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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ralph T Reilly,
10 Plaintiff,
11 v.
12 Steve Wozniak, et al.,
13 Defendants.
14

No. CV-18-03775-PHX-MTL
ORDER

15 Plaintiff Ralph T. Reilly (“Plaintiff” or “Reilly”) filed suit against Steve Wozniak
16 (“Wozniak”) and three entities (Doc. 1 at 3). The case arises from Plaintiff’s allegations
17 that after he worked for years on—and obtained copyright protection for—his idea of the
18 “Woz Institute of Technology,” Wozniak and his co-Defendants formed “Woz U” without
19 compensating Plaintiff. (*Id.* at 6.) Plaintiff alleges claims of breach of an implied-in-fact-
20 contract, money had and received, copyright infringement, declaratory relief, and
21 accounting.

22 Before the Court are two motions: Defendants’ Motion to Dismiss Counts II, IV and
23 V of Plaintiff’s Complaint (“Defendants’ Motion”) (Doc. 46); and Defendant Steve
24 Wozniak’s Motion for Judgment on the Pleadings as to Count I of Plaintiff’s Complaint
25 (“Wozniak’s Motion”) (Doc. 58). Defendants’ Motion is granted in part and denied in part;
26 Wozniak’s Motion is denied.¹

27
28 ¹ The Court believes that oral argument would not significantly aid the decisional process.
See Fed. R. Civ. P. 78(b) (court may decide motions without oral hearing); LRCiv 7.2(f)
(same).

1 **I. BACKGROUND**

2 Plaintiff is an Assistant Professor of Management Information Systems at the
3 Barney School of Business, University of Hartford. (Doc. 1 ¶ 3.) He alleges that on
4 September 12, 2010, he emailed Wozniak, the co-founder of Apple Computers Inc., stating
5 “I want to start a high tech university.” (*Id.* ¶ 4; at 16.) Wozniak replied, “Great idea.” (*Id.*)
6 Wozniak also provided advice and noted “I’m too busy to do anything more.” (*Id.*) Plaintiff
7 claims that over the next two years, he and Wozniak took steps to develop the idea. For
8 example, Plaintiff claims that he introduced Wozniak and Charter Oak State College, who
9 ultimately executed a Personal Service Agreement for purposes of developing the “Woz
10 School of Technology.” (*Id.* ¶ 5.) Plaintiff also states that he met with Wozniak on March
11 25, 2011 to discuss the idea, at which time they “agreed to proceed with a ‘deal’ handshake
12 depicted in a photograph[.]” (*Id.* ¶ 6.) Plaintiff also claims that Wozniak permitted him to
13 proceed with potential investors in a November 21, 2011 email, stating “I figure it’s your
14 idea.” (*Id.* ¶ 6, at 34.) Plaintiff created a website and logo for the project² (*Id.* ¶ 8; 46–58)
15 and obtained copyright protection for the “graphic images, photographs, and tangible
16 expressions” attached as Exhibit I to the Complaint. (*Id.* at 4, 59–76.)

17 Plaintiff alleges that on November 11, 2017, he learned that Wozniak entered into a
18 business arrangement with Defendant Southern Careers Institute, Inc. (“SCI”) to form
19 “Woz U.” (*Id.* ¶ 10.) Plaintiff states that Wozniak and SCI formed Woz U Education, LLC
20 (“Woz Arizona”) and Woz U Education Holdings, LLC (“Woz Delaware”) to formalize
21 Woz U business arrangements. Plaintiff emailed Wozniak to congratulate him on
22 November 21, 2017. Wozniak responded on December 24, 2017, stating, “You are right
23 on the mark. You had the right idea.... I doubt it would have happened without your initial
24 idea.” (*Id.* ¶ 14, at 91.)

25 Plaintiff filed the Complaint against Wozniak, SCI, Woz Arizona, and Woz
26 Delaware (collectively, “Defendants”) on November 3, 2018. It alleges that Defendants

27 ² The Complaint states that this included an A+ Certification, Ethical Hacker Certification,
28 Web Design and Development Certification, Network Security Certification, Network
 Administration Certification, and Could Essentials Certification. (*Id.* at 4.)

1 “used, applied, and exploited” Plaintiff’s work, and infringed on his copyrighted work, in
2 marketing and publicizing Woz U. (*Id.* ¶¶ 12, 13.) The Complaint alleges claims of breach
3 of an implied-in-fact contract against Wozniak; and claims of money had and received,
4 copyright infringement, declaratory relief, and accounting against all Defendants. (*Id.* at
5 7–11.) Plaintiff seeks damages of at least \$1,000,000, disgorgement of Defendants’ profits,
6 an accounting, declaratory judgment, and attorneys’ fees. (*Id.* at 13.)

7 Defendants, for their part, characterize the underlying events as follows: “Plaintiff
8 tried, albeit unsuccessfully, t[o] market an online school using Defendant Steve Wozniak’s
9 name and likeness. Long after the Plaintiff failed in his attempts to do so, another group
10 that was already operating an online school approached Wozniak with what would
11 ultimately become WOZ U.” (Doc. 54 at 2.) Defendants filed an Answer on January 16,
12 2019.³ (Doc. 19.) Then, on May 13, 2019, Defendants filed the pending Motion to Dismiss
13 Counts II, IV and V of the Complaint. (Doc. 46.) After briefing on Defendants’ Motion
14 was complete, Defendant Wozniak filed a Motion for Judgment on the Pleadings as to
15 Count I. (Doc. 58.) Both motions are fully briefed; the Court will address them in turn.

16 **II. LEGAL STANDARDS**

17 **A. Rule 12(b)(6)**

18 To survive a motion to dismiss, a complaint must contain “a short and plain
19 statement of the claim showing that the pleader is entitled to relief” such that the defendant
20 is given “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl.*
21 *Corp. v. Twombly*, 550 U.S. 545, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2); *Conley v.*
22 *Gibson*, 355 U.S. 41, 47 (1957)). Dismissal under Rule 12(b)(6) “can be based on the lack
23 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
24 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). The
25 Court must accept Plaintiff’s material allegations as true and construe them in the light

26
27 ³ At no point in this case were Defendants instructed that they were required to file an
28 Answer. (Doc. 16) (ordering that “Defendants WozU Education, LLC, and Woz U
Education Holdings, LLC shall have until January 18, 2019 to file their Answer **or**
responsive pleading to Plaintiff’s Complaint (Doc. 1) (emphasis added)).”

1 most favorable to Plaintiff. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580
2 (9th Cir. 1983). A complaint should not be dismissed “unless it appears beyond doubt that
3 the plaintiff can prove no set of facts in support of the claim that would entitle it to relief.”
4 *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000). Review of a
5 Rule 12(b)(6) motion is “limited to the content of the complaint.” *North Star Int'l*, 720 F.2d
6 at 581. Rule 12(b) states that a motion asserting defenses stated in Rule 12(b)(1)-(7) “must
7 be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b).

8 **B. Rule 12(c)**

9 Rule 12(c) of Federal Rules of Civil Procedure 12(c) states, “[a]fter the pleadings are
10 closed—but early enough not to delay trial—a party may move for judgment on the
11 pleadings.” The legal standard for Rule 12(c) is “substantially identical” to the standard for
12 a motion to dismiss under Rule 12(b)(6) because under both rules, “a court must determine
13 whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal
14 remedy.”⁴ *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (quotation
15 omitted). As with a motion to dismiss, a court must assume that the non-moving party’s
16 allegations are true and must draw all reasonable inferences in its favor. *See Hal Roach*
17 *Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Although Rule
18 12(c) does not expressly provide for partial judgment on the pleadings, “neither does it bar
19 them; it is common to apply Rule 12(c) to individual causes of action.” *Larsen v. Trader*
20 *Joe’s Co.*, 917 F. Supp. 2d 1019, 1022 (N.D. Cal. 2013). “Courts have discretion to grant
21 leave to amend in conjunction with 12(c) motions, and may dismiss causes of action rather
22 than grant judgment.” *Moran v. Peralta Cmty. Coll. Dist.*, 825 F. Supp. 891, 893 (N.D.

23 ⁴ Motions to dismiss and motions for judgment on the pleadings differ in only two
24 respects: “(1) the timing (a motion for judgment on the pleadings is usually brought *after*
25 an answer has been filed, whereas a motion to dismiss is typically brought *before* an
26 answer is filed), and (2) the party bringing the motion (a motion to dismiss may be brought
27 *only* by the party against whom the claim for relief is made, usually the defendant, whereas
28 a motion for judgment on the pleadings may be brought by *any* party).” *Sprint Telephony*
PCS, L.P. v. Cty. of San Diego, 311 F. Supp. 2d 898, 902–03 (S.D. Cal. 2004), opinion
clarified *sub nom. Sprint Tel. PCS, L.P. v. Cty. of San Diego*, No. 03-CV-1398-K(LAB),
2004 WL 859333 (S.D. Cal. Jan. 23, 2004) (internal citation omitted).

1 Cal. 1993).

2 **III. ANALYSIS**

3 **A. Motion to Dismiss (Counts II, IV, and V)**

4 Defendants' Motion (Doc. 46) argues that the Copyright Act preempts Plaintiff's
5 claims for money had and received (Count II), declaratory relief (Count IV), and
6 accounting (Count V). The Court will first analyze whether it may consider the motion as
7 one for judgment on the pleadings; it will then address the substantive arguments.

8 **1. Conversion of Motion**

9 Defendants' Motion is styled as a motion to dismiss for failure to state a claim under
10 Rule 12(b)(6). (Doc. 46 at 1.) However, it was filed nearly four months after Defendants'
11 Answer. Rule 12(b) provides that "[e]very defense to a claim for relief in any pleading
12 must be asserted in the responsive pleading if one is required." Fed. R. Civ. P. 12(b).
13 Plaintiff argues that the Court should strike the motion in light of this procedural defect.
14 (Doc. 51 at 8.) Defendants state for the first time in their reply that the motion should be
15 treated as one for judgment on the pleadings under Rule 12(c) or 12(h)(2), as there is "no
16 shortage of case law in the Ninth Circuit" permitting the conversion. (Doc. 54.) The Court
17 agrees with Defendants and, in light of the procedural flaws, will construe Defendants'
18 Motion as a motion for judgment on the pleadings under Rule 12(c).

19 Rule 12(h)(2) authorizes the use of a Rule 12(c) motion to raise the defense of failure
20 to state a claim. Fed. R. Civ. P. 12(h)(2). The Ninth Circuit has specifically held that a
21 "motion to dismiss" filed after the close of pleadings may be converted to a motion for
22 judgment on the pleadings: "[b]ecause it is only after the pleadings are closed that the
23 motion for judgment on the pleadings is authorized (Rule 12(c)), Rule 12(h)(2) should be
24 read as allowing a motion for judgment on the pleadings, raising the defense of failure to
25 state a claim, even after an answer has been filed." *Aldabe v. Aldabe*, 616 F.2d 1089, 1093
26 (9th Cir. 1980). Rules 12(c) and 12(h)(2) therefore constitute a "qualification" of Rule
27 12(b)(6). *Id.*; see also 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and
28 Procedure § 1367 (3d ed.) ("In this context, Rule 12(c) is merely serving as an auxiliary or

1 supplementary procedural device to determine the sufficiency of the case before
2 proceeding any further and investing additional resources in it.”).

3 An important consideration in converting the motion is whether the pleadings raised
4 the affirmative defense at issue. As the *Aldabe* court noted, “[t]he case for adopting such a
5 position is further strengthened where, as here, each of the answers included the defense of
6 failure to state a claim. The motions to dismiss were not based on new arguments for which
7 appellant could claim to have been unprepared.” *Id.* at 1093. *See also* Wright & Miller
8 § 1367 (“It should be stated again, however, that Rule 12(c) cannot be used to assert Rule
9 12(b) defenses that have not been raised previously in the pleadings or by preliminary
10 motion or are not expressly preserved by Rule 12(h).”). Here, Defendants’ Answer raised
11 the defense of failure to state a claim: “A[nd] a[s] for a separate defense, and in the
12 alternative, Defendants allege Plaintiff’s Complaint fails to state a claim upon which relief
13 may be granted against Defendants.” (Doc. 19 at 4.)⁵ In light of these considerations, the
14 Court will treat Defendants’ Motion as a motion for judgment on the pleadings. *See Aldabe*
15 at 1093; *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954–55 (9th Cir.
16 2004) (“Here, the Defendants filed their motion to dismiss *after* filing their answer. Thus,
17 the motion should have been treated as a motion for judgment on the pleadings, pursuant
18 to Rule 12(c) or 12(h)(2).”).

19 2. Merits of Defendants’ Motion

20 Defendants’ Motion argues that the Copyright Act, 17 U.S.C. §§ 101–810,
21 preempts three of Plaintiff’s claims brought under California law.⁶ The Copyright Act gives
22 “the owner of copyright ... the exclusive rights to do and to authorize” others to display,
23 perform, reproduce or distribute copies of the work, and to prepare derivative works.
24 17 U.S.C. § 106. Sections 301(a) and (b) describe when the Copyright Act preempts legal

25 ⁵ Plaintiff argues that the motion cannot be converted because it “makes no reference to
26 its own Answer.” (Doc. 51 at 8.) A motion for judgment on the pleadings must be
27 submitted after the answer. Fed. R. Civ. P. 12(c). However, there does not appear to be
28 authority specifically stating that the motion must *reference* the answer.

⁶ Plaintiff’s third claim is for copyright infringement pursuant to 17 U.S.C. § 501. (Doc.
1 at 10–11.)

1 and equitable rights granted by state law. Section (a) states:

2
3 On and after January 1, 1978, all legal or equitable rights that
4 are equivalent to any of the exclusive rights within the general
5 scope of copyright as specified by section 106 in works of
6 authorship that are fixed in a tangible medium of expression
7 and come within the subject matter of copyright as specified
8 by sections 102 and 103, whether created before or after that
9 date and whether published or unpublished, are governed
exclusively by this title. Thereafter, no person is entitled to any
such right or equivalent right in any such work under the
common law or statutes of any State.

10 *Id.* § 301(a). Section (b) states:

11 Nothing in this title annuls or limits any rights or remedies
12 under the common law or statutes of any State with respect to
13 ... subject matter that does not come within the subject matter
14 of copyright as specified by sections 102 and 103, including
15 works of authorship not fixed in any tangible medium of
expression....

16 *Id.* § 301(b).

17 As the parties recognize, the Ninth Circuit employs a two-part test to determine
18 whether a state law is preempted by the Copyright Act. “First, we decide ‘whether the
19 ‘subject matter’ of the state law claim falls within the subject matter of copyright as
20 described in 17 U.S.C. §§ 102 and 103.’ Second, assuming it does, we determine ‘whether
21 the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106,
22 which articulates the exclusive rights of copyright holders.” *Maloney v. T3Media, Inc.*, 853
23 F.3d 1004, 1010 (9th Cir. 2017) (citing *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134,
24 1137-38 (9th Cir. 2006)) (Doc. 46 at 3; Doc. 51 at 22).

25 Defendants argue that the Copyright Act preempts Plaintiff’s claims for money had
26 and received (Count II), declaratory relief (Count IV), and accounting (Count V). The
27 Court will address these claims in turn.⁷

28 _____
⁷ Plaintiff argues that “Defendants’ ‘converted’ MJP would be a ‘partial’ MJP not

1 **a. Money Had and Received (Count II)**

2 Defendants first argue that Plaintiff’s claim for money had and received (Count II)
3 is preempted by the Copyright Act. The Complaint asserts that Defendants are indebted to
4 Plaintiff “for money had and received by Defendants and each of them from their use,
5 application and exploitation of Reilly’s Work in the operation, marketing and promotion
6 of Woz U[.]” (Doc. 1 ¶ 29.) “Reilly’s Work” is defined as “ideas, designs, business plans,
7 curricula, images, sale strategies and educational training concepts original to and created
8 by Reilly.” (*Id.* ¶ 1(A).) The claim is brought under California law. (*Id.* ¶ 15.) In response,
9 Plaintiff argues that the claim should not be dismissed because it is an “alternative legal
10 ground for relief based on the same nucleus of operative facts alleged in all Causes of
11 Action[.]” (Doc. 51 at 27.)

12 The first inquiry is whether the subject matter of the state law claim falls within the
13 subject matter of copyright as described in Sections 102 and 103 of the Copyright Act.
14 *Maloney*, 853 F.3d at 1010. The Court concludes that it does. Plaintiff brings a claim for
15 money had and received based on the benefit obtained from his “ideas, designs, business
16 plans, curricula, images, sale strategies and education training concepts.” (Doc. 1 at 2.)
17 Some of these works—including at least the “designs” and “business plans”—are
18 specifically included in Section 102 as “original works of authorship” such as “pictorial”
19 or “graphic” works. 17 U.S.C. § 102(a)(5). As to the remaining components of “Reilly’s
20 Work,” the works at issue need “not actually be protected, or even protectable, under the
21 Copyright Act” to fall within the “subject matter of copyright.” *Idema v. Dreamworks, Inc.*,
22 162 F. Supp. 2d 1129, 1189 (C.D. Cal. 2001), *aff’d in part, dismissed in part*, 90 F. App’x
23 496 (9th Cir. 2003), as amended on denial of reh’g (Mar. 9, 2004). Put another way, “the
24 shadow actually cast by the Act’s preemption is notably broader than the wing of its
25 protection.” *Endemol Entertainment B.V. v. Twentieth Television Inc.*, No. CV 98-0608

26 _____
27 authorized by the express language of FRCP 12(c), thus requiring this Court to plunge into
28 that unnecessary analysis solely by reason of Defendants’ failure to follow the Rules.”
(Doc. 51 at 8.) However, as referenced above, “it is common to apply Rule 12(c) to
individual causes of action.” *Larsen*, 917 F. Supp. 2d at 1022.

1 ABC (BQRX, 1998 WL 785300, at *3 (C.D. Cal. Sept. 29, 1998) (citation omitted). And
2 while “ideas” are specifically excluded from copyright protection, 17 U.S.C. § 102(b),
3 “courts have consistently held that they fall within the ‘subject matter of copyright’ for the
4 purposes of preemption analysis.” *Entous v. Viacom Int’l, Inc.*, 151 F. Supp. 2d 1150, 1159
5 (C.D. Cal. 2001) (citing *Selby*, 96 F.Supp.2d at 1058). The Court therefore concludes that
6 the subject matter of Count II falls within the subject matter of copyright.

7 The next issue, accordingly, is whether the rights asserted under state law are
8 equivalent to the rights contained in Section 106 of the Copyright Act. *See Maloney*,
9 853 F.3d at 1010. Section 106 provides a copyright owner with the “exclusive rights” of
10 reproduction, preparation of derivative works, distribution, and display. 17 U.S.C. § 106.
11 To survive preemption, the state claim “must protect rights which are qualitatively different
12 from the copyright rights. The state claim must have an ‘extra element’ which changes the
13 nature of the action.” *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973,
14 977 (9th Cir. 1987). (citation omitted).

15 The Court agrees with Defendants that Plaintiff’s state law claim for money had and
16 received is functionally equivalent to the rights protected under the Copyright Act. The
17 elements of a claim for money had and received under California law are: “(1) defendant
18 received money; (2) the money defendant received was for plaintiff’s use; and (3) defendant
19 is indebted to plaintiff.” *Lincoln Nat’l Life Ins. Co. v. McClendon*, 230 F. Supp. 3d 1180,
20 1190 (C.D. Cal. 2017) (citing *Fireman’s Fund Ins. Co. v. Commerce & Indus. Co.*, No. C-
21 98-1060VRW, 2000 WL 1721080, at *8 (N.D. Cal. Nov. 7, 2000)). This claim is not
22 “qualitatively different” from a claim that Defendants violated Plaintiff’s exclusive right
23 to copyrighted materials. *Del Madera Properties*, 820 F.2d at 977. Multiple other courts
24 have reached the same conclusion. *See, e.g., Pizarro v. Aguilar*, No. CV 10-2252-GHK
25 (SSX), 2010 WL 11598015, at *3 (C.D. Cal. July 6, 2010) (claim for money had and
26 received, though “camouflaged” as a common law cause of action, was “in fact equivalent
27 to federal copyright infringement claims.”); *Kabehie v. Zoland*, 102 Cal. App. 4th 513, 530
28 (2002) (a claim for money had and received was preempted because it was “not

1 qualitatively different from a copyright infringement action”); *Saint-Amour v. Richmond*
2 *Org., Inc.*, 388 F. Supp. 3d 277, 292 (S.D.N.Y. 2019) (“The Plaintiffs’ claim for money
3 had and received is preempted by the Copyright Act.”); *Olivares v. Univ. of Chicago*, 213
4 F. Supp. 3d 757, 766 (M.D.N.C. 2016) (“No extra element transforms a claim for money
5 had and received into something qualitatively different from a copyright infringement
6 claim.”).

7 The Court is not persuaded by Plaintiff’s argument that the claim should remain
8 because it is an “alternative legal ground for relief.” (Doc. 51 at 27.) The Copyright Act
9 does, admittedly, permit alternative causes of action for claims that are “not equivalent to
10 any of the exclusive rights within the general scope of copyright as specified by section
11 106...” 17 U.S.C. § 301(b)(3). However, because the Court concludes that the claim for
12 money had and received *is* equivalent to the rights within the scope of Section 106, this
13 argument fails. To rule otherwise would essentially nullify the Copyright Act’s preemption
14 provisions by permitting a plaintiff to argue that each claim is an “alternative” claim for
15 relief. Ultimately, “[a]lthough the elements of [Plaintiff’s] state law claims may not be
16 identical to the elements in a copyright action, the underlying nature of [Plaintiff’s] state
17 law claims is part and parcel of a copyright claim.” *Laws*, 448 F.3d at 1144. Accordingly,
18 Count II is dismissed.

19 **b. Declaratory Relief (Count IV)**

20 Defendants next move to dismiss Plaintiff’s claim for declaratory relief (Count IV)
21 on grounds that it is preempted by the Copyright Act. Plaintiff seeks a declaratory
22 judgment from the Court stating:

23
24 A. Woz U embodies the Reilly Work in its operation,
marketing and promotion.

25 B. Defendants and each of them are obligated to account and
26 pay to Reilly the reasonable and fair value of Reilly’s Work.

27 (Doc. 1 ¶ 40.) Defendants argue that Plaintiff’s claim for declaratory relief is “rooted
28 primarily on the contentions that defendants infringed on Plaintiff’s copyrighted works,”

1 and therefore preempted. (Doc. 46 at 6.) In response, Plaintiff argues in part that the
2 declaratory relief claim is brought pursuant to the federal Declaratory Judgment Act,
3 28 U.S.C. § 2201,⁸ and that “Defendants cite no authority for their claim that Section 301
4 can preempt declaratory relief through another Federal law and there is no such authority.
5 Congress cannot preempt itself.” (Doc. 51 at 23.)

6 The Complaint does not state whether the claim for declaratory relief is brought
7 under state or federal law. (Doc. 1 at 11–12.) However, in construing the Complaint in the
8 light most favorable to Plaintiff, as it is required to do, *Hal Roach Studios, Inc.*, 896 F.2d
9 at 1550. the Court considers Plaintiff’s claim for declaratory relief as brought under the
10 Declaratory Judgment Act, 28 U.S.C. § 2201. For one, the declaratory relief claim is not
11 included in the Complaint’s statement that the claims “for implied-in-fact contract, money
12 had and received and accounting arose by reason of conduct in, or based on contracts with,
13 the State of California. As a result, California law determines the rights and obligations of
14 ... Defendants ... with respect to each of such Causes of Action.” (Doc. 1 ¶ 15.) When
15 viewed in the light most favorable to Plaintiff, this suggests that the remaining claims—
16 including Count IV—are brought under federal law.

17 The Court also relies on relevant legal authority, which states that the federal
18 Declaratory Judgment Act applies in cases arising under both federal question and
19 diversity jurisdiction. The federal Declaratory Judgment Act provides that “[i]n a case of
20 actual controversy within its jurisdiction ... any court of the United States ... may declare
21 the rights and other legal relations of any interested party seeking such declaration, whether
22 or not further relief is or could be sought.” 28 U.S.C. § 2201(a). It creates a federal remedy
23 but is not itself a basis for federal jurisdiction. *See Fiedler v. Clark*, 714 F.2d 77, 79 (9th
24 Cir.1983). Plaintiff alleges that both federal question jurisdiction and diversity jurisdiction
25 exist in this case. (Doc. 1 ¶¶ 16–17.) The Court may properly construe Plaintiff’s claim as
26 brought under the federal Declaratory Judgment Act in both contexts.

27
28 ⁸ Although Plaintiff refers to the “Declaratory Relief Act,” 28 U.S.C. § 2201 is titled the
Declaratory Judgment Act.

1 Plaintiff first alleges that federal question jurisdiction exists, pursuant to
2 28 U.S.C. § 1331, because the action arises under the Copyright Act of 1976. (*Id.* ¶ 16.)
3 For federal question jurisdiction cases, the declaratory judgment plaintiff must establish an
4 “actual controversy.” *Societe de Conditionnement v. Hunter Eng’g Co.*, 655 F.2d 938, 943
5 (9th Cir.1981). Defendants do not dispute this or move to dismiss Plaintiff’s copyright
6 infringement claim (Count III). Further, other courts have concluded that declaratory
7 judgment claims in the copyright infringement context should be interpreted as brought
8 under the Declaratory Judgment Act. *See Adobe Sys. Inc. v. Kornrumpf*,
9 780 F. Supp. 2d 988, 992 (N.D. Cal. 2011) (“Nor does [Plaintiff] articulate any authority
10 for its request for a declaration of copyright misuse. [Plaintiff] did not cite any provision
11 of the Copyright Act affirmatively providing such relief. Thus, the Court presumes
12 [Plaintiff] seeks a declaration pursuant to the Declaratory Judgment Act,
13 28 U.S.C. § 2201(a).”); *Acorne Prods., LLC v. Tjeknavorian*, 33 F. Supp. 3d 175, 183
14 (E.D.N.Y. 2014) (“The declaratory judgment remedy is not expressly stated in the
15 Copyright Act; it is available by virtue of a separate statute, The Declaratory Judgment
16 Act. *See* 28 U.S.C. § 2201.”).

17 Plaintiff also alleges that diversity jurisdiction exists in this case pursuant to
18 28 U.S.C. § 1332(a)(1). (Doc. 1 ¶ 17.) Courts apply the Declaratory Judgment Act, rather
19 than the state law counterpart, to diversity jurisdiction cases. *See, e.g., Mardian Equip. Co.*
20 *v. St. Paul Fire & Marine Ins. Co.*, No. CV-05-2729-PHX-DGC, 2006 WL 2456214, at
21 *4 (D. Ariz. Aug. 22, 2006) (“Because this action has been removed to federal court,
22 however, Plaintiff’s state law [declaratory judgment] claim must be converted to a claim
23 brought under the Federal Declaratory Judgment Act.... This is so because under the *Erie*
24 doctrine, federal courts sitting in diversity apply state substantive law and federal
25 procedural law, and the Act is a procedural statute.”); *In Golden Eagle Insurance Co. v.*
26 *Travelers Cos.*, 103 F.3d 750, 753 (9th Cir.1996), overruled on other grounds by *Gov’t*
27 *Emps. Ins. Co. v. Dizol*, 133 F.3d 1220 (1998) (en banc) (applying Declaratory Judgment
28 Act where “[t]he complaint [plaintiff] filed in state court for declaratory relief was filed

1 under California’s declaratory relief statute,” but “[w]hen [defendant] removed the case to
2 federal court, based on diversity of citizenship, the claim remained one for declaratory
3 relief, but the question whether to exercise federal jurisdiction to resolve the controversy
4 became a procedural question of federal law.”).

5 Defendants’ Motion does not argue that the Copyright Act preempts a *federal* law
6 such as the Declaratory Judgment Act, 28 U.S.C. § 1332(a)(1). Defendants also do not raise
7 any other arguments for dismissing this claim. (Doc. 46 at 5–6.) Accordingly, the motion
8 for judgment on the pleadings as to Count IV is denied.

9 **c. Accounting (Count 5)**

10 Defendants also argue that Plaintiff’s claim for an accounting (Count V) is
11 preempted by the Copyright Act. Plaintiff seeks an accounting from Defendants on “the
12 revenues derived from, and expenses incurred in, the operation, marketing and promotion
13 of Woz U.” (*Id.* ¶ 45.) This claim is brought under California law. (Doc. 1 ¶ 15.) The Court
14 agrees with Defendants that this claim is preempted by the Copyright Act.

15 First, the Court finds that the subject matter of the accounting claim falls within the
16 subject matter of the Copyright Act. *Maloney*, 853 F.3d at 1010. As noted, Plaintiff seeks
17 an accounting of Defendants’ involvement in Woz U. Plaintiff argues that Defendants
18 “used, applied and exploited Reilly’s Work in the creation, formation, operation,
19 management and publicity of Woz U” and “infringed Reilly’s Copyrighted Work in the
20 marketing and publicity of Woz U” (Doc. 1 ¶¶ 12, 13). Accordingly, for the same reasons
21 as stated with respect to Count II, the subject matter of Plaintiff’s Count V falls within the
22 subject matter of copyright. *See Idema*, 162 F. Supp. 2d at 1189 (works need “not actually
23 be protected, or even protectable, under the Copyright Act” to fall within the “subject
24 matter of copyright.”).

25 Second, the rights asserted in the accounting claim are equivalent to those exclusive
26 rights identified in Section 106 of the Copyright Act. *Maloney*, 853 F.3d at 1010. An
27 accounting claim requires a showing “(1) that a relationship exists between the plaintiff
28 and defendant that requires an accounting; and (2) that some balance is due to the plaintiff

1 that can only be ascertained by an accounting.” *Brosious v. JP Morgan Chase Bank, N.A.*,
2 No. 2:15-CV-00047-KJM, 2015 WL 5173063, at *3 (E.D. Cal. Sept. 2, 2015) (citing
3 *Teselle v. McLoughlin*, 173 Cal.App.4th 156, 179, 92 Cal.Rptr.3d 696 (2009)). The Court
4 agrees with other courts to find that the accounting claim is “rooted primarily on
5 contentions that defendants infringed on plaintiffs’ copyrighted works.” *Motown Record*
6 *Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1241 (C.D. Cal. 1987). *See also*
7 *Alexander v. Timberlake*, No. 207CV00590RLHGWF, 2008 WL 11452529, at *4 (D. Nev.
8 Jan. 3, 2008) (finding that Plaintiff’s claim for accounting was preempted because it
9 “assert[ed] the same wrongs alleged to support his claim for copyright infringement.”).
10 Further, “the Copyright Act already affords [Plaintiff] an adequate means by which to
11 calculate damages in this action. *See* 17 U.S.C. § 504.” *Young Money Entm’t, LLC v.*
12 *Digerati Holdings, LLC*, No. 2:12-CV-07663-ODW, 2012 WL 5571209, at *9 (C.D. Cal.
13 Nov. 15, 2012).

14 The Court notes the case relied on by Plaintiff, *Oddo v. Reis*, 743 F.2d 630 (9th Cir.
15 1984), is readily distinguishable. Plaintiff states that the case “represents just another area
16 where state contract law and [Copyright] Act principles easily co-exist[.]” (Doc. 51 at 26.)
17 However, that case involved two business partners who each had “an independent right to
18 use or license the use of the copyright.” *Id.* at 633. Because the parties were co-owners of
19 the copyright, the defendant “could not infringe the partnership’s copyrights[.]” *Id.* He
20 could, however, “be required to account to [plaintiff] for any profits he has made from use
21 of those copyrights.” *Id.* In the present case, there is no indication that Plaintiff and
22 Defendants were co-owners in the Plaintiff’s copyrighted works. According to the face of
23 the Complaint, Defendants *could* have violated Plaintiff’s copyright protection; the claim
24 for an accounting is accordingly preempted and will be dismissed.

25 **B. Motion for Judgment on the Pleadings (Count I)**

26 In the second motion, Defendant Wozniak moves for judgment on the pleadings
27 with respect to Count I, for breach of an implied-in-fact contract. Wozniak states that
28 “based on Plaintiff’s allegations, and the exhibits to his Complaint, an implied-in-fact

1 contract was never entered into between the parties.” (Doc. 58 at 1.) The Court will first
2 address whether it may consider Wozniak’s Motion; it will then address the merits.

3 **1. Second Motion for Judgment on the Pleadings**

4 The first issue is whether the Court may consider Wozniak’s Motion in light of the
5 fact that, for the reasons discussed above, it would be the second motion for judgment on
6 the pleadings in this case. Plaintiff argues that “Rules 12(g)(2) and 12(h)(1)(A) prohibit
7 successive MJP’s pursuant to Rule 12(c) and successive MTD’s made pursuant to Rule
8 12(b)(6), when the issue raised is one that could have been raised in the earlier MTD or
9 MJP, as the case may be.” (Doc. 59 at 2.) In reply, Wozniak argues that Rule 12(g)(2)
10 specifically authorizes the second motion for judgment on the pleadings. (Doc. 61 at 3.)
11 The Court agrees with Wozniak.

12 Rule 12(g)(2) states, in pertinent part, “*Except as provided in Rule 12(h)(2) or (3),*
13 *a party that makes a motion under this rule must not make another motion under this rule*
14 *raising a defense or objection that was available to the party but omitted from its earlier*
15 *motion.” Fed. R. Civ. P. 12(g)(2) (emphasis added). Therefore, although the general rule*
16 *prohibits a party from asserting defenses available when that party made its initial motion,*
17 *Rules 12(h)(2) and 12(h)(3) provide exceptions. Rule 12(h)(2) specifically permits a*
18 *motion for “failure to state a claim upon which relief can be granted...by a motion under*
19 *Rule 12(c).” Fed. R. Civ. P. 12(h)(2)(B). Accordingly, a motion for judgment on the*
20 *pleadings alleging failure to state a claim, such as Wozniak’s Motion (Doc. 58), is*
21 *specifically exempt from Rule 12’s prohibition on successive motions.*⁹

22 There is limited case law on this topic. Plaintiff cites a Northern District of Texas
23 case holding that “when a party files a Rule 12(c) motion, the opposing party does not file
24 an intervening pleading (e.g., an amended complaint) that is subject to challenge for failure

25 ⁹ Plaintiff also cites Rule 12(h)(1)(A), which states, “A party waives any defense listed in
26 Rule 12(b)(2)-(5) by: omitting it from a motion under the circumstances described in Rule
27 12(g)(2).” Fed. R. Civ. P. 12(h)(1)(A). This is not helpful for Plaintiff for two reasons:
28 first, Wozniak does not raise a defense listed in Rule 12(b)(2)-(5), and second, the
circumstances described in Rule 12(g)(2), as noted above, exempt motions listed under
Rule 12(h)(2)—including Rule 12(c) motions for judgment on the pleadings.

1 to state a claim on which relief can be granted, and the party files a second Rule 12(c)
2 motion that is addressed to the same pleading that is the subject of the first Rule 12(c)
3 motion, the second motion is successive and can be denied on that basis.” *Fisher v. Dallas*
4 *Cty.*, No. 3:12-CV-3604-D, 2014 WL 4797006, at *9 (N.D. Tex. Sept. 26, 2014). Plaintiff
5 does not cite a Ninth Circuit case, and the Court has not located one on point. However,
6 district courts in other circuits have reached the opposite conclusion of the *Fisher* case. For
7 example, in *Palmer v. New York State Office of Court Admin.*, the Northern District of New
8 York addressed the “contention that Defendant’s third motion for judgment on the
9 pleadings is foreclosed by Rule 12(g), which precludes the bringing of motions that raise
10 arguments that the defendant did not raise at the first available opportunity.” No.
11 5:00CV00110(HGM/GHL), 2007 WL 2362360, at *4 (N.D.N.Y. Aug. 13, 2007). Based
12 on a review of the relevant rules, the Court concluded that the “contention is without merit”
13 and permitted the third Rule 12(c) motion. *Id.*

14 Further, district courts in the Ninth Circuit have considered the merits of multiple
15 motions for judgment on the pleadings without specifically addressing whether they were
16 permitted. *See, e.g., Qwest Commc’ns Corp. v. City of Berkeley*, 208 F.R.D. 288, 292 (N.D.
17 Cal. 2002) (considering plaintiff’s two motions for judgment on the pleadings); *Lanuza v.*
18 *Love*, 134 F. Supp. 3d 1290, 1293 (W.D. Wash. 2015) (“Defendant United States’ motions
19 to dismiss are properly construed as motions for judgment on the pleadings.”); *Patel v.*
20 *Callies*, No. 07-CV-474-WFD, 2009 WL 10713058, at *2 (D. Idaho Jan. 26, 2009) (“This
21 order will address first those elements common to all defendants’ motions for judgment on
22 the pleadings, after which it will address those elements specific to individual
23 defendants.”).

24 Finally, courts in the Ninth Circuit have noted that Rule 12(g) applies to “situations
25 in which a party files successive motions under Rule 12 for the sole purpose of delay.”
26 *Davidson v. Countrywide Home Loans, Inc.*, No. 09–CV–2694–IEG JMA, 2011 WL
27 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (internal quotations omitted); *see also Kilopass*
28 *Tech. Inc. v. Sidense Corp.*, No. C 10–02066 SI, 2010 WL 5141843, at *3 (N.D. Cal. Dec.

1 13, 2010) (same); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F.Supp.2d 1164, 1175
2 (C.D.Cal.2011) (“Rule 12(g) is designed to avoid repetitive motion practice, delay, and
3 ambush tactics.”). There is no indication that Wozniak’s Motion was filed for the “sole
4 purpose of delay.” It was filed just over one month after briefing on the first motion
5 concluded, and the Court is able to address both motions simultaneously. For all of these
6 reasons, the Court will consider Wozniak’s Motion.

7 **2. Merits of Wozniak’s Motion**

8 Wozniak argues that Count I should be dismissed because Plaintiff has not stated a
9 *Desny* claim for breach of implied-in-fact contract.¹⁰ (*Id.* at 4.) The claim is brought under
10 California law and only against Wozniak. (Doc. 1 ¶ 15.) Plaintiff argues that the Complaint
11 alleges the elements of a *Desney* implied-in-fact contract claim, including that “Plaintiff
12 approached Woz about his idea for the Woz Institute of Technology and asked Woz if he
13 was interested. Woz said he was and authorized plaintiff to attempt to execute this idea
14 which involved both Plaintiff and Woz[.]... As will be proven at trial, Woz fully
15 understood that Plaintiff expected to be compensated from implementation of Plaintiff’s
16 concept and use of the Reilly Work, as did Woz himself.” (Doc. 59 at 7.) For the reasons
17 discussed below, the Court finds that the Complaint states a claim for breach of an implied-
18 in-fact contract.

19 As Wozniak notes, the Complaint does not specifically describe Count I as a
20 “*Desny*” claim.¹¹ A district court generally limited to the contents of the pleadings when
21 ruling on a Rule 12(c) motion. *See* Fed. R. Civ. Proc. 12(c). However, the Court need not
22 rely on material outside the pleadings here. A “contract implied in fact ‘consists of
23 obligations arising from a mutual agreement and intent to promise where the agreement
24 and promise have not been expressed in words.’” *Retired Employees Ass’n of Orange*

25 ¹⁰ Although Wozniak did not raise this argument, the Court notes that the Ninth Circuit
26 has held that *Desny* claims for breach of implied contract are not preempted by federal
27 copyright claims. *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 976 (9th Cir.
2011).

28 ¹¹ “[T]here was no reference to *Desny* in the Plaintiff’s Complaint, nor the Plaintiff’s
Mandatory Initial Disclosures.” (*Id.* at 3.)

1 *Cnty., Inc. v. Cnty. of Orange*, 52 Cal.4th 1171, 1178 (2011) (citation omitted). Under
2 California law, “when an idea is furnished by one party to another, a contract sometimes
3 may be implied even in the absence of an express promise to pay.” *Grosso v. Miramax*
4 *Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004), opinion amended on denial of reh’g, 400
5 F.3d 658 (9th Cir. 2005).

6 This principle arose from the leading California Supreme Court case in this area,
7 *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956). In that case, the plaintiff alleged that Paramount
8 Pictures turned his pitched idea into a feature film without compensation. *Id.* at 726–27.
9 Ruling in plaintiff’s favor, the court held that a contract exists where “the circumstances
10 preceding and attending disclosure, together with the conduct of the offeree acting with
11 knowledge of the circumstances, show a promise [to pay] of the type usually referred to as
12 ‘implied’ or ‘implied in fact.’” *Id.* at 738. The Ninth Circuit has endorsed *Desny* claims,
13 stating, “[t]o establish a *Desny* claim for breach of implied-in-fact contract, the plaintiff
14 must show that the plaintiff prepared the work, disclosed the work to the offeree for sale,
15 and did so under circumstances from which it could be concluded that the offeree
16 voluntarily accepted the disclosure knowing the conditions on which it was tendered and
17 the reasonable value of the work.” *Grosso*, 383 at 967. It has further explained that “rights
18 created under California law emanating from *Desny* [are] qualitatively different from the
19 rights protected by federal copyright law because a *Desny* claim includes an added element:
20 an agreement to pay for use of the disclosed ideas.” *Montz v. Pilgrim Films & Television,*
21 *Inc.*, 649 F.3d 975, 980 (9th Cir.2011).

22 The Court finds that the Complaint states a *Desny* claim for breach of an implied-
23 in-fact contract. First, Plaintiff has alleged that he prepared the work at issue. *Grosso*, 383
24 at 967. (Doc. 1 ¶ 4 (Plaintiff emailed Wozniak stating “I want to start a high tech
25 university”); ¶ 6 (Wozniak emailed Plaintiff, stating “I figure it’s your idea”); ¶ 8 (Plaintiff
26 “created a website and logo”). Second, the Court concludes that Plaintiff “disclosed the
27 work to the offeree for sale.” *Grosso*, 383 at 967. This issue is more difficult because at no
28 point does the Complaint explicitly state that Plaintiff tried to *sell* Reilly’s work to

1 Wozniak. The Court is therefore sympathetic to Wozniak’s argument that “[t]he Plaintiff
2 wasn’t seeking to sell anything to Defendant Wozniak [sic]. On the contrary, the Plaintiff
3 was seeking to use Wozniak’s name and likeness to start his own online school.” (Doc. 61
4 at 4.) However, in accepting Plaintiff’s allegations as true and drawing all reasonable
5 inferences in Plaintiff’s favor, *see Hal Roach Studios, Inc.*, 896 F.2d at 1550, the Court
6 concludes that Plaintiff has alleged that he disclosed his work to Wozniak “for sale.”
7 Considerations include Plaintiff’s allegations that he introduced Wozniak to at least one
8 potential business partner (Doc. 1 ¶ 5; 20–30); that Plaintiff and Wozniak met to discuss
9 Plaintiff’s idea and “agreed to proceed with a ‘deal’ handshake depicted in a photograph
10 taken at the Luncheon” (*Id.* ¶ 6, at 31–32); that Wozniak gave Plaintiff “the right to proceed
11 with potential investors and counter-parties” (*Id.* ¶ 6); that Plaintiff and Wozniak presented
12 the idea to Apollo Group (*Id.* ¶ 7); and that Wozniak “consented to all the obligations
13 arising from the acceptance of the benefits of Reilly’s work,” including the obligation to
14 “pay Reilly the fair and reasonable value of Reilly’s work.” Third, Plaintiff has alleged that
15 “the offeree voluntarily accepted the disclosure knowing the conditions on which it was
16 tendered and the reasonable value of the work.” *Grosso*, 383 at 967. Specifically, the
17 Complaint states that Defendants “voluntarily accepted [] the benefit of Reilly’s work with
18 full knowledge of the circumstances and the fact that Reilly did not submit and
19 communicate Reilly’s Work to Woz gratuitously” (*Id.* ¶ 25), and that they “consented to
20 all the obligations arising from the acceptance of the benefits” of Plaintiff’s work. (*Id.* ¶
21 26.)

22 Wozniak also argues that “Plaintiffs have produced no evidence of the parties’ intent
23 or conduct relating to the creation of an implied-in-fact contract[.]” (Doc. 58 at 6.)
24 However, at this stage, “Plaintiff does not have to allege in detail all the facts upon which
25 he bases his claim. To the extent that Defendant argues that Plaintiff’s allegations, if true,
26 are insufficient in themselves to establish the existence of an implied-in-fact contract, that
27 is not the standard used to decide a motion to dismiss.... Therefore, the Court will not
28 dismiss Plaintiff’s claim for breach of an implied-in-fact contract.” *Maley v. Pulte Home*

1 Corp., No. C 06-3082 CW, 2006 WL 2168206, at *4 (N.D. Cal. July 31, 2006).

2 Ultimately, without commenting on the likelihood that Plaintiff will prevail on the
3 merits, the Court concludes that Plaintiff has sufficiently stated the minimal requirements
4 to proceed on his claim for breach of an implied-in-fact contract. *See Goldberg v. Cameron*,
5 482 F. Supp. 2d 1136, 1150 (N.D. Cal. 2007) (“While this is by no means a compelling
6 allegation that the work was disclosed to the defendants in a manner that would create an
7 implied contract ... it is sufficient to state a claim for an implied contract.”); *Quirk v. Sony*
8 *Pictures Entm’t Inc.*, No. C 11-3773 RS, 2012 WL 12920192, at *4 (N.D. Cal. July 5,
9 2012) (“Whether Quirk has adequately pleaded facts to support an inference that his novel
10 was transferred with such an expectation is a close call. To be sure, his allegations are to a
11 significant degree both conclusory and speculative, and he forthrightly concedes that
12 additional facts must be developed through discovery.”) However, “the motion to dismiss
13 must be denied.”). The Court will deny Wozniak’s motion for judgment on the pleadings
14 as to Count I.


15 **IV. CONCLUSION**

16 Accordingly,

17 **IT IS ORDERED** that Defendants’ Motion to Dismiss Counts II, IV and V of
18 Plaintiff’s Complaint (Doc. 46) is **granted in part and denied in part**. The Motion is
19 granted with respect to Counts II (Money Had and Received) and V (Accounting); these
20 claims are dismissed. The Motion is denied with respect to Count IV (Declaratory Relief).

21 **IT IS FURTHER ORDERED** that Defendant Steve Wozniak’s Motion for
22 Judgment on the Pleadings as To Count I of Plaintiff’s Complaint (Doc. 58) is **denied**.

23 Dated this 3rd day of March, 2020.

24
25 

26

Michael T. Liburdi
27 United States District Judge
28