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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

8th WONDER ENTERTAINMENT, LLC,)	Case No. 2:14-cv-01748-DDP-JCG
et al.,)	
)	ORDER GRANTING DEFENDANTS'
Plaintiff,)	MOTION FOR SUMMARY
)	JUDGMENT
v.)	
)	[Dkt. 45]
VIACOM INTERNATIONAL, INC., et)	
al.,)	
)	
Defendants.)	
)	

Presently before the court is Defendants Viacom International Inc., MTV Networks Enterprises, Inc., New Pop Culture Productions, Inc., Monami Entertainment, LLC, Mona Scott-Young, NFGTV, Inc., Jim Ackerman, Jeff Olde, Toby Barraud, Stefan Springman, and Christian McLaughlin’s (collectively, “Defendants”) Motion for Summary Judgment on Plaintiffs 8th Wonder Entertainment, LLC (“8th Wonder”), Nickie Lum-Davis and Trisha Lum’s (collectively, “Plaintiffs”) action for copyright infringement. (Dkt. 45.) After considering the parties’ submissions and hearing oral argument, the court adopts the following Order.

1 **I. BACKGROUND**

2 **A. The Parties**

3 In December 2008 or January 2009, Trisha Lum and Tashera Simmons conceived
4 of an idea for a television show featuring the lives of women in relationships with hip
5 hop artists. (Lum Decl. ¶¶ 2-4.) Lum then reached out to Nickie Davis to develop a
6 Treatment for the concept. (*Id.* ¶ 7.) The Treatment, which was finalized on February 27,
7 2009, described an idea for a reality television show entitled “Hip Hop Wives,” (HHW).
8 (*Id.* ¶ 8.) The show would feature Simmons, along with three other women connected to
9 the hip hop industry: Chrissy Lampkin, Mashonda Tifrere, and Debbie Lorenzo. (*Id.* ¶ 10-
10 11.) All four principal cast members signed talent attachment letters at the same time,
11 memorializing their commitment to the HHW project. (*Id.* ¶ 12.)

12 During the development of HHW, Davis reached out to 8th Wonder
13 Entertainment about the possibility of pitching the idea to network and producing the
14 show. (*Id.* ¶ 14.) On February 27, 2009, Plaintiffs 8th Wonder, Lum, and Davis met with
15 executives at VH1, a television network owned by Defendant Viacom International, to
16 pitch the HHW project. (*Id.* ¶ 16.) On March 17, 2009, Defendant Viacom submitted an
17 offer to 8th Wonder to develop and potentially broadcast HHW. (*Id.* ¶ 17.) By April 24,
18 2009, Plaintiffs developed a written agreement with Defendants regarding HHW. (Decl.
19 Michael McQuarn ¶ 16, Ex. A.) Plaintiffs subsequently assisted Defendants in executing
20 Artist Performer Agreements with the four principal cast members. (*Id.* ¶ 19.)

21 On October 29, 2009, Plaintiffs were informed by counsel for one of the
22 contemplated cast members, Chrissy Lampkin, that she was no longer interested in
23 working on the project and wanted to terminate the agreement. (Lum Decl. ¶ 23.) In
24 December 2009, Plaintiffs were notified by VH1 that the network would not be moving
25 forward with HHW. (*Id.* ¶ 25.) On February 8, 2010, 8th Wonder executed a termination
26 agreement with VH1. (Decl. Susannah M. Rooney, Ex. A.) On March 14, 2011, VH1 aired
27 the premiere of “Love & Hip Hop” (L&HH), a reality television show focused on the
28 personal and professional lives of women in the hip hop industry. (First Amended

1 Complaint ¶ 79.) In 2014, after L&HH had been on the air for four seasons, Plaintiffs filed
2 suit for copyright infringement. (See FAC.)

3 **B. “Hip Hop Wives” Treatment**

4 The basis of Plaintiffs’ copyright infringement action is the one-page Treatment
5 that Plaintiffs produced and submitted to VH1 when they were pitching HHW. (FAC, Ex.
6 A.(“Treatment”).) The Treatment opens by stating that the show’s concept is to “delve
7 deep into the lives of four women married to some of the biggest names in hip hop. . . .
8 This show will reveal the ups and the downs that come with being the wife of a hip hop
9 icon.” (*Id.* ¶ 1.) The Treatment then introduces the four principal cast members. The
10 following descriptions are all taken for the treatment. First is Tashera Simmons, the wife
11 of hip hop artist DMX. (*Id.* ¶ 2.) Simmons met DMX when they were 10 and have been in
12 a relationship for over 20 years. (*Id.*) DMX has had legal troubles and public infidelities
13 but “his latest bout in jail is testing her resolve like never before.” (*Id.*) The next cast
14 member is Debbie Lorenzo, the wife of producer Irv Gotti. (*Id.* ¶ 3.) Lorenzo and Gotti
15 have lived apart for five years. (*Id.*) During this time, Lorenzo has raised their children
16 and returned to school to pursue a higher degree. (*Id.*) The third cast member is
17 Mashonda Tifrere. (*Id.* ¶ 4.) Tifrere was the wife of producer Swizz Beats. (*Id.*) The two
18 were married for four years but then went through an acrimonious divorce. (*Id.*) Tifrere
19 is now trying to make her own mark as a singer, entrepreneur, and philanthropist. (*Id.*)
20 The final cast member is Chrissy Lampkin. (*Id.* ¶ 5.) Lampkin is in a relationship with hip
21 hop artist Jim Jones. (*Id.*) She is also a celebrity style who “was publicly pursued by a
22 number of A-list men in the music industry, but she chose Jim—the “love of her life.”
23 (*Id.*)

24 After describing the cast members, the Treatment notes that the series will show
25 “each of these women in their daily lives, individually and as real-life friend, as they
26 share in the spoils and struggle with the challenges being a hip hop wife entails.” (*Id.* ¶
27 6.) Viewers will “[g]et the real story,” “[l]earn the truth behind the legal troubles, rumors
28 and scandals” surrounding the featured artists, and “see how it has affected the women

1 who stand beside [those artists].” (*Id.*) The Treatment closes by inviting viewers to
2 “[w]atch as the drama unfolds in the no-holds barred, in-depth, insider look at the
3 woman these hip hop icons chose to ‘wife.’” (*Id.* ¶ 7.)

4 **C. Love & Hip Hop Television Series**

5 L&HH is reality television series that premiered on VH1 in 2011. The show depicts
6 the lives of women involved with the hip hop and R&B music industry. (Rooney Decl.,
7 Ex. A.) There have been six seasons to date, consisting of 82 episodes. (Rooney Decl., Ex.
8 I.) During its run, the series has featured nearly two dozen women as principal cast
9 members, but each season typically focuses on four to six women. (*Id.*) As the parties
10 primarily focus their arguments on the first season of the show, the court limits its
11 recitation of the facts to the storylines from the first eight episodes. (Rooney Decl., Ex. A.)

12 The first season of L&HH features four principal cast members: Chrissy Lampkin,
13 who was also featured in the HHW Treatment, Somaya Reece, Olivia Longott, and Emily
14 Bustamante. As a reality television show, the series purports to depict the real-life
15 happenings of the principal cast members and those around them. The typical episode of
16 L&HH is comprised of individual scenes developing the story lines of the four leading
17 women interspersed with group scenes where two or more of the cast members gather to
18 recount various happenings and develop their own interpersonal dynamics.

19 One story line from the first season focuses on Chrissy Lampkin’s efforts to settle
20 down with Jim Jones. Although they have been dating for years, she struggles with
21 Jones’s failure to commit and the fact that his affection is divided between his mother
22 and Lampkin. By the end of the season, Lampkin has decided to propose to Jones and
23 makes a speech at a nightclub. Jones agrees and, despite his mother’s disapproval, buys
24 Lampkin an engagement ring.

25 Lampkin also has tension with another principal character, Somaya Reece. Reece’s
26 storyline focuses on her life as an aspiring hip hop artist who has recently moved to New
27 York in an effort to build her music career. Reece is introduced to Jones early in the
28 seasons and strives to win his support as a producer. Lampkin, however, perceives Reece

1 as flirting with Jones and discourages Jones from working with Reece. In an effort to
2 demonstrate his commitment to Lampkin, Jones complies and declines to support Reece.
3 Reece eventually secures a new manager but Jones intervenes in that situation as well
4 and discourages the new manager from working with Reece.

5 A third story line follows Olivia Longott. Longott was previously a member of the
6 hip hop group G-Unit. The show features Longott's efforts to develop her solo career.
7 During the first season, Longott also claims to be dating a member of the New York Jets
8 in an effort to maintain standing among her friends. However, fellow cast member Emily
9 Bustamante is the Jets' player's personal stylist. After finding out from the player that he
10 has not been romantically involved with Longott for at least a year, Bustamante confronts
11 Longott about the lie. As a result, tension develops between these two characters. There
12 is also friction between Longott and Reece who insults Longott's musical abilities online.

13 The final major storyline focuses on Emily Bustamante, the long-time girlfriend
14 and stylist of Fabolous. As the season develops, it emerges that although Bustamante
15 lives with Fabolous and has a child with him, Fabolous does not publicly acknowledge
16 his relationship with Bustamante. Bustamante's friends, including Mashonda Tifrere,
17 who was also slated to feature in HHW, encourage Bustamante to leave Fabolous. The
18 climax of this story line occurs when Bustamante sets up a family photo shoot but
19 Fabolous fails to appear. Bustamante ultimately decides to leave Fabolous, move into her
20 own apartment, and start a new life.

21 **II. LEGAL STANDARD**

22 Summary judgment is appropriate where the pleadings, depositions, answers to
23 interrogatories, and admissions on file, together with the affidavits, if any, show "that
24 there is no genuine dispute as to any material fact and the movant is entitled to judgment
25 as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the
26 initial burden of informing the court of the basis for its motion and of identifying those
27 portions of the pleadings and discovery responses that demonstrate the absence of a
28 genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All

1 reasonable inferences from the evidence must be drawn in favor of the nonmoving party.
2 See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986). If the moving party does not
3 bear the burden of proof at trial, it is entitled to summary judgment if it can demonstrate
4 that “there is an absence of evidence to support the nonmoving party’s case.” *Celotex*,
5 477 U.S. at 323.

6 Once the moving party meets its burden, the burden shifts to the nonmoving party
7 opposing the motion, who must “set forth specific facts showing that there is a genuine
8 issue for trial.” *Anderson*, 477 U.S. at 256. Summary judgment is warranted if a party
9 “fails to make a showing sufficient to establish the existence of an element essential to
10 that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*,
11 477 U.S. at 322. A genuine issue exists if “the evidence is such that a reasonable jury
12 could return a verdict for the nonmoving party,” and material facts are those “that might
13 affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. There
14 is no genuine issue of fact “[w]here the record taken as a whole could not lead a rational
15 trier of fact to find for the nonmoving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio*
16 *Corp.*, 475 U.S. 574, 587 (1986).

17 It is not the court’s task “to scour the record in search of a genuine issue of triable
18 fact.” *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel has an obligation to lay
19 out their support clearly. *Carmen v. San Francisco Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir.
20 2001). The court “need not examine the entire file for evidence establishing a genuine
21 issue of fact, where the evidence is not set forth in the opposition papers with adequate
22 references so that it could conveniently be found.” *Id.*

23 **III. DISCUSSION**

24 To state a claim for copyright infringement, a Plaintiff must allege “(1) ownership
25 of a valid copyright, and (2) copying of constituent elements of the work that are
26 original.” *Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). The parties
27 do not dispute that Plaintiffs own a copyright to the Treatment. (Lum Decl. ¶ 14.) To
28 demonstrate copying, a plaintiff must show that “the infringer had access to plaintiff’s

1 copyrighted work and that the works at issue are substantially similar in their protected
2 elements." *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). "Where
3 reasonable minds could differ on the issue of substantial similarity, . . . summary
4 judgment is improper." *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990). However,
5 the Ninth Circuit has rejected efforts to characterize *Shaw* as "either prohibit[ing]
6 summary judgment in copyright cases or creat[ing] a heightened standard." *Kouf v Walt*
7 *Disney Pictures*, 16 F.3d 1042, 1045 n.3 (9th Cir. 1994); *see also Berkic v. Crichton*, 761 F.2d
8 1289, 1292 (9th Cir. 1985) ("[W]e have frequently affirmed summary judgments in favor
9 of copyright defendants on the substantial similarity issue.") (collecting cases).

10 **A. Access to the Treatment**

11 For purposes of the present motion, Defendants concede the allegations of access
12 to the Treatment. (Mot. 11-12.) Plaintiffs nonetheless press the issue to suggest that the
13 evidence of access gives rise to an inference of copying. (Opp'n 9.) Specifically, Plaintiffs
14 note that one of the creators of L&HH admitted to one of the creators of the Treatment
15 that she thought HHW "was such a great idea" and "that she had wished she had come
16 up with it." (Lum Decl. ¶ 20.) In Plaintiffs' view, this statement is tantamount to an
17 admission of copying. However, even if there is evidence of access, Plaintiffs cannot state
18 a claim for copyright infringement without showing substantial similarity. *See, e.g., Krofft*
19 *Tele. Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) ("No amount of proof
20 of access will suffice to show copying if there are no similarities."), *superseded on other*
21 *ground by* 17 U.S.C. § 504(b); *Funky Films*, 462 F.3d at 1082 (quoting same). The same is
22 true even if a defendant admits to using another's work. *See BensBargains.net, LLC v.*
23 *XPBargains.com*, 2007 WL 2385092, at *3 (S.D. Cal. 2007) (holding that "Plaintiff must
24 prove the existence of a triable issue of material fact with respect to substantial similarity,
25 regardless of how strong its evidence is that Defendants in fact copied . . ."); *see also*
26 *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989) ("A finding that a defendant copied a
27 plaintiff's work, without application of a substantial similarity analysis, has been made
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1 only when the defendant has engaged in a virtual duplication of a plaintiff's entire
2 work.”).

3 Plaintiffs also press the issue of access to invoke the “inverse ratio rule,” which
4 provides that a high “degree of access justifies a lower standard of proof to show
5 substantial similarity.” *Krofft*, 562 F.2d at 1172. While the *Krofft* panel noted that “it [was]
6 impossible to quantify this standard” in that case, subsequent decisions have reaffirmed
7 that “[e]ven where the fact of copying is conceded, no legal consequences will follow
8 from that fact unless the copying is substantial.” *Newton v. Diamond*, 388 F.3d 1189, 1192-
9 93 (9th Cir. 2003). Thus, although the court is mindful that the degree of access in this
10 case might justify a lower standard of proof, the court proceeds to consider whether the
11 alleged copying, if any, was substantial.

12 **B. Substantial Similarity of Protected Elements**

13 To determine substantial similarity, a plaintiff must satisfy both an “extrinsic test”
14 and “intrinsic test.” *Funky Films*, 462 F.3d at 1077. Prior to a jury trial, courts only
15 evaluate the extrinsic test because “the intrinsic test, which examines an ordinary
16 person’s subjective impressions of the similarities between two works, is exclusively the
17 province of the jury.” *Id.* However, a “plaintiff who cannot satisfy the extrinsic test
18 necessarily loses on summary judgment, because a jury may not find substantial
19 similarity without evidence on both the extrinsic and intrinsic tests.” *Kouf*, 16 F.3d at
20 1045). The extrinsic test is an objective comparison of specific, protectable expressive
21 elements. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822-23 (9th Cir. 2002); *see also Funky*
22 *Films*, 462 F.3d at 1077 (“In applying the extrinsic test, this court compares, not the basic
23 plot ideas for stories, but the actual concrete elements that make up the total sequence of
24 events and the relationships between the major characters.”)

25 1. General Elements Are Not Protectable

26 In determining the scope of copyright protection afforded the Treatment, the court
27 begins by noting that copyright protection does not protect ideas generally but instead
28 the expression of those ideas. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174–75 (9th Cir. 2003).

1 As the Ninth Circuit has explained, “similarities derived from the use of common ideas
2 cannot be protected; otherwise, the first to come up with an idea will corner the market.”
3 *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). Thus, when
4 applying the extrinsic test, the court “must take care to inquire only whether the
5 protectable elements, standing alone, are substantially similar.” *Funky Films*, 462 F.3d at
6 1077. This requires “filter[ing] out and disregard[ing] the non-protectable elements in
7 making [the] substantial similarity determination.” *Cavalier*, 297 F.3d at 822. In addition
8 to general plot ideas, the court must also disregard scènes à faire, “which are scenes that
9 flow naturally from unprotectable basic plot premises and ‘remain forever the common
10 property of artistic mankind.’” *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288, 1294
11 (C.D. Cal. 2008) (quoting *Berkic*, 761 F.2d at 1293). Finally, facts within a work are not
12 protected by copyright. *Feist*, 499 U.S. at 349 (“No matter how original the format . . .
13 facts themselves do not become original through association.”).¹

14 The idea for HHW expressed in the Treatment is largely comprised of
15 unprotectable elements. By way of background, many of the concepts described in the
16 treatment are general tropes from the saturated market of reality television
17 programming. First, when Plaintiffs produced the Treatment, there were already several
18 television shows that depicted the lives of women connected with either wealthy or
19 famous individuals. Starting with the *Real Housewives of Orange County* in 2006 and
20 continuing with spin-offs based in New York (2008), Atlanta (2008), and New Jersey
21 (2009), a number of series utilized the structures and narrative devices described in the
22 Treatment of depicting a small cast of women in relationships with prominent men as
23 they endure the highs and lows of their relationships, friends, and lives generally. (See
24 Rooney Decl., Ex. I (Margolin Report) ¶¶ 19-20.)

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27 ¹ Although Plaintiffs suggest that this rule only extends to “historical or contemporary
28 facts that are known to the public,” (Opp’n at 14 (quoting *Hoehling v. Universal City Studios*, 618 F.2d 972, 974 (2d Cir. 1980))), this argument is neither supported by the Second Circuit case relied upon by Plaintiffs nor the law of this Circuit. See *Shaw*, 919 F.2d at 1356 (“[F]acts and ideas within a work are not protected.”).

1 Admittedly, the Real Housewives series expressly focuses on women bound by a
2 specific geography while HHW intends to focus on women bound by a specific industry.
3 But the prior art also contains numerous examples of shows focused on the lives of hip
4 hop stars and their families. Shows such as *Run's House* (2005), *The Salt-N-Pepa Show*
5 (2007), *Snoop Dogg's Father Hood* (2007) and *Gotti's Way* (2007) all depict the lives of
6 famous hip hop and R&B artists and their interactions with their families. (*Id.* ¶ 23.)
7 Given this context, no rational jury could agree with Plaintiffs' assertion that combining
8 these two generic concepts in a one-page Treatment resulted in a "highly original" work.
9 In fact, programs from the *E! True Hollywood Story* series addressed nearly identical
10 concepts in episodes entitled *Hip Hop Wives* (2006) and *Rapper Wives* (2008). (*Id.* ¶ 26.)
11 Moreover, these shows depict many of the themes referenced in the Treatment, including
12 struggling with legal trouble, infidelity, deteriorating relationships, struggles with child-
13 rearing, inter-family conflict, and women seeking to achieve success independent of their
14 prominent partners. (*See id.* ¶¶ 19-26.)

15 In addition to the general scènes à faire utilized in reality television shows
16 focusing either on groups of wives or the lives of artists in the hip hop industry, the
17 factual biographies of the cast members selected for the Treatment are not entitled to
18 copyright protection. As one of creators of the Treatment concedes, the facts included in
19 the Treatment "are all real life facts about these women" and that "this is what they were
20 actually going through." (Rooney Decl., Ex. E (Lum Depo.) 72:11-22.) In a separate
21 deposition, the owner of 8th Wonder suggested that there were at least two fictional
22 elements in the treatment: 1) the women did not all "stand by their man" contrary to a
23 phrase in the Treatment suggesting that they did and 2) one of the character is not
24 actually a stylist. (*Compare, e.g.,* Rooney Decl., Ex. G (McQuarn Depo.) 87:25-88:14
25 ("[Tashera's] not by his side) *with* Treatment ¶ 7 ("see how it has affected the women
26 who stand beside them") *and* McQuarn Depo. 110:10-25 ("Chrissy is not a celebrity
27 stylist.") *with* Treatment ¶ 6 ("Meet Chrissy . . . a celebrity stylist . . .").) Even crediting
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1 these touches of imagination, the remainder of the biographies of the four women
2 featured in the treatment are not subject to any copyright protection.

3 After disregarding the unprotectable elements of Treatment—including, the
4 general idea of a reality television show about women in relationships with famous
5 individuals; a reality television show about the families of hip hop artists; the factual
6 biographies of Tashera Simmons, Chrissy Lampkin, Mashonda Tifrere, and Debbie
7 Lorenzo; general themes of relationship difficulties, legal challenges, troubled family
8 dynamics, female friendships, and the burdens of the lifestyles of the rich and the
9 famous—the court is able to identify few, if any, protectable elements that would give
10 rise to a claim for copyright infringement of the Treatment. While this disposes of
11 Plaintiffs’ claim, the court nonetheless proceeds to consider whether there is a substantial
12 similarity between the Treatment for HHW and L&HH, assuming *arguendo* the existence
13 of protectable elements.

14 2. Similarity of Protectable Elements

15 To apply the extrinsic test for substantial similarity, a court must determine
16 whether there are “articulable similarities between the plot, themes, dialogue, mood,
17 setting, pace, characters, and sequence of events” in the two works at issue. *Funky Films*,
18 462 F.3d at 1077.

19 a. Plot and Sequence of Events

20 The plot is “the sequence of events by which the author-expresses his theme or
21 idea.” *Zella*, 529 F. Supp. 2d at 1135. As noted above, the court “compares, not the basic
22 plot ideas for stories, but the actual concrete elements that make up the total sequence of
23 events and the relationships between the major characters.” *Berkic*, 761 F.2d at 1293. By
24 that definition, the Treatment is largely devoid of any plot. In its fullest form, the plot of
25 Treatment is a general ambition to follow “these women in their daily lives, individually
26 and as real-life friends, as they share in the spoils and struggle with the challenges being
27 a hip hop wife entails.” (Treatment ¶ 6.) These generalized points do not lay out any
28 sense of narrative arc or character development nor do they specify any particular

1 expression of the general concept of the show. By contrast, L&HH develops a number of
2 parallel and intersecting plots across its episodes, which consist of a “total sequence of
3 events and relationships.” One illustrative example is the plot for the relationship
4 between Bustamante and Longott in the first season. Early in the season, a group of
5 women gather to relax poolside and update each other on their lives. In an effort to
6 maintain stature in the eyes of her friends, Longott claims to be dating Darrelle Revis, a
7 player for the New York Jets. Bustamante, a relative newcomer to the group, happens to
8 be the personal stylist for Revis. Several episodes later, while Bustamante is meeting with
9 Revis for a style session at his apartment, she questions him about his relationship with
10 Longott. Revis informs Bustamante that the two have not been involved for at least a
11 year. Bustamante struggles with whether to confront Longott with this discovery.
12 Ultimately, Bustamante decides to confront Longott and inform her fellow cast mates
13 about the misrepresentation, which leads to tension between the two women. This
14 narrative arc is specific and plays out over a period of time. The Treatment, by contrast,
15 contains no such plot development. Plaintiffs’ only response is that a plot might flow
16 from the basic points laid out on the treatment but that is inadequate for purposes of
17 establishing substantial similarity. *See DuckHole Inc. v. NBC Universal Media LLC*, No. CV
18 12-10077 BRO (CWx), 2013 WL 5797279, at *7 (C.D. Cal. Sept. 6, 2013) (“The
19 commonalities between the situations and incidents in the two works ‘flow naturally
20 from [the] basic plot premise’ of [the] television show”) (citing *Berkic* 761 F.2d at
21 1293).

22 b. Themes and Mood

23 Plaintiffs suggest a number of themes that overlap between HHW and L&HH
24 including “knowing when to let love go,” “a man does not always have to take the lead
25 in a relationship,” “finding your own independent voice,” and “friendship amongst a
26 group of women.” (Opp’n 19-20.) Defendants respond that their work does not contain a
27 single theme but instead several countervailing themes such as romance and
28 empowerment. (Mot. 21) Defendants also contend that the purported themes in HHW

1 are comparatively "heavy," while L&HH contains lighter themes that focus as much on
2 the characters' successes as their foibles. Ultimately, it is difficult to determine if there is
3 any similarity because, aside from general statements, the Treatment contains little
4 exposition of any "theme." One can imagine a serious show that depicts the struggles
5 these women face as they navigate their roles in the hip hop industry and highlights the
6 strength they find in each other just as easily as one can imagine a less didactic or
7 uplifting show focused on petty individuals responding in overly dramatic ways to
8 minor issues. While Plaintiffs now attempt to draw on various phrases from the
9 Treatment to assert a certain thematic ambition, there is little in the Treatment that
10 requires any particular thematic approach.

11 As with the theme, the parties present differing interpretations of mood. In
12 Defendants' view, the mood of HHW, insofar as there is one, is "heavy" and "deep." By
13 contrast, Defendants describe the mood of L&HH as "light-hearted." The reality is that
14 the Treatment contains no discernible mood. It is a composition of biographical facts and
15 general accounts of a concept. If the Treatment were ever produced, it could just as easily
16 have a "light" mood as a "dark" one. Absent any specific indicia of mood, this factor
17 cannot support a finding of substantial similarity.

18 c. Dialogue and Setting

19 Plaintiffs concede that the Treatment contains no dialogue. (Lum Depo. 129:8-10.)
20 While Plaintiffs contend that this element is irrelevant in context of a reality television
21 show, both parties agree that, at a minimum, it does not provide a basis for proving
22 substantial similarity in this case. Likewise, Plaintiffs concede that "in this instant matter
23 setting is not a protectable element and constitutes scènes-à-faire." Opp. at 22:2-3.

24 d. Pace

25 Relying on an expert report, Plaintiffs contend that the pace in both HHW and
26 L&HH can be described as "fast" and "high octane." Plaintiffs' expert arrives at this
27 conclusion on the grounds that the Treatment uses phrases like "no holds barred,"
28 "drama unfolds," and "ups and downs." The expert fails to adequately substantiate why

1 those words necessitate a particularly fast pace. As Defendants accurately note, the same
2 exegesis of these women’s lives could take pace at a “deliberate pace.” Much like theme
3 and mood, the Treatment lacks any specific indicator of pace that could form the basis of
4 a claim of substantial similarity.

5 e. Characters

6 Plaintiffs present two claims in support of their claim that the characters are
7 substantially similar between HHW and L&HH. First, Plaintiffs note that the shows share
8 at least two cast members in common. While Defendants acknowledge the overlap, they
9 note that this fact is of limited value given that L&HH has featured nearly two dozen
10 principal cast members across six seasons. Defendants also note that only one of the
11 overlapping characters has a leading role in L&HH. The overlap of these two individuals
12 between the shows, alone, is inadequate to create a triable issue of fact on the question of
13 substantial similarity. Moreover, as noted above, the actual biographies of the two
14 overlapping individuals are not subject to copyright and cannot give rise to an
15 infringement claim.

16 Plaintiffs’ alternative position is that even if the characters are based on the lives of
17 real people, once those lives are developed into characters for purposes of television they
18 can be considered copyrightable elements. (Opp’n 12.) Plaintiffs further argue that once
19 these characters are conceived of as stock elements, even if there are few one-to-one
20 overlaps, a number of the characteristics of the HHW cast members can be found in the
21 L&HH cast members. Plaintiffs provide no authority, nor can the court identify any, for
22 the proposition that the development of real life characters in a television show renders
23 the facts of their biography copyrightable. Perhaps, if the individuals were taken as the
24 starting point for creative works, there might be a colorable argument on this point but
25 there is no evidence to suggest the Treatment did any work to develop the biographies of
26 the principal cast members into “characters.” Rather, the Treatment recounted basic facts
27 about the four principal characters in a straightforward manner and declared the
28 intention to follow where their lives go. As to the claim that characters in L&HH are

1 composites of the slated cast members for HHW, only one district court has permitted a
2 claim for copyright infringement to proceed on this character “mix-and-match” theory.
3 *See Universal City Studiosv. Film Ventures Int’l*, 543 F. Supp. 1134, 1137 (C.D. Cal. 1982).
4 Even if the court were to permit such a theory, there is inadequate evidence to support
5 the conclusion the chance overlap in characteristics between the individuals in the
6 Treatment and those in L&HH amounts to a showing of substantial similarity. Many of
7 the identified characters are stock attributes that flow from the basic premise of the show.
8 Moreover, giving undue weight to this minimal overlap runs afoul of the Ninth Circuit’s
9 warning against finding “substantial similarity” where a Plaintiff only “emphasizes
10 random similarities scattered throughout the works.” *Litchfield v. Spielberg*, 736 F.2d 1352,
11 1356–1357.

12 Given that each factor strongly counsels against a finding of substantial similarity,
13 the court concludes that, even if Plaintiffs’ Treatment contained any protectable elements,
14 no reasonable jury could conclude that the two works are substantially similar.

15 3. *Metcalf* Claim

16 Plaintiffs’ final argument against summary judgment is that, even if the Treatment
17 is largely comprised of generic and unprotectable elements, the “particular sequence in
18 which an author strings a significant number of unprotectable elements can itself be a
19 protectable element.” (Opp’n 22 (quoting *Metcalf v. Bochco*, 294 F.3d 1069, 1075 (9th Cir.
20 2002)).) Although Plaintiffs recognize that *Metcalf* is “a narrow decision [that] the courts
21 have been reluctant to expand,” Plaintiffs contend that the reluctance to extend *Metcalf* is
22 because the other cases involved less clear proof of access to the copyrighted work.
23 (Opp’n 22.) Reprising their arguments about the “inverse ratio rule,” Plaintiffs contend
24 that where access is largely undisputed, as here, the court should more readily consider a
25 *Metcalf* claim. *See Rice*, 330 F.3d at 1179 (“[O]ur decision in *Metcalf* was based on a form
26 of inverse ratio rule analysis: the plaintiff’s case was strengthened considerably by
27 [defendants’] concession of access to their works.) (quotations and citations omitted).
28 With the frame in mind, Plaintiffs contend that there is a triable *Metcalf* claim, as the two

1 works focus on similar story lines, share at least two characters in common, depict life in
2 the same cities, and focus on women who are approximately at the same level of
3 prominence in the world of hip hop. (Opp'n 23.)

4 Plaintiffs are correct that Ninth Circuit concluded in *Metcalfe* that “[t]he particular
5 sequence in which an author strings a significant number of unprotectable elements can
6 itself be a protectable element.” *Metcalfe*, 294 F.3d at 1074 (“Each note on a scale, for
7 example, is not protectable, but a pattern of notes in a tune may earn copyright
8 protection.”) This holding was based on the “striking” similarities between the plaintiffs’
9 and defendants’ works, including the fact that the works in *Metcalfe* featured the same
10 hospital setting in the same city; had a similar cast of supporting characters; addressed
11 the same issues; starred similar looking characters with nearly identical backgrounds
12 who confronted similar dilemmas and obstacles; and had nearly identical plot sequences.
13 *Id.* at 1073–74. Based on this overlap, the court concluded that a jury “could easily infer
14 that the many similarities between plaintiffs’ scripts and defendants’ work were the
15 result of copying, not mere coincidence.” *Id.* at 1075.

16 Courts since *Metcalfe* have been reluctant to extend such a claim to situations where
17 the overlap between the nonprotectable elements were not quite as significant. *See Bernal*,
18 788 F. Supp. 2d at 1068 (holding that *Metcalfe* applies where “generic similarities [are]
19 voluminous, nearly identical, and occurred in the same pattern”); *Zella*, 529 F. Supp. 2d at
20 1138 (noting that many courts “have been reluctant to expand this concept beyond the
21 clear-cut case in *Metcalfe*”) (collecting cases); *see also Identity Arts v. Best Buy Enter. Servs.*
22 *Inc.*, 2007 WL 1149155, at *17 (N.D. Cal. Apr. 18, 2007) (finding that “in *Metcalfe*, the
23 ‘many’ generic similarities and patterns present in the works in question were much
24 more voluminous and specific than in this case.”). While some post-*Metcalfe* decisions have
25 noted that the absence of evidence regarding access provided another reason to deny
26 such a claim, none of these cases displaced the high burden for showing similarity in
27 order to state a *Metcalfe* claim. Indeed, several cases dismissing *Metcalfe* claims involved
28 situations where access was either stipulated to or admitted. *See, e.g., Zella*, 529 F. Supp.

1 2d at 1138; *Bethea*, 2005 WL 1720631, at *15. Given this standard, the court cannot
2 conclude that there is any triable copyright claim. First, the substantial similarity
3 analysis, *supra*, confirms that even any overlap or sequencing is largely superficial and
4 that there are significant differences between the work. Moreover, even though Plaintiffs
5 have identified a few random similarities scattered throughout the work, they are
6 inadequately to show that the creators of L&HH have strung together a substantial
7 number of unprotectable elements. *See Flynn v. Surnow*, 70 U.S.P.Q. 2d 1231, 1238
8 (C.D.Cal.2003) (rejecting a *Metcalf* claim because the alleged similarities were “randomly
9 scattered throughout the works and have no concrete pattern or sequence in common.”)

10 **IV. CONCLUSION**

11 For the reasons stated above, the court GRANTS Defendants’ Motion for
12 Summary Judgment and DISMISSES the case.

13
14 **IT IS SO ORDERED.**

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17 Dated: November 21, 2016

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21 _____
22 DEAN D. PREGERSON
23 UNITED STATES DISTRICT JUDGE
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