s FAC cannot be cured by amendment  
23 of the FAC, the FAC should be dismissed with prejudice.

24 This Motion is based on this Notice of Motion, the accompanying  
25 Memorandum of Points and Authorities, the Declaration of Kelly L. Perigoe and  
26 Request for Judicial Notice and exhibits thereto filed concurrently herewith, all of  
27 the pleadings and other documents on file in this case, all other matters of which the  
28

1 Court may take judicial notice, and any further argument or evidence that may be  
2 received by the Court at the hearing.

3 Pursuant to Local Rule 7-3, counsel for Defendant called counsel for Plaintiff  
4 to meet and confer regarding this Motion on October 6, 2015, and at the request of  
5 Plaintiff's counsel, followed up by email setting forth the grounds for this Motion.  
6 The parties discussed the issues presented in this Motion by telephone on October 8,  
7 2015, but were unable to resolve them. *See* Declaration of Kelly L. Perigoe, ¶ 2.

8  
9 DATED: October 15, 2015

CALDWELL LESLIE & PROCTOR, PC  
LINDA M. BURROW  
KELLY L. PERIGOE

10  
11  
12  
13 By \_\_\_\_\_ /s/

14 LINDA M. BURROW  
15 Attorneys for TWENTIETH CENTURY FOX  
16 FILM CORPORATION; LEE DANIELS;  
17 DANNY STRONG; TERRENCE HOWARD;  
18 AND MALCOLM SPELLMAN  
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**Page(s)**

**Cases**

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16 *Idema v. Dreamworks, Inc.*,  
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18 *Klekas v. EMI Films, Inc.*,  
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20 *Kouf v. Walt Disney Pictures & Television*,  
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16 *Smith v. Jackson*,  
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3 *Willis v. Home Box Office*,  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff, Ron Newt is a self-described “gangsta pimp” who claims to have  
4 created three works—a book, a screenplay, and a DVD documentary (the  
5 “Works”)—“based” on his “life story” as a San Francisco-area pimp and drug  
6 dealer. Plaintiff’s Works include detailed descriptions of cold-blooded killings,  
7 dismemberments, and crude descriptions of Plaintiff’s sexual escapades in graphic  
8 detail that would never be shown on network television, but they do not, as he  
9 claims, have a “core theme” of raising himself and his sons “from the ghetto and a  
10 life of crime into the world of the music industry.” ECF 24, ¶ 20(a). Instead,  
11 Plaintiff’s Works focus on his failure to escape his violent past and only briefly, *e.g.*,  
12 in the last quarter of Plaintiff’s book, discuss Plaintiff’s brief, unsuccessful, effort to  
13 break into the music business as manager of his sons’ teen bubble gum pop trio, the  
14 Newtrons. From the book’s very first page, the reader knows that the Newtrons’  
15 music career ends quickly when one of Plaintiff’s singer sons is killed.

16 Plaintiff claims that the hit Fox network television series *Empire* is  
17 substantially similar to his Works, and asserts claims for copyright infringement and  
18 breach of implied contract. But, in contrast to Plaintiff’s crudely written, violent,  
19 regretful autobiographical Works, Fox’s *Empire* is a dialogue-rich, soap opera-  
20 styled family drama, a fictional account of a close-knit family and their music  
21 empire involving two equally powerful characters: Lucious Lyon, a former drug  
22 dealer turned rapper and music mogul, and his ex-wife, Cookie, a music producer  
23 and singer (and former drug dealer), who battles Lucious for control of his music  
24 empire. In a modern take on Shakespeare’s *King Lear*, Lucious, upon learning he  
25 has a life-threatening illness, must choose one of his three adult sons to take over his  
26 company. The sons, Hakeem, Jamal, and Andre, compete for their parents’ love and  
27 business alliances. Andre has an MBA from the Wharton School, while Hakeem

28

1 and Jamal are singers, with Hakeem singing mostly rap and hip-hop, and Jamal  
2 singing mostly pop love songs. Empire is a story of a family’s soaring success.

3 Plaintiff’s claims fail as a matter of law, and his First Amended Complaint  
4 (“FAC”) should be dismissed with prejudice for at least the following reasons:

5 **First**, Plaintiff’s Works are not substantially similar in protectable expression  
6 to *Empire*, which dooms his copyright claim. *See Zella v. E.W. Scripps Co.*, 529  
7 F.Supp.2d 1124, 1130-31 (C.D. Cal. 2007) (observing that “[f]or fifty years, courts  
8 have . . . dismissed copyright claims that fail from the face of the complaint (and in  
9 light of all matters properly considered on a motion to dismiss)’”).

10 **Second**, Plaintiff’s claim for infringement of the screenplay and DVD fails  
11 for the additional reason that the copyright application attached to the FAC is  
12 defective, as it purports to register multiple works with different publication dates in  
13 a single application. *See Olander Enters., Inc. v. Spencer Gifts, LLC*, 812 F.Supp.2d  
14 1070, 1076 (C.D. Cal. 2011) (multiple works can be registered in a single  
15 application only if they are “first published together”).

16 **Third**, Plaintiff’s implied contract claim fails as to Defendants Daniels,  
17 Strong, and Spellman because Plaintiff fails to allege privity of contract with any of  
18 these three Defendants. *See Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 634  
19 (9th Cir. 2010) (privity “is a necessary element” of an implied contract claim).

20 **Fourth**, Plaintiff’s implied contract claim fails for the additional reason that  
21 Plaintiff fails to allege that *any* Defendant used his Works and fails to identify any  
22 similarities between the ideas in his Works and *Empire*. *See Klekas v. EMI Films,*  
23 *Inc.*, 150 Cal.App.3d 1102, 1114-15 (1984) (rejecting implied contract claim where  
24 the defendant’s film was “substantially dissimilar” to the plaintiff’s novel).

25 Plaintiff’s FAC is devoid of facts sufficient to ““permit the court to infer more  
26 than the mere possibility of misconduct,”” and should be dismissed. *See Wild v.*  
27 *NBC Universal, Inc.*, 788 F.Supp.2d 1083, 1097 (C.D. Cal. 2011) (quoting *Ashcroft*  
28 *v. Iqbal*, 556 U.S. 662, 679 (2009)). Moreover, because no amended pleading could

1 create similarities between Plaintiff's Works and *Empire* where none exist,  
 2 permitting Plaintiff to amend "would be an exercise in futility," and Plaintiff's FAC  
 3 should be dismissed with prejudice and without leave to amend. *See Gadh v.*  
 4 *Spiegel*, No. CV 14-855 JFW, 2014 WL 1778950, at \*2 (C.D. Cal. Apr. 2, 2014).

## 5 **II. FACTUAL BACKGROUND<sup>1</sup>**

### 6 **A. Plaintiff's Works**

7 Plaintiff claims that he created three works based on his life story: (1) a book  
 8 entitled "Bigger Than Big" (the "Book"), (2) a motion picture screenplay entitled  
 9 "All That Glitters," also called "Bigger Than Big" (the "Screenplay"), and (3) a  
 10 DVD documentary entitled "Bigger Than Big: A Documentary of a Gangsta Pimp  
 11 Ron Newt" (the "DVD") (collectively, the "Works"). ECF 24, ¶ 12. According to  
 12 Plaintiff, the DVD and the Screenplay are based on the Book and the Screenplay is  
 13 the "script of" the Book. *Id.*, ¶¶ 3, 12, Ex. 1. Plaintiff alleges that he has applied for  
 14 copyright registration for all three Works, attaching to the FAC an application for  
 15 registration of the DVD and Screenplay. *Id.*, ¶ 12, Ex. 1. According to Copyright  
 16 Office records, only the Book has in fact been registered. *See* RJN, Ex. A.

17 **The Book.** Plaintiff writes in his Book's Introduction that he is "candidly  
 18 laying out the story of [his] life . . . as a gangster-pimp" and drug dealer whose  
 19 various stints in prison are briefly interrupted by his failed attempt to break into the  
 20 music business as manager of his children's pop boy-band, the Newtrons. RJN, Ex.  
 21 B, (page 1 of Intro). The Book is set in the San Francisco Bay Area, and, although it  
 22 focuses on Plaintiff's youth in the 1960s and 1970s, spans from Plaintiff's birth on  
 23 June 20, 1949, to the early 2000s. *See generally id.*

24 The Book opens in 1988, with Plaintiff leaving a Newtrons concert to  
 25 \_\_\_\_\_

26 <sup>1</sup> For the purposes of this Motion, Defendants accept as true the factual allegations  
 27 in the FAC, except those that are flatly contradicted by judicially noticeable facts.  
 28 *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998). For  
 the record, Defendants vehemently deny Plaintiff's factual allegations.

1 confront rival drug dealers. *Id.* at 15-21. Plaintiff shoots his rivals, is arrested and  
2 put in prison, where he sees a news report that his son, 16-year-old Ron Jr., was  
3 killed while robbing a convenience store during a Crips gang initiation. *Id.* at 25-39.

4 The next chapter starts with Plaintiff's childhood. *Id.* at 45. Plaintiff is  
5 abused by his mother's husband, and, in revenge, sets the house on fire. *Id.* at 46-  
6 51. He is arrested at age 7 and sent to juvenile hall. *Id.* at 55. Upon release, he robs  
7 a milkman and steals his stepfather's car, crashing it in a police chase. *Id.* at 55-59.  
8 Plaintiff is then imprisoned twice in California Youth Authority facilities: once after  
9 a shootout and later after he shoots a man for insulting his cousins. *Id.* at 59-62.

10 Plaintiff moves in with his sister and her husband, through whom he meets a  
11 number of "gangster pimps" and decides to become a pimp himself. *Id.* at 64-67.  
12 He begins pimping in 1967, developing a profitable business with a "stable" of  
13 many of the Bay Area's "top whores." *Id.* at 79.

14 Plaintiff falls in love at age 17 with the 15-year-old "China Doll." *Id.*,  
15 102-05, 108. China Doll and Plaintiff are arrested by undercover FBI agents for  
16 selling heroin at their high school. *Id.* at 107-16. China Doll is released first and  
17 takes care of Plaintiff's pimping business during his imprisonment. *Id.* at 116-17.  
18 When Plaintiff is released, he resumes his pimping business. *Id.* at 119-22.

19 Plaintiff learns from China Doll that she was robbed, raped, and beaten while  
20 Plaintiff was in custody. *Id.* at 117-18, 123-24. Plaintiff kills the men involved: he  
21 first sodomizes one of the men with the butt of his pistol before shooting him and  
22 watching as an accomplice slits his throat; and he and his accomplice shoot the other  
23 alleged rapist in both kneecaps, hogtie him to a chair, pour cement in a bucket  
24 around his bound ankles, cut off his penis and put it in his mouth, and throw him off  
25 the Golden Gate Bridge. *Id.* at 124-41.

26 The Book describes in graphic detail numerous other violent acts, among  
27 them: Plaintiff shoots a bartender who had attempted to "shake down" one of his  
28 prostitutes, *id.* at 80-82; one of Plaintiff's associates has his throat cut, his penis cut

1 off and put in his mouth, and is shot by a rival drug dealer, *id.*, 183-84; Plaintiff  
 2 drives a U-Haul truck through the glass window of a restaurant, and kills everyone  
 3 inside, *id.* at 184-85; and Plaintiff shoots someone in the penis and each knee cap,  
 4 then puts the gun in his mouth and kills him. *Id.* at 190-91. Plaintiff himself is  
 5 eventually injured when he is shot in the hand during a shootout. *Id.* at 199-204.

6 On page 209 of the 286-page Book, China Doll asks Plaintiff to leave the  
 7 criminal world, and he starts managing his pre-teen and teenaged sons as a Jackson  
 8 5-like group called the Newtrons.<sup>2</sup> *Id.* at 205-06, 209-18. Plaintiff and his family  
 9 become friendly with the Jackson family, and Joe Jackson signs the Newtrons to his  
 10 label. *Id.* at 213-18. As the group is finishing its first album, however, Jackson  
 11 refuses to release the album. *Id.* at 245-46. Plaintiff returns to pimping, is arrested  
 12 for cocaine possession and later escapes from prison. *Id.* at 248-59.

13 The Newtrons sign with MCA Records. *Id.* at 263-70. Their video is aired  
 14 on BET and they perform on Soul Train, but MCA will not pay for them to tour. *Id.*  
 15 at 270-71. Plaintiff takes the group on tour, and is arrested for gun possession in  
 16 Maryland. *Id.* at 272-73. Plaintiff returns to California and goes to MCA, where he  
 17 is arrested. *Id.* at 275, 278-80. Plaintiff then serves six years in federal prison,  
 18 where he learns about his son's 1991 death on television. *Id.* at 280-82. China Doll  
 19 dies on June 14, 2005 for reasons unexplained in the Book, followed a year later by  
 20 the deaths of Plaintiff's parents. *Id.* at 282. In all, less than a quarter of the entire  
 21 Book is devoted to Plaintiff's so-called music "career."

22 ***The DVD.*** The DVD is a montage of still photographs, footage from home  
 23 videos and television shows, and dramatizations. It contains occasional voice-over  
 24 narration, which is barely audible, as well as superimposed text. *See, e.g.*, RJN, Ex.

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25  
 26 <sup>2</sup> Plaintiff alleges that the Newtrons were made up of his *three* sons. ECF 24,  
 27 ¶ 20(b). According to the DVD jacket, however, Plaintiff had 27 children, *four* of  
 28 whom were in the Newtrons, and the Book never clarifies how many of his children  
 were in the group. RJN, Exs. B-C.

1 C, 4:18-48, 35:39. Like the Book, the DVD states it is autobiographical, titled “A  
 2 Documentary of a Gangsta Pimp Ron Newt.” RJN, Ex. C, DVD jacket. The DVD  
 3 jacket also states that the documentary is “a journey into the deepest, darkest, most  
 4 dangerous inner secret parts of the world” where the viewer “will meet some of the  
 5 coldest & most notorious pimps, whores, drug dealers and killers the world has ever  
 6 known.” *Id.* Plaintiff describes himself as a “self made [sic] millionaire,” with a  
 7 gorgeous wife, 17 whores, and 27 beautiful children,” who, in August 1989, “while  
 8 managing an unknown group that consisted of four of his sons called the Newtrons  
 9 . . . landed an \$8 million record deal with MCA Records.” *Id.*

10 Plaintiff’s life then “spiraled downward.” *Id.* His son, Ron Newt Jr. was  
 11 killed while robbing a grocery store in an attempt to complete his gang initiation.  
 12 *Id.* As described on the DVD jacket, Plaintiff “was fascinated by the temptations of  
 13 power and money. The past had come back to haunt him and when the game was  
 14 over it would prove to cost him much more than he ever anticipated.” *Id.*

15 The DVD opens with a summary of Plaintiff’s birth and early childhood. *Id.*,  
 16 4:00-6:00. The overwhelming majority of the DVD is devoted to Plaintiff’s  
 17 successes and challenges as a pimp and drug dealer, *id.*, 6:00-41:30, including  
 18 several minutes of footage of “Playa’s Balls,” award parties for Bay Area pimps.  
 19 *Id.*, 14:02-18:12, 20:13-21:10, 26:21-30:56. The DVD also includes footage of  
 20 Plaintiff’s house, cars, and pet tiger, *id.*, 31:19, 35:19-37:46, and interviews with  
 21 Plaintiff about the business of pimping. *E.g.*, *id.*, 7:01-7:15, 7:54-8:13, 39:33-39:42.

22 Plaintiff’s wife, China Doll, is only a peripheral character in the DVD. After  
 23 the opening credits, she is introduced into the story for the first time at the 41:30  
 24 minute mark, and has very little airtime, consisting primarily of photographs from  
 25 prom or graduation or with her children as babies. *Id.*, 41:30-43:38. The Newtrons  
 26 are not discussed in depth until more than 40 minutes into the 80-minute DVD, with  
 27 just 25 minutes of Newtron performances and images of the Newt family with the  
 28 Jackson family. *Id.*, 43:49-1:08:30. The DVD then shows footage from news

1 coverage of Ron Jr.’s shooting, *id.*, 1:08:33. Following the news show footage,  
2 there are another 10 minutes of footage from the early 2000s. *Id.*, 1:10:40-1:20:54.

3 ***The Screenplay.*** Plaintiff has refused to provide a copy of the Screenplay,  
4 and Defendants’ request to the Copyright Office for the deposit copy is pending.  
5 Perigoe Decl., ¶ 5. However, because Plaintiff alleges that the Screenplay is the  
6 “script of the book,” ECF 24, ¶ 3, Ex. 1, it follows that the Book contains the  
7 relevant elements of the Screenplay (e.g., plot, character, theme).

8 ***B. The Empire Television Series***

9 *Empire* is the story of rapper and music mogul, Lucious Lyon (“Lucious”),  
10 who has spent his life building Empire Entertainment (“Empire”), a privately held  
11 music empire on the verge of going public. RJN, Ex. D, Ep. 1, 4:50-6:42. When  
12 Lucious learns that he has Amyotrophic Lateral Sclerosis (ALS), he must decide  
13 which of his three adult sons will take over his entertainment empire. In a plot  
14 reminiscent of Shakespeare’s *King Lear*, Lucious’s three sons—Andre, a married  
15 businessman with bipolar disorder; Jamal, a gay singer rejected by the homophobic  
16 Lucious; and Hakeem, a talented but unfocused rapper—vie for control of Empire.  
17 *Id.*, Ep. 1, 6:43-8:05, 22:24-23:16, 34:36-35:26, 39:20-34; Ep. 10, 0:53-3:49. The  
18 reappearance of Lucious’s ex-wife, Cookie, after serving 17 years on drug charges,  
19 complicates the story. *Id.*, Ep. 1, 8:06-37, 14:52-56. Cookie becomes the focus of  
20 the action as she demands half of the company she started with Lucious, and  
21 ultimately helps Jamal take control of Empire. *Id.*, Ep. 1, 15:25-41; Ep. 11, 46:58-  
22 47:24. Conflict also arises between the blunt-spoken Cookie and Lucious’s fiancé,  
23 Anika, Empire’s head of artists and repertoire (A&R). *Id.*, Ep. 1, 16:35-17:13, Ep.  
24 6, 2:43-3:33.

25 Although Lucious and Cookie were involved in drug dealing and related  
26 criminal activity before starting Empire, *Empire*’s pilot episode begins long after  
27 they have left the drug trade, and the briefly-shown shooting by Lucious is to silence  
28 a character with knowledge of his long-ago past. *Id.*, Ep. 1, 36:43-37:45, 41:24-



1 43:17. *Empire* is set in the music industry and takes place in present day New York  
 2 City, in a setting marked by imagery of over-the-top glamour. The occasional  
 3 flashbacks to Lucious’s and Cookie’s drug dealing provide backstory, but do not  
 4 drive the plot. *Id.*, Ep. 1, 39:49-40:47. Instead, the focus is on the relationships  
 5 among the web of family members and friends, and on the music, as each episode  
 6 includes the performance of a at least two original pop and hip hop songs performed  
 7 by the show’s characters. *E.g., id.*, Ep. 1, 3:20-4:38, 30:11-32:33.

8 In many ways, *Empire* is a contemporary take on *Dynasty*, a 1980s prime-  
 9 time soap opera that focused on the family drama around a succession plan for a  
 10 patriarch running an oil empire. Though set in the music industry, *Empire*—like  
 11 *Dynasty*—explores the relationships among a wealthy business-owning patriarch, his  
 12 children, his current partner and his ex-wife (and children’s mother) as the patriarch  
 13 struggles with the decision over who will succeed him. *Id.*, Ep. 12, 0:01-1:01.

14 *Empire* debuted on January 7, 2015, and airs during prime time on the Fox  
 15 Broadcasting Company television network. ECF 24, ¶ 15. Season One consists of  
 16 12 episodes, each lasting between 44 and 47 minutes. RJN, Ex. D.

17 **C. Plaintiff’s Allegations Regarding Disclosure of the Works to Howard**

18 Plaintiff alleges that he met with Defendant Terrence Howard in November  
 19 2010 to “promote his Book/Screenplay/DVD” and “to discuss [the Works] and the  
 20 possibility of jointly developing a motion picture adaptation of the [Works].” ECF  
 21 24, ¶ 13. Plaintiff alleges that, after Howard expressed interest in *playing* Plaintiff  
 22 in a potential film, he gave his Works to Howard, who never returned them. *Id.*  
 23 Plaintiff alleges that the Works were “presented to Howard with the clear  
 24 understanding that if any element of the [Works] was to be used by Howard, he  
 25 must first obtain rights to the [Works] in connection with appropriate compensation,  
 26 and in accordance with entertainment industry custom and practice.” *Id.*, ¶ 14.

27 Based on his alleged contact with Howard, Plaintiff claims that “*Defendants*  
 28 knew, or should have known, based on the parties’ course of conduct including oral

1 representations creating a reasonable expectation, that the submission was  
 2 conditioned on Defendants’ agreement” to compensate Plaintiff. *Id.*, ¶¶ 31, 35  
 3 (emphasis added). Plaintiff does not, however, allege that he has ever met any  
 4 Defendant other than Howard, that Howard told him he had the power to bind any  
 5 other Defendant, or that Howard in fact had such power. Nor does Plaintiff allege  
 6 that Howard had any role in creating *Empire*. Instead, Plaintiff alleges only that  
 7 Howard is the *actor* who stars in *Empire* as Lucious Lyon. *Id.*, ¶ 4.

#### 8 **D. Plaintiff’s Action**

9 Plaintiff filed his Complaint in *pro per* on April 15, 2015. ECF 1. The Court  
 10 granted then-Defendant Fox Broadcasting Company’s motion to dismiss without  
 11 prejudice and ordered Plaintiff to file any amended complaint by August 25, 2015.  
 12 ECF 23. Represented by counsel, Plaintiff timely filed his FAC, naming Twentieth  
 13 Century Fox Film Corporation (“Fox”) and four other Defendants: Lee Daniels and  
 14 Danny Strong, *Empire*’s co-creators and Executive Producers, ECF 24, ¶¶ 6, 7;  
 15 Terrence Howard, the actor who plays Lucious Lyon, *id.*, ¶ 4; and Malcolm  
 16 Spellman, a co-producer and writer on *Empire*’s first season, *id.*, ¶ 8. Fox answered  
 17 on September 8, 2015. ECF 26. Counsel for Defendants agreed to accept service  
 18 for the remaining Defendants and to a response date of October 15, 2015, which the  
 19 Court set in an October 1, 2015 order. ECF 30, 31.

### 20 **III. LEGAL STANDARD FOR RULE 12(b)(6) MOTION**

21 To survive a motion to dismiss under Federal Rule of Civil Procedure  
 22 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to  
 23 ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting  
 24 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
 25 plausibility when the plaintiff pleads factual content that allows the court to draw  
 26 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
 27 “[T]he tenet that a court must accept as true all of the allegations contained in a  
 28 complaint is inapplicable to legal conclusions.” *Id.*

1 When deciding a Rule 12(b)(6) motion, the Court may also consider evidence  
2 on which the complaint “‘necessarily relies’ if: (1) the complaint refers to the  
3 document; (2) the document is central to the plaintiff’s claim; and (3) no party  
4 questions the authenticity of the document.” *United States v. Corinthian Colleges*,  
5 655 F.3d 984, 999 (9th Cir. 2011) (citation omitted). Where, as here, the plaintiff’s  
6 works and the allegedly infringing work “are referenced in—although not attached  
7 to—the amended complaint, they are incorporated by reference in it, and can be  
8 considered by the court in assessing substantial similarity.” *Shame on You Prods.,*  
9 *Inc. v. Banks*, No. CV-14-03512-MMM (JCx), 2015 WL 4885221, at \*11 (C.D. Cal.  
10 Aug. 14, 2015).

11 **IV. THE FAC SHOULD BE DISMISSED WITH PREJUDICE**

12 **A. Plaintiff Cannot State a Claim for Copyright Infringement**

13 “To establish a prima facie case of copyright infringement, a plaintiff must  
14 show (1) ownership of a valid copyright and (2) violation by the alleged infringer of  
15 at least one of the exclusive rights granted to copyright owners by the Copyright  
16 Act.” *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011)  
17 (citation omitted); *see also* 17 U.S.C. § 501(a). “Absent direct evidence of copying,  
18 proof of infringement involves fact-based showings that the defendant had ‘access’  
19 to the plaintiff’s work<sup>3</sup> and that the two works are ‘substantially similar.’” *Three*  
20 *Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (quoting *Smith v.*  
21 *Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)).

22 “[W]hen the copyrighted work and the alleged infringement are both before  
23 the court, capable of examination and comparison, non-infringement can be  
24 determined on a motion to dismiss.” *Christianson v. West Publ’g Co.*, 149 F.2d  
25 202, 203 (9th Cir. 1945) (citing cases). The Court may dismiss a copyright  
26

27 \_\_\_\_\_  
28 <sup>3</sup> For purposes of this motion only, Defendants do not challenge access.

1 infringement claim if it concludes that the works are not substantially similar in  
2 protectable expression. *See Zella*, 529 F.Supp.2d at 1130-31 (citing cases).

3 **1. *Empire Is Not Substantially Similar to Plaintiff's Works***

4 Copyright law protects the *expression* of ideas, not the ideas themselves, 17  
5 U.S.C. § 102(b). “[C]opyright protection does not extend to historical or  
6 contemporary facts, material traceable to common sources or in the public domains,  
7 and *scenes a faire*.” *Chase-Riboud v. Dreamworks, Inc.*, 987 F.Supp. 1222, 1226  
8 (C.D. Cal. 1997) (citation omitted); *see also Satava v. Lowry*, 323 F.3d 805, 810  
9 (9th Cir. 2003) (“The originality requirement mandates that objective ‘facts’ and  
10 ideas are not copyrightable.”).

11 The Court “must take care to inquire only whether the protectable elements  
12 [of the works at issue], standing alone, are substantially similar.” *Cavalier v.*  
13 *Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (internal quotation marks,  
14 citations, emphasis omitted); *see also Funky Films, Inc. v. Time Warner Entm’t Co.*,  
15 *L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (requiring the court to disregard non-  
16 protectable elements in determining substantial similarity). The substantial-  
17 similarity test contains an extrinsic and intrinsic component, *Funky Films*, 462 F.3d  
18 at 1077, but only the extrinsic test applies at the pleading stage. *Zella*, 529  
19 F.Supp.2d at 1133; *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045  
20 (9th Cir. 1994) (citation omitted). The extrinsic test “focuses on ‘articulable  
21 similarities between the plot, themes, dialogue, mood, setting, pace, characters, and  
22 sequence of events’ in two works.” *Funky Films*, 462 F.3d at 1077 (quoting *Kouf*,  
23 16 F.3d at 1045).

24 Applying each factor of the extrinsic test in this case makes clear that there is  
25 no substantial similarity between the protectable elements of *Empire* and Plaintiff’s  
26 Works. Indeed, each of Plaintiff’s claimed “similarities” consists of *ideas* and *facts*  
27 from his “life story,” or generic *scenes a faire*, none of which are protectable.

28

1 (a) Plot and Sequence of Events

2 (i) Plaintiff Mischaracterizes *Empire* and His Works

3 Plaintiff alleges that the plots of his Works and *Empire* both “follow[] an  
4 African American man, his wife who went to jail for dealing drugs to save her  
5 family, and their three sons who are engaged in pursuing careers in the music  
6 industry,” and that both “*focus* in central part on the protagonist’s history of  
7 violence and crime, drug dealing and pimping on the one hand and drug dealing on  
8 the other, the protagonist’s struggle to maintain power in their world and achieve  
9 legitimacy and success in the music industry.” ECF 24, ¶ 20(b) (emphasis added).

10 Plaintiff mischaracterizes *Empire* in an effort to create similarities where none  
11 exist. *Empire* is not about the characters’ history of violence and crime or Lucious’s  
12 *struggle* to achieve legitimacy and success in the music industry. When they are  
13 introduced in the pilot, Lucious and Cookie have long ago left the drug trade, and  
14 Lucious is already at the top of the industry. Instead, *Empire* is about a drug dealer-  
15 turned-rapper-turned-music mogul, who, believing he has a terminal illness, seeks a  
16 successor from among his three sons, while battling with the women in his life.

17 Neither is there any similarity between the storylines of the Newtrons’ pursuit  
18 of musical careers in Plaintiff’s Works and Jamal’s and Hakim’s musical careers in  
19 *Empire*. Unlike the Newtrons, Jamal and Hakim have successful solo careers,  
20 which are central to each *Empire* episode. The Newtrons, on the other hand,  
21 performed only as a group, never achieve success, and are, at most, a secondary  
22 story line in Plaintiff’s Works. They appear in less than a third of the DVD, and do  
23 not appear in the Book at all until Chapter 17 of 20. RJN, Ex. C, 43:49-1:08:30, Ex.  
24 B at 209-22. Even then, only one chapter—“The Beginning and the End of the  
25 Newtrons”—is devoted to the group itself, RJN, Ex. B at 209-22, as opposed to the  
26 Newt family’s relationship to the Jackson family, *id.* at 223-50 (“The Newtrons  
27 Meet Michael Jackson”), or Plaintiff’s efforts to secure a recording deal. *Id.* at 259-  
28 83. From the first page of the Book’s Introduction, the reader knows that the

1 Newtrons' career was cut short by the death of 16-year-old Ron Newt Jr. and there  
2 will be no long-running plot centered on the Newt family music empire.

3 **(ii) Plaintiff Identifies No *Protectable* Similarities**

4 "General plot ideas," such as those Plaintiff identifies, are not protected by  
5 copyright law; they remain forever the common property of artistic mankind."  
6 *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). Moreover, the Court must  
7 "look[] beyond the vague, abstracted idea of a general plot" when assessing  
8 substantial similarity. *Id.*

9 The FAC includes a list of purported similarities between Plaintiff's Works  
10 and *Empire*. See ECF 24, ¶ 20. The Ninth Circuit, however, "is 'particularly  
11 cautious'" in finding infringement based on a list of random similarities scattered  
12 throughout the works. See *Shame on You*, 2015 WL 4885221, at \*16 (quoting  
13 *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984); *Bernal v. Paradigm*  
14 *Talent & Literary Agency*, 788 F.Supp.2d 1061, 1063 (C.D. Cal. 2010) (rejecting "a  
15 133-page chart indicating a side-by-side comparison of certain events, dialogue, and  
16 characters"). Plaintiff's list of "similarities" is particularly suspect because he lists  
17 the events in both the Works and *Empire* out of order, all but conceding "that the  
18 two stories do not have a similar sequence of events," *Bernal*, 788 F.Supp.2d at  
19 1072, and because each purported "similarity" is, according to Plaintiff, a  
20 biographical *fact*, and is thus not protectable. See *Satava*, 323 F.3d at 810  
21 ("objective 'facts' and ideas are not copyrightable").

22 Each of Plaintiff's so-called "similarities" consists either of a general idea or  
23 the "situations and incidents that flow naturally from a basic plot premise, so called  
24 scenes a faire," none of which are protectable. See *Berkic*, 761 F.2d at 1293. A  
25 character killing his best friend, ECF 24, ¶ 20(28), killing four drug dealers, *id.*,  
26 ¶ 20(27), being questioned by police, *id.*, ¶ 20(34), or breaking out of jail, *id.*,  
27 ¶ 20(40), are classic examples of "general plot ideas" that "flow naturally from a  
28 basic plot premise," of characters involved in selling drugs, which cannot sustain a

1 copyright infringement claim. *See Berkic*, 761 F.2d at 1293. The same is true of a  
 2 character grooming his sons for show business, ECF 24, ¶ 20(24), or writing songs  
 3 for and making music with his son(s), *id.*, ¶ 20(25), (31), which flow directly from  
 4 the idea of a father and sons involved in the music industry. *See Cavalier*, 297 F.3d  
 5 at 823 (“Scenes-a-faire, or situations and incidents that flow necessarily or naturally  
 6 from a basic plot premise, cannot sustain a finding of infringement.”).

7 Indeed, courts in the Ninth Circuit have found plots with far more similarities  
 8 to be *dissimilar* as a matter of law. *See, e.g., Benay*, 607 F.3d at 625 (no substantial  
 9 similarity between works about American war veterans who traveled to Japan to  
 10 train the Japanese army to combat a samurai uprising); *Funky Films*, 462 F.3d at  
 11 1081 (no substantial similarity between works where fathers who operate family-run  
 12 funeral homes die, resulting in the subsequent operation of the homes by two sons,  
 13 one of whom has been estranged from the family prior to the father’s death); *Shame*  
 14 *on You*, 2015 WL 4885221, at \*\*16-17 (no substantial similarity between works  
 15 where female main character breaks up with boyfriend, gets intoxicated and has  
 16 one-night stand, wakes up disoriented the next morning and, due to various  
 17 difficulties including losing her cell phone and wallet, has a hard time finding her  
 18 way home). Plaintiff’s Works are far *less* similar to *Empire* than any of the works at  
 19 issue in these cases, and thus his list of purported similarities notwithstanding,  
 20 Plaintiff cannot sustain his infringement claim here.

### 21 (b) Characters

22 Only characters that are “especially distinctive” are protected by copyright  
 23 law. *Olson v. National Broad. Co., Inc.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (citing  
 24 cartoon characters as an example of a distinctive, copyrightable character); *Feldman*  
 25 *v. Twentieth Century Fox Film Co.*, 723 F.Supp.2d 357, 367 (D. Mass. 2010)  
 26 (“copyright protection does not extend to stock characters, such as a blond, blue-  
 27 eyed hero or doctors in ‘hot and cold’ romances”). Characters with “traits that flow  
 28 naturally from the works’ shared premises” cannot serve as a basis for infringement.

1 *Benay*, 607 F.3d at 626 (citing *Olson*, 855 F.2d at 1451-53).<sup>4</sup> As described below,  
 2 Plaintiff identifies no protectable similarities between any of the specific characters  
 3 in *Empire* and Plaintiff’s Works.

4 **(i) Lucious Lyon and Plaintiff**

5 While Plaintiff claims that the lead character in both his Works and *Empire* is  
 6 “a charismatic African American man, in his forties, who has risen from the ghetto  
 7 and a life of drug dealing and/or pimping that included multiple violent acts of  
 8 murder to tackle the world of the hip hop music industry as producers and through  
 9 the talents of their three sons,” ECF 24, ¶ 20(d), such characteristics (even if  
 10 accurate), are too generic and common to be protectable. *See, e.g., Benjamin v.*  
 11 *Walt Disney Co.*, No. CV 05-2280GPS, 2007 WL 1655783, at \*6 (C.D. Cal. June 5,  
 12 2007) (rejecting infringement claim where both works featured “attractive, likable,  
 13 30-year-old females that have escaped their humble past to pursue their dreams of  
 14 working and living in the big city”); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1176  
 15 (9th Cir. 2003) (finding “shared attributes of appearance and mysterious demeanor”  
 16 between magician characters to be “generic and common”).

17 The absence of similarity is even more pronounced when the characters of  
 18 Plaintiff and Lucious are accurately described. Lucious is a *former* drug dealer (and  
 19 never a pimp), who became a major rap star and then created his own record label  
 20 and entertainment company. Lucious did not achieve legitimacy *through* the talents  
 21 of his three sons—when the audience first meets Lucious, he is already an  
 22 established entertainment mogul with a number of successful artists, only two of  
 23 whom are his sons. Plaintiff, on the other hand, remains a pimp and drug dealer  
 24

25 <sup>4</sup> The presence of characters in each work that do *not* appear in the other also weighs  
 26 in favor of finding that the works are not substantially similar. *See Funky Films*,  
 27 462 F.3d at 1078-79. There are numerous characters in *Empire* without (alleged or  
 28 actual) counterparts in Plaintiff’s Works, and aside from Lucious, Cookie, and their  
 sons, Plaintiff does not allege that Defendants copied any characters in his Works.



1 throughout his story, with only a temporary—and unsuccessful—attempt to break  
2 into the music business, not as an executive, but as a manager for the Newtrons.

3 Nor can Plaintiff support his claim based on alleged similarities in the  
4 characters’ clothing and hairstyles. ECF 24, ¶ 20. Such similarities flow from the  
5 factual, well-documented fashions of drug dealing and hip hop and thus are not  
6 copyrightable. *See Reece v. Island Treasures Art Gallery, Inc.*, 468 F.Supp.2d 1197,  
7 1207 (D. Haw. 2006) (a hula dancer’s “kahiko dress” is an unprotectable “*scenes a*  
8 *faire*”); *Winfield Collection Ltd. v. Gemmy Indus. Corp.*, 311 F.Supp.2d 611, 616-17  
9 (E.D. Mich. 2004) (“the pointed hat, the flowing cape, the curled boots, the  
10 dominant black color of the clothing, as well as the broom, are all elements that  
11 follow from [a] witch theme”); *Shame on You*, 2015 WL 4885221, at \*30 (“a  
12 brightly colored dress, standing alone, is entirely generic and therefore not a  
13 copyrightable concept, especially not in a comedy”). Plaintiff’s assertions that  
14 Lucious is friends with the president and Newt is friends with the mayor, or that  
15 both characters are “womanizers”—even if they were, in fact, similar—are far too  
16 common to be protectable. *See, e.g., Althouse v. Warner Bros. Entm’t*, No. CV 13-  
17 00696, 2014 WL 2986939, at \*3 (C.D. Cal. Apr. 28, 2014) (characters that have an  
18 enemy whom they hate and have nightmares of their significant other dying are  
19 standard elements common to film and literature).

20 **(ii) Cookie Lyon and China Doll**

21 Lucious’s ex-wife, Cookie, and Plaintiff’s wife, China Doll, are also wholly  
22 dissimilar. While Plaintiff alleges that both characters are the mother of the leading  
23 character’s children and go “to jail for dealing drugs to sacrifice for the good of  
24 [their] famil[ies] and to keep the patriarch out of jail,” ECF 24, ¶ 20(d), China Doll  
25 does not even go to prison in the DVD, and in the Book she is incarcerated only for  
26 a short period of time, before she and Plaintiff are married or have children, and is  
27 released *before* Plaintiff. In any event, that a character is the mother of her  
28 husband’s children and goes to prison on drug charges is entirely generic and merely

1 *scenes a faire* of the premise of a couple involved in selling drugs. *See Idema v.*  
 2 *Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1186 (C.D. Cal. 2001) (“To the extent that  
 3 the two characters *are* similar, it is only with respect to traits that are so generalized  
 4 and/or cliché as to be nearly *scenes a faire* of the military/action genre.”).

5 Indeed, Cookie and China Doll are very distinct characters. China Doll is a  
 6 loyal wife who runs Plaintiff’s pimping business while he is incarcerated and urges  
 7 him to leave a life of crime out of fear for his safety. She plays a peripheral role in  
 8 Plaintiff’s Works. Cookie, by contrast, shares the spotlight with Lucious as a  
 9 primary character in *Empire*. A talented music producer and performer in her own  
 10 right, Cookie is strong, charismatic, and independent, and battles Lucious for a share  
 11 of the record company that she helped found.

12 Plaintiff again tries to salvage his claim by alleging that Cookie and China  
 13 Doll “look[] identical” and wear similar costumes. FAC, ¶ 20(6); *see e.g., id.*,  
 14 ¶ 20(7) (Cookie wears “‘China Doll’ style coat with fur collar” and “‘China Doll’  
 15 style hair”). Such random “similarities” in costume are, however, far too generic to  
 16 be protectable. *See Capcom Co., Ltd. v. MKR Grp., Inc.*, No. C 08-0904 RS, 2008  
 17 WL 4661479, at \*8 (N.D. Cal. Oct. 20, 2008) (rejecting infringement claim based  
 18 on “superficial, generic physical similarities of gender, hair color and wardrobe”).

### 19 (iii) The Sons

20 Plaintiff also seeks unsuccessfully to draw parallels between his three (or  
 21 four, *see* RJN, Ex. C) sons who form the Newtrons and Lucious’s three sons. The  
 22 *only* similarity between the characters is that some are musicians, and even then  
 23 there are differences: the Newtrons are pre-teens and teenagers and performed as a  
 24 group, while the sons in *Empire* are all adults, two are solo artists and the third is not  
 25 a performer but a married businessman with an MBA. Each of the three sons in  
 26 *Empire* is a complex character with his own distinct characteristics: one is gay, one  
 27 is bipolar, and each has a dramatically different relationship with his father.  
 28 Plaintiff’s Works, on the other hand, treat the Newtrons (however many) as a single

1 unit, except for Ron Newt Jr., whose only distinguishing characteristic is that he was  
2 shot in a convenience store robbery—an event that does not appear in *Empire*.

3 The only other alleged similarity between the sons is that the Newtrons  
4 performed in sunglasses and gold chains similar to those worn by Hakeem Lyon.  
5 ECF 24, ¶ 20(15). As with the other costumes, these generic similarities are  
6 unprotectable *scenes a faire*, which flow directly from the characters being musical  
7 performers. *See Reece*, 468 F.Supp.2d at 1207; *Capcom*, 2008 WL 4661479, at \*8.

### 8 (c) Dialogue

9 Plaintiff alleges absolutely *no* similarities in the dialogue, which dooms his  
10 claim entirely. *See Olson*, 855 F.2d at 1450 (“[E]xtended similarity of dialogue [is]  
11 needed to support a claim of substantial similarity.”).

### 12 (d) Mood

13 Neither is there any merit to Plaintiff’s claim that the works “have a similar  
14 mood in that they are dramas that promote the excesses of a ‘pimp’ lifestyle, sustain  
15 an undercurrent of violence that threatens to and periodically does erupt through the  
16 tension, and utilize hip hop music to enhance the drama and forward the action,”  
17 ECF 24, ¶ 20(e). While both works contain music, music is a central element of  
18 each *Empire* episode, which includes the performance of original contemporary  
19 songs interspersed throughout each episode, while very different music is performed  
20 in Plaintiff’s Works only during the part of the story about the Newtrons, which is  
21 less than a third of the DVD, and even less of the Book. Modeled after the Jackson  
22 5, the Newtrons perform songs featuring boy-band harmonies and saccharine lyrics,  
23 accompanied by simplistic choreographed dance moves. The music of *Empire’s*  
24 artists are, in contrast, sophisticated hip hop and R&B songs.

25 More important, *Empire* is a polished nighttime soap opera that airs on  
26 primetime network television. It has a vibrant, bright, and colorful tone, with little  
27 violence and an upbeat mood about a family’s financial success. Plaintiff’s Works,  
28 on the other hand, are crudely written, dark, regretful, and violent memoirs detailing

1 the death of Plaintiff’s teenaged son, acts of graphic violence and other criminal  
 2 activity—the portrayal of which would likely warrant an NC-17 rating in film, and  
 3 would not be permitted in network primetime.<sup>5</sup> *See Campbell v. Walt Disney Co.*,  
 4 718 F.Supp.2d 1108, 1114 (N.D. Cal. 2010) (finding the moods of two works not  
 5 substantially similar where one contained scenes involving drug dealers and the hero  
 6 chopping off his own finger while the other had “‘happy upbeat overtones’”).

7 **(e) Theme**

8 While Plaintiff alleges that “[e]ach work has as a core theme of drama  
 9 centering around the story of an African American man with a history of violence  
 10 raising himself and his three-sons [sic] from the ghetto and a life of crime into the  
 11 world of the music industry,” ECF 24, ¶ 20(a), he mischaracterizes his own Works.  
 12 The Newtrons never make it big, Plaintiff returns to crime, and his son is killed at  
 13 age 16 in a convenience store robbery.<sup>6</sup> Nor does Plaintiff accurately describe the  
 14 theme of *Empire*, which is set long after the protagonist has exited a life of crime  
 15 and becomes a successful entertainer and music mogul.

16 Moreover, the theme of a character raising himself up out of a life of poverty  
 17 and crime to become successful is neither original nor protectable. *See Cavalier*,  
 18 297 F.3d at 823 (“[f]amiliar stock scenes and themes that are staples of literature are  
 19 not protected” and hence cannot serve as grounds for substantial similarity); *Willis*  
 20 *v. Home Box Office*, No. 00 CIV 2500 (JSM), 2001 WL 1352916 at \*2 (S.D.N.Y.  
 21 Nov. 2, 2001) (rejecting claim of similarities based on “themes . . . common to the  
 22 talent agency business, or to situation comedies in general or in trivial detail that are  
 23

24 <sup>5</sup> The DVD also contains nudity, including close-up images of female genitalia.  
 25 RJN, Ex. C, 8:34-36.

26 <sup>6</sup> Indeed, Plaintiff himself identifies the theme of the Book as “you reap what you  
 27 sow.” RJN, Ex. B at 1. Similarly, the synopsis of the DVD states: “The past had  
 28 come back to haunt him and when the game was over it would prove to cost him  
 much more than he ever anticipated.” RJN, Ex. C.

1 not essential to either series”); *Benjamin*, 2007 WL 1655783, at \*5 (“stock themes  
2 ‘cannot raise a triable issue of fact on [a] plaintiff’s copyright claim”).

3       Regardless, because Plaintiff’s Works are, by Plaintiff’s admission, the  
4 candid story of his life, *see* RJN Exs. B-C, even if there were similarity in the  
5 themes of those Works and *Empire* (and there are not), there could be no  
6 infringement, because the objective “facts” of Plaintiff’s life are not copyrightable.  
7 *See Satava*, 323 F.3d at 810.

8                               **(f) Pace**

9       “The time period within which the movie is set is a factor for determining the  
10 pace of the movie.” *Campbell*, 718 F.Supp.2d at 1115. Plaintiff’s Works span from  
11 the late 1940s through the early 2000s, in a single book or 80-minute DVD, while  
12 *Empire* takes place in present day (with brief flashbacks to the 1980s), and unfolds  
13 over a matter of months in twelve episodes totaling 531 minutes. *See Capcom*, 2008  
14 WL 4661479, at \*10 (no substantial similarity in pace where one story takes place  
15 over many months and the other takes place entirely over a three-day period).

16                               **(g) Setting**

17       Although Plaintiff alleges that both works take place in a “large urban  
18 setting,” ECF 24, ¶ 20(c), “the mere fact that some portion of both works occurs in a  
19 city” is ‘generic and inconsequential.’” *Shame on You*, 2015 WL 4885221, at \*23  
20 (*quoting Rice*, 330 F.3d at 1177). Plaintiff also fails to allege that Works’ tone is  
21 similar—while Plaintiff claims that his Works and *Empire* “favor[] a lavish ‘pimp’  
22 aesthetic and contain[] flashbacks to the ghetto of a different era” *see id.*, ¶ 20(c),  
23 *Empire* is set in the music world, while Plaintiff’s work is set primarily in the world  
24 of drug-dealing and prostitution.

25   \* \* \*

26       There are virtually no similarities between Plaintiff’s Works and *Empire*, and  
27 certainly no similarities of protectable expression. No additional pleadings can  
28 change that fact, and Plaintiff’s infringement claim should therefore be dismissed

1 with prejudice and without leave to amend. *See Zella*, 529 F.Supp.2d at 1130-31;  
 2 *see also Campbell*, 718 F.Supp.2d at 1116 (denying leave to amend where works  
 3 were not substantially similar as a matter of law).

## 4                   **2.       The Application to Register the DVD & Screenplay Is Invalid**

5           Copyright registration is “a precondition to filing a claim,” which “plaintiffs  
 6 ordinarily must satisfy before filing an infringement claim.” *Reed Elsevier, Inc. v.*  
 7 *Muchnick*, 559 U.S. 154, 157-58 (2010); *see also* 17 U.S.C. § 411(a). In the Ninth  
 8 Circuit, a plaintiff can avoid dismissal by alleging facts showing “receipt by the  
 9 Copyright Office of a complete application” for registration. *Cosmetic Ideas, Inc. v.*  
 10 *IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010).

11           While the Book appears to have been registered, *see* RJN, Ex. B, Plaintiff has  
 12 failed to apply properly to register the Screenplay and DVD. Plaintiff claims that  
 13 Exhibit 1 to the FAC is “[a] true and correct copy of the application for copyright  
 14 registration for the Screenplay *and* the DVD.” ECF 24, ¶ 12 (emphasis added).  
 15 That application states that it is for a work titled “All That Glitters is not Gold script  
 16 of the book bigger than big,” not the DVD. *See id.*, Ex. 1 at 2.

17           Plaintiff’s attempt to register two works in a single application is deficient  
 18 and fails to satisfy Plaintiff’s pleading obligation. *See Cosmetic Ideas*, 606 F.3d at  
 19 621 (requiring a Plaintiff to allege a “complete application” for registration).  
 20 Multiple works may be registered in a single application only if they are “otherwise  
 21 recognizable as self-contained works” that are “included in a single unit of  
 22 publication.” *See* 37 C.F.R. § 202.3(b)(4)(i)(A); *Olander Enters., Inc. v. Spencer*  
 23 *Gifts, LLC*, 812 F.Supp.2d 1070, 1076-77 (C.D. Cal. 2011) (citation omitted).  
 24 Plaintiff’s copyright application makes clear that the Screenplay was published in  
 25 1998, *see id.*, Ex. 1 at 41, while the DVD, on its face, states that it was published in  
 26 2006. *See* RJN, Ex. C. Works published eight years apart cannot be a “single unit  
 27 of publication,” *see Olander Enters.*, 812 F.Supp.2d at 1076-77, and Plaintiff’s  
 28 apparent attempt to register the Screenplay and DVD together, *see* ECF 24, ¶ 12, is

1 thus invalid.<sup>7</sup> Without a valid registration, Plaintiff’s claim for infringement of the  
2 Screenplay or DVD necessarily fails. *See Reed Elsevier*, 559 U.S. at 166-67.

3 **B. Plaintiff Cannot State a Claim for Breach of Implied Contract**

4 Courts will imply a contract for use of a plaintiff’s idea where the plaintiff  
5 “disclosed the work to the offeree for sale, and did so under circumstances from  
6 which it could be concluded that the offeree voluntarily accepted the disclosure  
7 knowing the conditions on which it was tendered and the reasonable value of the  
8 work.” *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004)  
9 (summarizing the holding in *Desny v. Wilder*, 46 Cal.2d 715 (1956)); *see also*  
10 *Benay*, 607 F.3d at 629 (listing the elements of a so-called *Desny* claim). Such a  
11 contract will be implied only where the work was disclosed by the plaintiff for sale  
12 “on the theory that the bargain is not for the idea itself, but for the *services* of  
13 conveying that idea.” *Grosso*, 383 F.3d at 967 (citation omitted, emphasis added).  
14 Plaintiff fails to allege that any Defendant other than Defendant Howard was a party  
15 to the purported contract, and he fails to allege that *any* Defendant (including  
16 Defendant Howard) used his Works in creating *Empire*.

17 **1. Plaintiff Fails to Allege a Contract with Defendants Daniels,**  
18 **Strong, and Spellman**

19 To state an implied contract claim, the plaintiff must disclose the work  
20 directly to the defendant with whom the implied contract was allegedly formed. *See*  
21 *Benay*, 607 F.3d at 634 (“Privity between the parties is a necessary element of an  
22 implied-in-fact contract claim.”). “[T]he creation of an implied-in-fact contract  
23 between an author, on the one hand, and an agent, producer, or director, on the other  
24 hand, is of such a personal nature that it is effective only between the contracting  
25

26 \_\_\_\_\_  
27 <sup>7</sup> Footage in the DVD is purportedly from as late as 2004, indicating that the first  
28 publication of the DVD could not have been in 1998. RJN, Ex. C, 14:25.

1 parties.” *Rokos v. Peck*, 182 Cal.App.3d 604, 617-18 (1986).<sup>8</sup>

2 Plaintiff bases his implied contract claim on an alleged meeting with  
 3 Defendant Howard in November 2010, when Plaintiff claims to have “extensively  
 4 discussed his life story” and provided Howard with copies of his Works. ECF 24,  
 5 ¶ 30. Plaintiff does not claim that any other Defendant was present at that meeting,  
 6 nor does he allege facts showing that Howard had the authority to bind any other  
 7 Defendants to this purported agreement. Plaintiff relies instead on boilerplate  
 8 allegations of agency and alter ego between and among the Defendants, *id.*, ¶¶ 10-  
 9 11, which are insufficient as a matter of law. *See Gerritsen v. Warner Bros. Entm’t*  
 10 *Inc.*, ---F.Supp.3d---, No. CV 14-03305 MMM (CWx), 2015 WL 4069617, at \*20  
 11 (C.D. Cal. Jan. 30, 2015) (“a plaintiff must allege sufficient facts supporting both of  
 12 the elements of alter ego liability”); *In re Toyota Motor Corp.*, 785 F.Supp.2d 883,  
 13 911 (C.D. Cal. 2011) (striking boilerplate agency allegations; plaintiff failed to  
 14 allege “something more than mere conclusory allegations of mutual and overlapping  
 15 agencies pursuant to which Defendants at all time[s] acted”).

16 Because Plaintiff fails to allege that he disclosed his Works to Defendants  
 17 Daniels, Strong, or Spellman, he also fails to allege that these Defendants  
 18 voluntarily accepted the Works under circumstances implying an agreement. *See*  
 19 *Desny*, 46 Cal.2d at 739 (an implied contract requires that the contracting party  
 20

21 <sup>8</sup> Such direct contact is present in every case in which a plaintiff has been found to  
 22 have stated an implied contract claim. *See, e.g., Desny*, 46 Cal.2d at 726-27  
 23 (plaintiff conveyed his idea directly to the defendant’s secretary whose “knowledge  
 24 would be his knowledge”); *Montz v. Pilgrim Film & Television, Inc.*, 649 F.3d 975,  
 25 977 (9th Cir. 2011) (plaintiffs attended “[a] number of meetings and discussions”  
 26 with defendants during which the plaintiffs “presented screenplays, videos, and  
 27 other materials relating to their proposed show”); *Benay*, 607 F.3d at 622-23, 629  
 28 (plaintiffs “pitched” their idea for a screenplay on a telephone call with defendants  
 and provided a copy directly to the defendants); *Firoozye v. Earthlink Network*, 153  
 F.Supp.2d 1115, 1127 (N.D. Cal. 2001) (plaintiff emailed and communicated  
 directly with one of defendant’s executives).



1 “voluntarily accept the disclosure, knowing the conditions on which it is tendered”).  
 2 While Plaintiff alleges conclusorily that all “Defendants” “fully and clearly  
 3 understood” his “expectation” that he “would be compensated for [the] use [of the  
 4 Works]” ECF 24, ¶ 34, he fails to allege *how* Defendants Daniels, Strong, or  
 5 Spellman, who were not at the alleged 2010 meeting, could have become bound by a  
 6 “bilateral expectation” that Plaintiff’s idea requires compensation. *See Quirk v.*  
 7 *Sony Pictures Entm’t Inc.*, No. C 11-3773 RS, 2013 WL 1345075, at \*10 (N.D. Cal.  
 8 Apr. 2, 2013) (citation omitted). Indeed, Plaintiff fails to allege facts showing that  
 9 Defendants Daniels, Strong, or Spellman even *knew* of Plaintiff, his works, or his  
 10 meeting with Howard. This lack of privity requires dismissal of the implied contract  
 11 claim against Defendants Daniels, Strong, and Spellman.

## 12 **2. Plaintiff Does Not and Cannot Allege Use**

13 Plaintiff also fails entirely to allege that any Defendant *used* the Works, *see*  
 14 *Benay*, 607 F.3d at 629, for at least two reasons:

### 15 **(a) Plaintiff Fails to Allege Use by Defendants**

16 Plaintiff does not allege use by Defendant Howard, the only Defendant to  
 17 whom the Works allegedly were disclosed. *See Klekas*, 150 Cal.App.3d at 1114-15  
 18 (rejecting implied contract claim where “there is nothing in the record to establish  
 19 the use of [the plaintiff’s] work in the writing or making of” the works at issue).  
 20 Plaintiff alleges only that Defendant Howard is an “actor” in *Empire*, *see* ECF 24,  
 21 ¶ 4, not that he had any role in creating the series, and alleges no facts supporting  
 22 alleged use by Defendants Strong, Daniels, or Spellman.

### 23 **(b) The Ideas in the Works are Not Similar**

24 To state a claim for breach of implied contract, a plaintiff must establish, at a  
 25 minimum, substantial similarity between the ideas in the works at issue in order to  
 26 raise an inference of use. *See Green v. Schwarzenegger*, No. CV 93-5893-WMB,  
 27 1995 WL 874191, at \*12 (C.D. Cal. July 12, 1995), *aff’d*, 107 F.3d 877 (9th Cir.  
 28 1997).

1 Plaintiff fails to identify specific similarities of the ideas embodied in his  
2 Works and *Empire*. See *Klekas*, 150 Cal.App.3d at 1112. Indeed, as described in  
3 Part IV.A.2, *supra*, Plaintiff’s Works and *Empire* are, in fact, substantially  
4 *dissimilar*, and any similarities between them consist of common ideas inherent in  
5 stories about drug dealing, arrest, violence, music, and family. None of these  
6 purported “similarities” are in any way original to Plaintiff and none can support  
7 Plaintiff’s implied contract claim. See *id.* at 1113 (rejecting the plaintiff’s list of 23  
8 similarities as “either strained or devoid of legal significance” where the works had,  
9 at most, “certain similarities that necessarily flow from a common theme”); *Ware v.*  
10 *Columbia Broad. Sys., Inc.*, 253 Cal.App.2d 489, 495 (1967) (finding that it would  
11 have been “fatuous for plaintiff to have alleged that when his story was submitted  
12 defendants agreed, by implication, to pay him if they ever in the future made a  
13 picture embodying any stock situation which plaintiff had drawn upon in  
14 constructing his play”). As the above comparison of the works demonstrates, the  
15 works are not only substantially dissimilar in expression, but also in idea.

16 **C. Leave to Amend Would Be Futile**

17 Because Plaintiff fails to state either of his claims, his FAC should be  
18 dismissed in its entirety, and with prejudice, because nothing Plaintiff could allege  
19 in an amended complaint could change the fact that *Empire* is not in any way similar  
20 to Plaintiff’s Work. See *Campbell*, 718 F.Supp.2d at 1116 (denying leave to amend  
21 where the works were not substantially similar); *Gadh*, 2014 WL 1778950, at \*6  
22 (dismissing with prejudice where works were not substantially similar).

23 **V. CONCLUSION**

24 For the foregoing reasons, Defendants respectfully request that the Court  
25 grant this Motion and dismiss the FAC with prejudice and without leave to amend.

26 DATED: October 15, 2015

CALDWELL LESLIE & PROCTOR, PC

27 By           /s/          

LINDA M. BURROW

28