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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID LLOYD MARCUS,)	17-cv-00148-RSWL-AJWx
)	
Plaintiff,)	
)	
v.)	ORDER Re: DEFENDANTS'
)	MOTION TO DISMISS [35]
ABC SIGNATURE STUDIOS,)	AND MOTION TO STRIKE AND
INC.; KHALOBO INK SOCIETY;)	FOR SANCTIONS [42]
KENYA BARRIS; DOES 1-10.)	
)	
)	
Defendants.)	
_____)	

Plaintiff David Lloyd Marcus ("Plaintiff") brought the instant Action against Defendants ABC Signature Studios, Inc. ("ABC"); Khalabo Ink Society ("Khalabo"); and Kenya Barris ("Barris") (collectively, "Defendants") alleging copyright infringement, unfair competition, and fraud. Currently before the Court are Defendants' Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure ("FRCP" or "Rule") 12(b)(6) ("Motion to Dismiss") [35] and Defendants' Motion to Strike the Complaint and for Sanctions

1 ("Motion to Strike") [42]. Having reviewed all papers
2 submitted pertaining to these Motions, the Court **NOW**
3 **FINDS AND RULES AS FOLLOWS:** Defendants' Motion to
4 Dismiss is **GRANTED without leave to amend** and
5 Defendants' Motion to Strike and for Sanctions is
6 **DENIED as MOOT.**

7 I. BACKGROUND

8 A. Factual Background

9 In February 2013, former Defendant Overbrook and
10 ANA Alliance sponsored a script writing contest called
11 "Search for America's Newest Screenwriter." Compl.
12 ¶ 9, ECF No. 1. On March 20, 2013, Plaintiff submitted
13 a script called *Across the Tracks* ("*Across the Tracks*"
14 or "the Script") to the contest. Id. ¶ 10. In
15 November 2014, Plaintiff submitted the Script to the
16 United States Copyright Office and received the
17 exclusive rights and privileges to the Script. Id.
18 ¶ 17. Plaintiff alleges he never heard from the
19 contest creators on the status of his submission. Id.
20 ¶ 12.

21 Plaintiff alleges that former Defendant Will Smith
22 is the owner of former Defendant Overbrook, the sponsor
23 of "Search for America's Newest Screenwriter." Id.
24 ¶ 4. Plaintiff further alleges that Mr. Smith
25 developed a close business relationship with Barris
26 after working with Barris on various television
27 projects. Id. ¶¶ 15-16.

28 In the fall of 2014, ABC released a pilot called

1 *Black-ish*, created by Barris and produced by Khalabo.

2 Id. ¶ 18. Plaintiff alleges *Black-ish* is virtually
3 identical to *Across the Tracks*, including the major
4 characters, thematic points, and plot turns. Id.

5 ¶¶ 18-19. Subsequently, Plaintiff initiated an Action
6 in this Court against Defendants alleging copyright
7 infringement under the Copyright Act of 1976, unfair
8 competition under the Lanham Act of 1946, and fraud.

9 1. Summary of the Works

10 a. *Across the Tracks*

11 The Script begins with the Johnson family—Dave, his
12 wife, Keisha, and their children, Kimberly and Dave
13 Junior (“DJ”)—driving up to their new home after
14 “leaving their old neighborhood and old friends that
15 looked and talked just like they do.” Defs.’ Req. for
16 Jud. Not. (“RJN”), Ex. A at 8. As the Johnsons pull
17 into their driveway, they notice their new neighbors, a
18 white couple, Tim and Katie Smith, doing yard work.

19 Id. The Smiths greet the Johnsons, and the two
20 families have an awkward exchange as the Smiths try to
21 act stereotypically “black.” Id. at 9-10. The
22 Johnsons go inside and discuss the Smiths’ actions, and
23 instead of being offended, they note how the Smiths
24 were just trying to make the Johnsons feel welcome.

25 Id. at 13.

26 DJ meets the Smiths’ son, Matty, while shooting
27 hoops in the Johnsons’ backyard, and Dave invites Matty
28 and the rest of the Smiths over for a barbeque. Id. at

1 15-16.

2 Tim and Katie take their efforts to appear
3 stereotypically "black" even further when they arrive
4 at the barbeque. "Tim is dressed like a gansta [sic]
5 rapper, and Katie looking like a video girl, with her
6 heels and lip gloss popping." Id. at 17. As the
7 barbeque progresses, Tim and Katie both acknowledge how
8 ridiculous they have been, attributing it to just
9 wanting their new neighbors to feel welcome and prove
10 that they were not prejudiced. Id. at 20. The
11 Johnsons laugh off the situation, and both families
12 agree to be themselves. Id. at 21.

13 The Smiths' other son, Kyle, joins the barbeque,
14 and it quickly becomes clear that Kyle will become a
15 love interest for the Johnsons' daughter, Kimberly.
16 Id. at 18. While enjoying the barbeque, the families
17 discover that Keisha will be starting as a new nurse
18 manager at the hospital at which Katie works as a nurse
19 making Keisha Katie's boss. Id. at 23-24.

20 The family is confronted by even more overt racism
21 the following day. Matty invites DJ over to the
22 Smiths' house for a sleepover. Id. at 24. That night,
23 Matty's friend Chris tells DJ that DJ is only good at
24 violent video games because "[y]ou know about guns
25 right. You're from the hood aren't you." Id. at 28.
26 After hearing that DJ's father owns a used car
27 dealership, Chris declares that "blacks are good
28 salesmen anyway they go from pimps to sales. They even

1 get to [wear] the same suit. Hood skills pay off for
2 you guys." Id. at 28.

3 DJ quickly runs over to his house to tell his
4 parents about the encounter. Id. at 27. Dave, while
5 angry, uses it as a teaching moment for his son,
6 emphasizing that "God expects us to do what we are
7 supposed to do, and let him deal with those who offend
8 us." Id. at 29. Tim and Chris' father, Eric, come
9 over to apologize to the Johnsons. Id. at 30. Eric
10 makes clear that his son's behavior was unacceptable,
11 and the Script ends as Dave explains that there is a
12 valuable lesson in owning up to when you are wrong and
13 forgiving those who wrong you. Id. at 31.

14 b. *Black-ish*

15 The pilot episode of *Black-ish* opens with the main
16 character, Andre Johnson, introducing his family—his
17 wife, Rainbow ("Bow"), four children (teenagers, Andre
18 Jr. and Zoey, and pre-teen twins, Jack and Diane), and
19 his father, Pops. Andre explains that while he grew up
20 in the "hood," his and his wife's successes, including
21 his work at an advertising agency and his wife's work
22 as a doctor, have allowed him to raise his family in an
23 upper-class neighborhood.

24 Having raised his family in a predominantly white
25 area, Andre is concerned that his family may have
26 assimilated too well to the white culture. When Andre
27 drops Andre Jr. off at school, Andre Jr. tells Andre
28 that instead of playing basketball like his father,

1 Andre Jr. will be trying out for the field hockey team.
2 Additionally, Andre learns that Andre Jr.'s friends
3 call him "Andy" instead of Andre. Andre Jr. also later
4 informs his family that he wants to have a bar mitzvah.

5 The pilot spends time at Andre's work, where he has
6 just been promoted to Senior Vice President, a title
7 reserved primarily for Andre's white co-workers. When
8 Andre learns that he has been promoted to Senior Vice
9 President of his company's Urban Division, he is upset
10 that he has been put in charge of "black stuff."

11 Frustrated with work and his children, Andre makes
12 it his mission to ensure his family remains "black, not
13 black-ish," even going so far as to make Andre Jr.
14 participate in an African rite of passage ceremony.
15 Bow calls Andre out on his crazy behavior, and after a
16 discussion with his father, Andre discovers that he
17 must admit when he is wrong and find a way to make it
18 right. Andre then accepts his position as Senior Vice
19 President of the Urban Division, making a well-received
20 presentation for a Los Angeles tourism account. The
21 episode ends with Andre throwing a "bro mitzvah" for
22 Andre Jr. to make his son happy while still including
23 part of his culture that he thought his family was so
24 quickly losing.

25 **B. Procedural Background**

26 On January 6, 2017, Plaintiff filed his Complaint
27 [1]. On April 26, 2017, the parties stipulated and
28 this Court granted Plaintiff leave to file an amended

1 complaint within five days of the Court's order and
2 gave Defendants fourteen days to respond to the amended
3 complaint [29]. Plaintiff did not file an amended
4 complaint within the timeline prescribed.

5 On April 11, 2017, the parties filed a stipulation
6 to dismiss Defendants Overbrook and Will Smith [25].
7 The Court dismissed Defendants Overbrook and Will Smith
8 on April 20, 2017 [28].

9 On May 11, 2017, Plaintiff's counsel filed a Motion
10 to Withdraw as Attorney [31] requesting to be relieved
11 as counsel because of a disagreement that arose between
12 counsel and Plaintiff which rendered counsel's ability
13 to represent Plaintiff difficult. Mot. to Withdraw
14 3:12-16, ECF No. 31. After the Court granted the
15 Motion to Withdraw [40] on June 7, 2017, the Court
16 continued the hearing on the Motion to Dismiss to allow
17 Plaintiff additional time to either retain new
18 representation or prepare to proceed pro se. To date,
19 Plaintiff has not retained new representation.

20 On May 22, 2017, Defendants filed the instant
21 Motion to Dismiss [35], and on July 17, 2017,
22 Defendants filed a Motion to Strike and for Sanctions
23 [42]. Plaintiff's Oppositions to both the Motion to
24 Dismiss and Motion to Strike were due on August 1,
25 2017; however, Plaintiff did not file any Oppositions.
26 Defendants' Replies were due on August 8, 2017, and
27 none were filed.

28 ///

II. DISCUSSION

A. Legal Standard

1. Motion to Dismiss under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of one or more claims if the pleading fails to state a claim upon which relief can be granted. To survive a motion to dismiss on 12(b)(6) grounds, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(internal quotation marks omitted). Dismissal can be based on a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. Klarfeld v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

The question presented by a motion to dismiss is not whether the plaintiff will ultimately prevail, but whether the plaintiff has alleged sufficient factual

1 grounds to support a plausible claim to relief, thereby
2 entitling the plaintiff to offer evidence in support of
3 its claim. Iqbal, 556 U.S. at 678; Swierkiewicz v.
4 Sorema N.A., 534 U.S. 506, 511 (2002). While a
5 complaint need not contain detailed factual
6 allegations, a plaintiff must provide more than "labels
7 and conclusions" or "a formulaic recitation of a cause
8 of action's elements." Bell Atl. Corp. v. Twombly, 550
9 U.S. 544, 555 (2007)(internal citation omitted).
10 However, a complaint "should not be dismissed under
11 Rule 12(b)(6) 'unless it appears beyond doubt that the
12 plaintiff can prove no set of facts in support of his
13 claim which would entitle him to relief.'" Balistreri,
14 901 F.2d at 699 (citing Conley v. Gibson, 355 U.S. 41,
15 45-46 (1957)).

16 2. Motion to Strike

17 The Court may strike a pleading that contains "any
18 redundant, immaterial, impertinent, or scandalous
19 matter." Fed. R. Civ. P. 12(f). Matters are
20 "immaterial" if they have "no essential or important
21 relationship to the claim for relief or the defenses
22 being pleaded" and "impertinent" if they "do not
23 pertain, and are not necessary, to the issues in
24 question." Fantasy, Inc. v. Fogerty, 984 F.2d 1524,
25 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S.
26 517 (1994). Matters are "scandalous" if they "cast a
27 cruelly derogatory light on a party or other person."
28 In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d

1 955, 965 (C.D. Cal. 2000).

2 **B. Discussion**

3 1. Defendants' Request for Judicial Notice

4 A court "may judicially notice a fact that is not
5 subject to reasonable dispute because it . . . can be
6 accurately and readily determined from sources whose
7 accuracy cannot reasonably be questioned." Fed. R.
8 Evid. 201(b). Typically, however, in reviewing a Rule
9 12(b)(6) motion to dismiss, a court is generally
10 "limited to the contents of the complaint." Sprewell
11 v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.
12 2001). An exception to this general rule includes
13 material "which is properly submitted as part of the
14 complaint." Lee v. City of Los Angeles, 250 F.3d 668,
15 688 (9th Cir. 2001). "Even if a document is not
16 attached to the complaint, it may be incorporated by
17 reference into a complaint if the plaintiff refers
18 exclusively to the document or the document forms the
19 basis of the plaintiff's claim." United States v.
20 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). The second
21 exception to this rule includes matters of "public
22 record." Lee, 250 F.3d at 689; see Cabell v. Zorro
23 Prods., No. 5:15-cv-00771-EJD, 2017 U.S. Dist. LEXIS
24 82413, at *12 (N.D. Cal. May 30, 2017)(holding that in
25 reviewing a motion to dismiss, courts "may also
26 consider material subject to judicial notice").

27 Defendants request the Court take judicial notice
28 of the following materials: (1) a copy of the Script of

1 *Across the Tracks* from the United States Copyright
2 Office, (2) a DVD copy of the pilot episode of *Black-*
3 *ish*, (3) Plaintiff's proposed Amended Complaint, and
4 (4) United States Census Bureau data identifying the
5 top fifteen most popular last names in the United
6 States. See RJN.

7 With regards to the copy of the *Across the Tracks*
8 script, while Plaintiff did not attach the Script to
9 the Complaint, the Complaint "refers exclusively to the
10 document," and, in this copyright infringement suit,
11 Plaintiff's copyrighted script "forms the basis of
12 [his] claim." Ritchie, 342 F.3d at 908. Additionally,
13 "Courts routinely take judicial notice of documents
14 from the Copyright Office." Basile v. Twentieth
15 Century Fox Film Corp., No. CV144263DMGJPRX, 2014 WL
16 12521340, at *2 (C.D. Cal. Aug. 19, 2014), aff'd, 678
17 F. App'x 576 (9th Cir. 2017). Because the Script is
18 the basis for Plaintiff's claims and Defendants
19 obtained it from the Copyright Office, the Court **GRANTS**
20 Defendants' request for judicial notice of the Script.

21 Likewise, because the pilot episode of *Black-ish*
22 forms the basis for Plaintiff's copyright claim as the
23 allegedly infringing work, the Court also **GRANTS**
24 Defendants' request for judicial notice of the DVD of
25 the pilot episode of *Black-ish*. See id. (taking
26 judicial notice of DVD of allegedly infringing work);
27 Campbell v. Walt Disney Co., 718 F. Supp. 2d 1108, 1111
28 n.3 (N.D. Cal. 2010)(same).

1 Defendants request judicial notice of Plaintiff's
2 proposed Amended Complaint filed along with the
3 parties' stipulation asking the Court to grant leave
4 for Plaintiff to file the Amended Complaint [26].
5 Courts may "take judicial notice of court filings
6 and other matters of public record." Reyn's Pasta
7 Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6
8 (9th Cir. 2006). As such, the Court **GRANTS** Defendants'
9 request for judicial notice of Plaintiff's proposed
10 Amended Complaint.

11 Finally, Defendants seek judicial notice of United
12 States Census Bureau data identifying the top fifteen
13 most popular last names in the United States. "United
14 States census data is an appropriate and frequent
15 subject of judicial notice." Hollinger v. Home State
16 Mut. Ins. Co., 654 F.3d 564, 571-72 (5th Cir. 2011)
17 (citing United States v. Esquivel, 88 F.3d 722, 726-27
18 (9th Cir. 1996)). Therefore, the Court **GRANTS**
19 Defendants' request for judicial notice of this Census
20 Data.

21 2. Defendants' Motion to Dismiss

22 As a preliminary matter, Plaintiff did not file an
23 Opposition to Defendants' Motion to Dismiss. Pursuant
24 to Local Rule 7-12, "failure to file any required
25 document, or the failure to file it within the
26 deadline, may be deemed consent to the granting or
27 denial of the motion." C.D. Cal. R. 7-12.
28 Accordingly, the Court **GRANTS** Defendants' Motion

1 without reaching the merits, simply based on
2 Plaintiff's failure to oppose the Motion. See Ghazali
3 v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995)(per curiam)
4 (affirming grant of an unopposed motion to dismiss
5 under local rule by deeming pro se litigant's failure
6 to oppose as consent to granting motion). Despite
7 this, the Court will discuss the merits of Defendants'
8 Motion to Dismiss.

9 Defendants seek dismissal of the four causes of
10 action Plaintiff alleges against them in the Complaint:
11 (1) copyright infringement, (2) unfair competition
12 under the Lanham Act, (3) declaratory relief, and
13 (4) injunctive relief. Plaintiff's proposed Amended
14 Complaint only includes a copyright infringement claim
15 against Defendants; however, Plaintiff has not filed
16 the proposed Amended Complaint. Therefore, the
17 Complaint is the operative pleading, and the Court
18 addresses the copyright infringement, unfair
19 competition, and declaratory and injunctive relief
20 claims contained in the Complaint in turn below.¹

21 a. *Plaintiff's Copyright Infringement Claim*

22 To maintain a claim for copyright infringement, a
23 plaintiff must show "(1) ownership of a valid
24 copyright, and (2) copying of constituent elements of
25 the work that are original." Feist Publ'ns, Inc. v.

26
27 ¹ The Complaint also includes a claim for fraud. See Compl.
28 ¶¶ 39-52. However, this claim is only asserted against former
Defendants Overbrook and Will Smith. The Court dismissed these
Defendants on April 20, 2017 [28].

1 Rural Tel. Servs. Co., 499 U.S. 340, 361 (1991).
2 Copying may be established by demonstrating (1) "that
3 the [defendant] had access to plaintiff's copyrighted
4 work" and (2) "that the works at issue are
5 substantially similar in their protected elements."
6 Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th
7 Cir. 2002).

8 "There is ample authority for holding that when the
9 copyrighted work and the alleged infringement are both
10 before the court, capable of examination and
11 comparison, non-infringement can be determined on a
12 motion to dismiss." Christianson v. West Pub. Co., 149
13 F.2d 202, 203 (9th Cir. 1945). "If after examining the
14 works themselves, th[e] Court determines that there is
15 no substantial similarity, then the plaintiff [] can
16 prove no facts in support of his claim which would
17 entitle him to relief—the standard for dismissal under
18 Rule 12(b)(6)." Boyle v. Stephens, Inc., 97 Civ. 1351
19 (SAS), 1998 U.S. Dist. LEXIS 1968, at *12 (S.D.N.Y.
20 Feb. 23, 1998); see Zella v. E.W. Scripps Co., 529 F.
21 Supp. 2d 1124, 1131 (C.D. Cal. 2007).

22 i. *Plaintiff Has Alleged a Reasonable*
23 *Possibility of Access to the Script*

24 Plaintiff must first allege that Defendants had
25 access to his copyrighted work. See Cavalier, 297 F.3d
26 at 822. Proof of access requires only "an opportunity
27 to view or to copy plaintiff's work." Sid & Marty
28 Krofft Television v. McDonald's Corp., 562 F.2d 1157,

1 1162 (9th Cir. 1977). "Access must be more than a bare
2 possibility and may not be inferred through speculation
3 or conjecture." Gaste v. Kaiserman, 863 F.2d 1061,
4 1066 (2d Cir. 1988). One way to show access is through
5 "evidence that a third party with whom both the
6 plaintiff and defendant were dealing had possession of
7 plaintiff's work." Kamar Int'l, Inc. v. Russ Berrie &
8 Co., 657 F.2d 1059, 1062 (9th Cir. 1981).

9 Defendants do not discuss the access element of
10 Plaintiff's copyright claim in their Motion to Dismiss.
11 However, Defendants do note that they have also filed a
12 Motion to Strike [42], which discusses Plaintiff's
13 meritless argument for access. See Mot. to Dismiss 1:9
14 n.2. Attached to Defendants' Motion to Strike is the
15 Declaration of Richard O'Sullivan, in which Mr.
16 O'Sullivan declares that Will Smith did not have access
17 to Plaintiff's Script. See Decl. of Richard
18 O'Sullivan, ECF No. 42-1.

19 "[W]hen the legal sufficiency of a complaint's
20 allegations is tested by a motion under Rule 12(b)(6),
21 'review is limited to the complaint.'" Lee, 250 F.3d
22 at 688 (quoting Cervantes v. City of San Diego, 5 F.3d
23 1273, 1274 (9th Cir. 1993)). Further, "factual
24 challenges to a plaintiff's complaint have no bearing
25 on the legal sufficiency of the allegations under Rule
26 12(b)(6)." Id. In his Complaint, Plaintiff alleges
27 that he submitted the Script to the script writing
28 contest Overbrook sponsored. Compl. ¶ 9. Plaintiff

1 alleges that Will Smith is the director of Overbrook
2 and that Mr. Smith and Barris worked together
3 professionally and have developed a close personal
4 relationship. Id. ¶¶ 4, 15. Plaintiff then concludes
5 that Mr. Smith allowed Barris access to the Script,
6 which Barris used as the basis for *Black-ish*. Id.
7 ¶ 46. These allegations suggest that a third party,
8 Mr. Smith and Overbrook, with whom both Plaintiff and
9 Barris were dealing, had possession of Plaintiff's
10 work. Such allegations, while circumstantial, show a
11 reasonable possibility that Defendants had access to
12 Plaintiff's script and therefore are sufficient to
13 survive a motion to dismiss. Shame on You Prods. v.
14 Banks, 120 F. Supp. 3d 1123, 1149 (C.D. Cal. 2015) ("To
15 satisfy its burden of pleading access, plaintiff must
16 allege facts 'from which a reasonable finder of fact
17 could infer that the defendant had a reasonable
18 opportunity to copy his or her work.'" (quoting Grubb
19 v. KMS Patriots, L.P., 88 F.3d 1, 3 (1st Cir. 1996))).

20 ii. *Across the Tracks and Black-ish Are*
21 *Not Substantially Similar*

22 In addition to alleging access to the Script,
23 Plaintiff must also allege that *Across the Tracks* and
24 *Black-ish* are substantially similar. The test for
25 substantial similarity is broken into two parts: an
26 intrinsic test and an extrinsic test. Shaw v.
27 Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990). "[T]he
28 intrinsic test, which examines an ordinary person's

1 subjective impressions of the similarities between two
2 works, is exclusively the province of the jury." Funky
3 Films, Inc. v. Time Warner Entm't Co., L.P., 462 F.3d
4 1072, 1077 (9th Cir. 2006). Courts, in examining
5 substantial similarity as a matter of law, apply the
6 "extrinsic test," which focuses on "articulable
7 similarities between the plot, themes, dialogue, mood,
8 setting, pace, characters, and sequence of events of
9 the two works."² Id. As part of the extrinsic test,
10 the court should only determine whether "the
11 protectible elements, standing alone, are substantially
12 similar." Williams v. Crichton, 84 F.3d 581, 588 (2d
13 Cir. 1996). Because copyright law only protects
14 expression of ideas, not the ideas themselves, stock
15 scenes, general plot ideas, and scenes-a-faire
16 (situations and incidents that flow naturally from a
17 basic plot premise) are not protected. Cavalier, 297
18 F.3d at 823.

19 In his Complaint, Plaintiff alleges that "all the
20 major characters, thematic points, and plot turns were
21 virtually identical to those of the Script Across the
22 Tracks." Compl. ¶ 19. He specifically points to the
23 "overarching theme of the juxtaposition of an upwardly
24

25 ² Because a jury may not find substantial similarity without
26 evidence on both the extrinsic and intrinsic tests, if the Court
27 determines that there is no substantial similarity as a matter of
28 law, it has the power to dismiss a plaintiff's case. See Zella,
529 F. Supp. 2d at 1133 n.8; see also Silas v. HBO, Inc., 201 F.
Supp. 3d 1158, 1171 (C.D. Cal. 2016) ("A court may dismiss a
complaint on a 12(b)(6) motion, however, for failing to satisfy
the extrinsic test.").

1 mobile African American family moving into a
2 predominately Anglo community and the main characters
3 and their characteristics and personality traits are
4 virtually identical." Id. ¶ 21. The Court looks to
5 these allegations, the Script, and the DVD of the pilot
6 episode of *Black-ish*, to determine whether Plaintiff
7 has sufficiently pled that the two works are
8 substantially similar. See Idema v. Dreamworks, Inc.,
9 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001), aff'd in
10 part, dismissed in part, 90 F. App'x 496 (9th Cir.
11 2003), as amended on denial of reh'g (Mar. 9,
12 2004)("With these principles in mind, the Court must
13 therefore engage in an 'analytic dissection' and
14 comparison of the works at hand").

15 1) Plot

16 Plaintiff, in his Complaint, makes only conclusory
17 allegations related to the similarities in the plots of
18 the two works. See Compl. ¶ 19 ("[P]lot turns were
19 virtually identical to those of the Script Across the
20 Tracks."). In his proposed Amended Complaint,
21 Plaintiff alleges that the plots of the two works are
22 substantially similar because they both involve "an
23 upwardly mobile African American family moving into and
24 living amongst a predominately white neighborhood and
25 the perceptions of the family by and between themselves
26 and their neighbors and co-workers."³ Am. Compl. ¶ 30.

27

28 ³ While Plaintiff has at no point filed this proposed
Amended Complaint, the allegations contained in the proposed

1 While Plaintiff may allege that this idea "was a
2 radical and new departure from the traditional themes
3 of African American centered television comedies," this
4 plot, which as Defendants point out has been
5 "repeatedly explored in film and television series,"
6 including *The Jeffersons*, *Diff'rent Strokes*, and *The*
7 *Fresh Prince of Bel-Air*, is simply a "basic plot idea .
8 . . not protected by copyright law." Cavalier, 297
9 F.3d at 824.

10 While both works involve African American families
11 living in predominantly white areas, the concrete
12 elements of the two works are not substantially
13 similar. See Berkic v. Crichton, 761 F.2d 1289, 1293
14 (9th Cir. 1985)(holding that the court must look at
15 "the actual concrete elements that make up the total
16 sequence of events and the relationships between the
17 major characters"). *Across the Tracks* focuses almost
18 exclusively on the Johnson family's interactions with
19 their new white neighbors, the overt racism that arises
20 in these interactions, and the Johnsons' use of their
21 faith to deal with this racism. The pilot episode of
22 *Black-ish* does not once mention the Johnsons'
23 neighbors, and the plot does not include any

24
25
26 Amended Complaint are relevant to the analysis of whether the two
27 works are substantially similar and whether, if Plaintiff is
28 allowed to amend his Complaint, he will be able to sufficiently
plead a claim for copyright infringement. Therefore, the Court,
in performing its comparison of the two works, looks at
Plaintiff's allegations in both the Complaint and proposed
Amended Complaint.

1 interactions with neighbors. In *Black-ish*, it appears
2 that the Johnson family has been living in the
3 predominantly white neighborhood for some time, and the
4 focus of the plot is the struggles the main character,
5 Andre, endures as he realizes his family has
6 assimilated almost too well into the majority culture
7 while forgetting their own minority culture in the
8 process. For example, Andre scoffs at his son's
9 intention to join the field hockey team and desire to
10 be called "Andy" rather than Andre. *Across the Tracks*
11 makes no mention of the Johnson family losing sight of
12 their culture as they continue to interact with their
13 white neighbors. Instead, the Johnsons in *Across the*
14 *Tracks* seem to embrace their neighbors' attempts at
15 "acting black," recognizing it as their neighbors' way
16 of trying to make them feel comfortable in a new
17 neighborhood.

18 The climaxes of the plots in both works are also
19 dissimilar. The climax of *Across the Tracks* occurs
20 when DJ faces racist comments at a sleepover, and his
21 parents are then confronted with the aftermath of these
22 comments. The climax of *Black-ish* occurs when Bow puts
23 a stop to Andre's crazy antics in trying to make sure
24 his family remains "black, not black-ish." While Andre
25 faces some indirect racism with his co-worker trying to
26 "act black" around Andre, the pilot does not focus on
27 overt racism and instead focuses on Andre's fear that
28 his family is not "black enough." Although the two

1 works "at a high level of generality" are similar,
2 including the experiences of a black family living in a
3 predominantly white area, these similarities only exist
4 in the basic plots and are not protected. See Berkic,
5 ("No one can own the basic idea for a story. General
6 plot ideas are not protected by copyright law . .
7 . ."); see also Silas, 201 F. Supp. 3d at 1174 ("[N]one
8 of the alleged similarities [in the two plots] are
9 substantially similar in their protectible objective
10 details.").

11 Finally, Plaintiff alleges in his proposed Amended
12 Complaint that the storylines of the adult characters
13 receiving promotions is "identical." Am. Compl. ¶ 36.
14 Plaintiff's allegations regarding these "identical"
15 storylines are vague, but despite these allegations, it
16 is hard to see how these storylines are substantially
17 similar. *Black-ish* focuses on Andre's promotion to
18 Senior Vice President of the Urban Division and the
19 conflict that ensues when he learns he has been put in
20 charge of "black stuff." The script of *Across the*
21 *Tracks* had yet to explore Keisha's workplace, but she
22 did not receive a promotion; rather, she obtained a
23 better job at a different hospital. Further, there is
24 nothing in *Across the Tracks* that suggests Keisha
25 obtained the job because the hospital assumed she would
26 better understand "black culture," like Andre's boss in
27 *Black-ish*. Instead, it appears likely that *Across the*
28 *Tracks* would explore Keisha's struggles of coming into

1 a new workplace where she is the new boss, specifically
2 the boss of her new neighbor, Katie Smith. Even if
3 both characters did receive internal promotions and the
4 two shows explored the characters' reactions to those
5 promotions, basic plot ideas are "not protected by
6 copyright law." Campbell, 718 F. Supp. 2d at 1112.

7 Therefore the plots of the two works are not
8 substantially similar.

9 2) Theme

10 "A work's theme is its overarching message."
11 Silas, 201 F. Supp. 3d at 1180. "[T]here is no
12 protection for stock themes or themes that flow
13 necessarily from a basic premise." Id.; Cavalier, 297
14 F.3d at 823.

15 Defendants argue that Plaintiff's alleged theme,
16 "the juxtaposition of an upwardly mobile African
17 American family moving into a predominately Anglo
18 community," is merely a description of an underlying
19 plot idea, which copyright law does not protect. Mot.
20 to Dismiss 11:20-24; see Berkic, 761 F.2d at 1293
21 ("General plot ideas are not protected by copyright
22 law; they remain forever the common property of
23 artistic mankind."). The Court agrees with Defendants'
24 assessment as Plaintiff's alleged theme does not
25 encompass an overarching message. See Kouf v. Walt
26 Disney Pictures & Television, 16 F.3d 1042, 1045 (9th
27 Cir. 1994)(describing one work's theme as a
28 "celebrat[ion] [of] family values" and another work's

1 theme as "the triumph of good over evil"); cf. Silas,
2 201 F. Supp. 3d at 1180 ("[T]he alleged theme of 'fast
3 paced and lavish lives of professional football
4 players' is an underlying plot idea, not a theme.").
5 Instead, it describes the basic plot of the two works,
6 and such generic ideas are not protectable expressions
7 courts will consider in an extrinsic analysis. See
8 Silas, 201 F. Supp. 3d at 1180.

9 Plaintiff alleges in the proposed Amended Complaint
10 that the theme of "the juxtaposition of the white
11 majority community attempting to appear cool, hip, and
12 at peace with their new African American neighbors is
13 copied by Blackish from *Across the Tracks*." Am. Compl.
14 ¶ 30. Plaintiff notes the similarities of the
15 neighbors in *Across the Tracks* and the colleagues in
16 *Black-ish* who attempt "to talk with swagger or 'act
17 Black.'" Id.

18 Importantly, "acting black" is not a theme but
19 rather an underlying plot idea because it is not an
20 underlying message in the works. Silas, 201 F. Supp.
21 3d at 1180. Further, in *Black-ish*, while Andre's co-
22 workers do use dialogue in an attempt to "act black,"
23 these interactions are extremely brief and are not a
24 large point of contention. Rather, Andre, while a bit
25 annoyed, seems to brush off these interactions. On the
26 other hand, these interactions are the main focus of
27 the plot in *Across the Tracks*; the Johnson family
28 spends the entire script dealing with the Smiths'

1 effort to dress, talk, and act "black" to make the
2 Johnsons feel more comfortable.

3 The only similarity is the idea of "acting black";
4 none of the actual dialogue or instances of "acting
5 black" in the two works are similar. The Smiths in
6 *Across the Tracks* show up to the Johnsons' barbeque
7 having completely transformed their style in an effort
8 to "act black." The Script states, "Tim is dressed
9 like a gansta [sic] rapper, and Katie is looking like a
10 video girl, with her heels and lip gloss popping."
11 RJN, Ex. 1 at 17. In *Black-ish*, Andre's co-worker
12 refers to him as "Dr. Dre" and "Driggity Dre" in an
13 effort to show comradery. These instances are
14 "[s]cenes-à-faire, or situations and incidents that
15 flow necessarily or naturally" from the basic plot
16 premise of a black family living and working in a
17 predominantly white area, and they are not protected.
18 Cavalier, 297 F.3d at 823.

19 Plaintiff alleges that the theme of "moving into
20 the majority culture [and] constantly feel[ing] that
21 they are oddities and out of place" is prevalent in
22 both works. Am. Compl. ¶ 31. The alleged theme of
23 feeling out of place also naturally arises from the
24 plot and cannot qualify as a protectable element of the
25 work. Benay v. Warner Bros. Entertainment, Inc., 607
26 F.3d 620, 627 (9th Cir. 2010)(holding "fish-out-of
27 water" theme naturally arises from two works' shared
28 plot of an American war veteran who travels to Japan).

1 Because this "theme" arises from the basic plot idea,
2 it is not protected, and the Court must therefore
3 disregard this non-protectable element in looking at
4 Plaintiff's ability to plead substantial similarity.
5 Cavalier, 297 F.3d at 822-23 ("[W]hen applying the
6 extrinsic test, a court must filter out and disregard
7 the non-protectible elements in making its substantial
8 similarity determination.").

9 Finally, as Defendants note in their Motion, "the
10 actual themes of the two works are markedly different."
11 Mot. to Dismiss 14:8. In *Across the Tracks*, the
12 primary theme is relying on your faith to help you
13 overcome racism, while in *Black-ish* the theme is
14 staying true to one's heritage, or "keeping it real."
15 *Black-ish* does not reference the Johnsons' religion nor
16 does it use religion as the family's coping mechanism
17 for conflict. While both families may be dealing with
18 the struggles of being a minority in a majority
19 culture, the message in each work is distinct.
20 Therefore, the themes of the two works are not
21 substantially similar.

22 3) Characters

23 Plaintiff alleges that aspects of the characters in
24 the two works are very similar. He notes that the two
25 families share the same last name, Johnson, and each
26 family has a son named after the father (Dave and Dave
27 Jr. in *Across the Tracks* and Andre and Andre Jr. in
28 *Black-ish*). Am. Compl. ¶ 32. Plaintiff also alleges

1 that the two mothers are very similar because they both
2 work in the medical field, with the mother in *Across*
3 *the Tracks* working as a nurse manager and the mother in
4 *Black-ish* working as a doctor. Id. Plaintiff claims
5 that the teenage daughter characters are "virtually
6 identical" because they are both "constantly too busy
7 on [their] cell phone[s] to be involved in any family
8 discussions revolving around [them]." Id. ¶ 34.

9 As Defendants note, the cast of characters in the
10 two works are very different. In *Black-ish*, Andre and
11 his wife, Bow, have four children, a teenage son, a
12 teenage daughter, and pre-teen twins. In *Across the*
13 *Tracks*, Dave and his wife, Keisha, have two kids, a
14 teenage son and a teenage daughter. There is a
15 grandfather character in *Black-ish*, while there is no
16 grandfather character in *Across the Tracks*.
17 Additionally, the Smiths, the Johnsons' neighbors in
18 *Across the Tracks*, play a significant role, while there
19 are no neighbor characters in *Black-ish*. See Benay,
20 607 F.3d at 627 (noting that characters in one work did
21 not have a parallel in the other work).

22 Additionally, the similarities that Plaintiff
23 alleges are incidental and do not reach the level of
24 substantially similar. The fact that the families in
25 both works have the last name Johnson and both have son
26 characters who are "juniors" is of no consequence,
27 particularly where, as here, the names are generic.
28 See CK Co. v. Burger King Corp., 92 Civ. 1488 (CSH),

1 1994 U.S. Dist. LEXIS 13934, at *22 (S.D.N.Y. Sep. 29,
2 1994)("The fact that characters have identical names
3 and have similar roles in two works does not
4 necessitate a finding of substantial similarity.").

5 Further, Plaintiff's allegations regarding the
6 similarities of the characters personalities are not
7 protectable. "[O]nly distinctive characters are
8 protectible, not characters that merely embody
9 unprotected ideas." Benay, 607 F.3d at 626.

10 Accordingly, "[n]o character infringement claim can
11 succeed unless plaintiff's original conception
12 sufficiently developed the character, and defendants
13 have copied this development and not merely the broader
14 outlines." Smith v. Weinstein, 578 F. Supp. 1297, 1303
15 (S.D.N.Y. 1984), aff'd, 738 F.2d 419 (2d Cir. 1984).

16 The character trait of teenage daughters being too busy
17 on their cell phones is "too abstract to warrant
18 copyright protection." Shame on You Prods., 120 F.
19 Supp. 3d at 1164. It is a surface-level description of
20 a character and does not make either daughter
21 distinctive; it merely describes the majority of
22 today's teenagers. Id. (holding that stock characters
23 do not invoke copyright protection). Other than being
24 typical teenage girls, the two characters are quite
25 different. Kimberly in *Across the Tracks* learned to
26 cook from her mother and prepares dinner for the whole
27 family. There is no suggestion that Zoey in *Black-ish*,
28 who regularly sasses her father, would ever be

1 interested in cooking a dinner for her whole family.
2 See Hogan v. DC Comics, 48 F. Supp. 2d 298, 309-10
3 (S.D.N.Y. 1999) (“In determining whether characters are
4 similar, a court looks at the totality of [the
5 characters’] attributes and traits” (quoting
6 Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d
7 Cir. 1986))). Additionally, *Across the Tracks* has set
8 up a love interest for Kimberly, while there is no
9 equivalent love interest for Zoey.

10 The fact that both mother characters work in the
11 medical field is another example of a non-distinct
12 trait that cannot be copyrighted. The two women only
13 work in the same field; they do not share the exact
14 same profession, and even if they did, such similarity
15 would not be protected. See Eaton v. NBC, 972 F. Supp.
16 1019, 1029 (E.D. Va. 1997) (holding that basic human
17 traits including occupation “are too general or too
18 common to deserve copyright protection”). Plaintiff’s
19 allegations of similarities that only involve working
20 in the same field, are “far from the level of
21 specificity and distinctiveness required for characters
22 to be protected by copyright.” Gadh v. Spiegel, No. CV
23 14-855-JFW (PJWx), 2014 U.S. Dist. LEXIS 64081, at *15
24 (C.D. Cal. Apr. 2, 2014).

25 Finally, the main characters, Andre in *Black-ish*
26 and Dave in *Across the Tracks*, are distinct as well.
27 Andre is a successful advertising executive who is
28 distraught when he realizes that his family has become

1 too assimilated to the majority culture in which they
2 live. He then comedically goes above and beyond to
3 make sure his children, most specifically his son,
4 Andre Jr., appreciate their black culture. Dave, on
5 the other hand, owns a used car dealership and is a man
6 of strong faith who relies on God to give him guidance
7 about the racism his family is facing. Besides working
8 hard to provide a good life for their families, the two
9 men do not share many attributes. Any similarities
10 "flow naturally from the works' shared premises" and
11 are thus not protected. Benay, 607 F.3d at 627.

12 Accordingly, there are no substantial similarities
13 between the characters in the two works.

14 4) Dialogue

15 Plaintiff fails to make any allegations in his
16 Complaint regarding the similarity of the works'
17 dialogue. However, in his proposed Amended Complaint,
18 he alleges that "specific words and phrases are said if
19 [sic] a virtually identical way." Am. Compl. ¶ 35.
20 "[E]xtended similarity of dialogue [is] needed to
21 support a claim of substantial similarity." Olson v.
22 Nat'l Broad. Co., 855 F.2d 1446, 1450 (9th Cir. 1988).
23 Plaintiff alleges three instances of what he claims are
24 "virtually identical" dialogue. Plaintiff points to an
25 instance where characters in both works refer to
26 "seeing color." Am. Compl. ¶ 35. Bow in *Black-ish*
27 refers to how her twins do not "see color," while the
28 Script notes that the neighbors still "saw color." Id.

1 The reference in *Across the Tracks* to how the neighbors
2 "saw color" is a script note, not dialogue, and is thus
3 irrelevant to the Court's analysis.

4 The two examples Plaintiff provides of actual
5 dialogue, which he alleges are "identical," are also
6 insufficient to show substantial similarity. Plaintiff
7 notes that both works refer to "being black."⁴ Am.
8 Compl. ¶ 35. This two-word phrase, which is used once
9 in each work, can in no way be construed as "extended
10 similarity of dialogue." See Shame on You Prods., 120
11 F. Supp. 3d at 1156 (noting that any overlap in
12 dialogue in the two works was "isolated and involve[d]
13 common words or phrases," which did not support a claim
14 for substantial similarity). Further, short, stock
15 phrases are not protectable. See Southco, Inc. v.
16 Kanebridge Corp., 390 F.3d 276, 285-287 (3d Cir.
17 2004)(recognizing the longstanding principle of
18 copyright law that words and short phrases are not
19 copyrightable). Therefore, even if this phrase could
20 be considered "extended similarity of dialogue," it
21 still could not support a claim for substantial
22 similarity because the phrase is not a protected
23 element the Court considers when examining claims for
24 copyright infringement. Cavalier, 297 F.3d at 822-23.

25 Finally, Plaintiff points to a line of dialogue in
26

27
28 ⁴ In *Black-ish*, Andre states, "I need my family to be black
again at home." Am. Compl. ¶ 35. In *Across the Tracks*, Dave
states, "Do you mind being black for a second again[?]" Id.

1 each work where the father character states that his
2 family can learn from their mistakes.⁵ The dialogue,
3 while similar in the abstract, is not identical, and
4 the message of learning from one's mistake is a message
5 shared in countless works. Such stock dialogue,
6 "containing little in the way of original expression,"
7 cannot be protected. See Narell v. Freeman, 872 F.2d
8 907, 911 (9th Cir. 1989).

9 Of note, Andre in *Black-ish* frequently provides
10 voiceover narratives throughout the episode, while
11 *Across the Tracks* does not have any voiceovers. See
12 Silas, 201 F. Supp. 3d at 1181 (noting the difference
13 in use of, or lack of, voiceovers in the two works).
14 This distinction is yet another way of showing how the
15 dialogue in the two works, both in content and type, is
16 dissimilar.

17 For the foregoing reasons, the three instances of
18 dialogue Plaintiff alleges are "virtually identical,"
19 one of which is not even dialogue, are insufficient to
20 allege substantial similarity. See Silas, 201 F. Supp.
21 3d at 1181 (finding that one instance of similar
22 dialogue was insufficient to survive motion to
23 dismiss).

24 5) Mood, Setting, and Pace

26 ⁵ In *Black-ish*, Andre states, the "lesson we learned today
27 is that a man always admits when he is wrong," while in *Across*
28 *the Tracks*, Dave states, "We can all learn a valuable lesson
today, own up to being wrong, but if someone owns up to his
wrong, you have to be man enough to forgive them." Am. Compl.
¶ 35.

1 Plaintiff does not make any allegations regarding
2 the two works' similarities in mood, setting, and pace.
3 However, even a surface-level examination of these
4 elements shows that the two works are not substantially
5 similar.

6 While both works are billed as comedies, *Across the*
7 *Tracks* takes on a more serious mood with the overt
8 racism and clear movement towards a message of family
9 strength and emphasis on religion as the Johnson family
10 deals with the inappropriate behavior of their
11 neighbors. *Black-ish* is much more light-hearted, even
12 ending the episode with the family dancing at Andre
13 Jr.'s "bro mitzvah." Thus, the moods of the two works
14 are not substantially similar. See Olson, 855 F.2d at
15 1451 (holding that while both works were described as
16 comedies and thus had similar moods, this was
17 insufficient to demonstrate substantial similarity).

18 The setting of *Across the Tracks* is not clearly
19 defined in the Script, while *Black-ish* is set in Los
20 Angeles. Even if both works were set in Los Angeles,
21 this similarity would not be protectable under
22 copyright law. Alexander v. Murdoch, 2011 U.S. Dist.
23 LEXIS 79503, at *21 (S.D.N.Y. July 14, 2011)(finding
24 that the shared setting of Los Angeles was not
25 protectable under copyright law). Therefore, there is
26 no substantial similarity between the setting of the
27 two works.

28 As Defendants note in their Motion, the pace of the

1 two works is very different. Mot. to Dismiss 16:17-18.
2 In determining the pace of a work, courts look at the
3 time period within which the works are set. See Capcom
4 Co., Ltd. v. MKR Group, Inc., No. 08-0904-RS, 2008 U.S.
5 Dist. LEXIS 83836, at *10 (N.D. Cal. Oct. 20, 2008).
6 The majority of *Across the Tracks* takes place in one
7 day, with the last scene occurring the following night.
8 Additionally, the scenes all take place in and around
9 the Johnsons' home. The pace is slow and the scenes
10 are linear. *Black-ish* is fast-paced as it cuts back
11 and forth between different parts of the Johnsons' home
12 and Andre's work place. Additionally, *Black-ish*
13 clearly takes place over a number of days. During the
14 pilot episode, Andre obtains the promotion, creates two
15 different presentations for work, and plans a "bro
16 mitzvah" for Andre Jr. At the very least, the pilot
17 episode takes place over the course of a couple of
18 days. See Kouf, 16 F.3d at 1046 (noting two works were
19 dissimilar when one took place over 24 hours and the
20 other took place over a series of days). Thus, there
21 is no substantial similarity in the pace of the two
22 stories.

23 Ultimately, *Across the Tracks* and *Black-ish* share
24 similarities only in the abstract: both works involve
25 black families living in predominantly white areas and
26 their experiences as they navigate living in these
27 areas. Plaintiff's Complaint alleges nary a similarity
28 that is protectable under the copyright law. See Funky

1 Films, 462 F.3d at 1081. Even a review of Plaintiff's
2 proposed Amended Complaint does nothing to cure the
3 defects in his pleading of copyright infringement.
4 Plaintiff's allegations in the proposed Amended
5 Complaint are again generic ideas that flow from the
6 basic plot of the two works, not specific,
7 copyrightable elements. See Shame on You Prods., 120
8 F. Supp. 3d at 1148 (noting that the court, in
9 evaluating the extrinsic test, only looks at
10 protectable elements of the works).

11 Finally, this Court has reviewed both of the works
12 in detail, including examining the potential
13 "similarities between the plot, themes, dialogue, mood,
14 setting, pace, characters, and sequence of events in
15 two works." Kouf, 16 F.3d at 1045. Any similarities,
16 including characters "acting black," the lessons of
17 owning up to your mistakes, and the two families
18 feeling out of place in a predominantly white area,
19 "flow necessarily and naturally from the basic plot
20 premise." See Cavalier, 297 F.3d at 823.

21 Consequently, Plaintiff cannot allege that the two
22 works are substantially similar, and the Court **GRANTS**
23 Defendants' Motion to Dismiss as to Plaintiff's
24 copyright infringement claim.

25 ///

26 b. *Plaintiff's Unfair Competition Claim*

27 Plaintiff also asserts a claim for unfair
28 competition, alleging that Defendants "have made, and

1 will continue to make a false and misleading
2 designation about the origin of [*Black-ish*] in
3 violation of the Lanham Act." Compl. ¶ 34. As
4 Defendants note, the U.S. Supreme Court in Dastar Corp.
5 v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)
6 dealt with the relationship between designation of
7 origin claims under the Lanham Act and copyright
8 claims. Mot. to Dismiss 23:4-7. In Dastar, the
9 plaintiffs alleged that the defendant purchased video
10 tapes from the plaintiffs, copied and edited the tapes,
11 and then distributed the tapes as its own product. 539
12 U.S. at 26-27. The plaintiffs sued under the Lanham
13 Act alleging that the defendant's "passing off" of the
14 tapes as its own resulted in a "false designation of
15 origin" of the tapes. Id. at 29. The Court focused on
16 the definition of "origin" under the Lanham Act to
17 determine whether it included the "entity that
18 originated the ideas that 'goods' embody or contain."
19 Id. at 32.

20 In holding that "origin" did not include the
21 originator of the ideas but instead refers to the
22 producer of the actual good itself, the Court noted
23 that including the originator of the ideas in the
24 "origin" definition would put the Lanham Act in
25 conflict with copyright law. Id. at 34 ("[I]n
26 construing the Lanham Act, we have been 'careful to
27 caution against misuse or over-extension' of trademark
28 and related protections into areas traditionally

1 occupied by patent or copyright." (quoting TrafFix
2 Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29
3 (2001)). Ultimately, the Court concluded that because
4 the defendant was the producer of the actual video
5 tapes it sold, it was therefore the "origin" of those
6 tapes, and the plaintiffs could not prevail on their
7 Lanham Act claim. Id. at 38.

8 Courts in the Central District have relied on this
9 ruling and dismissed plaintiffs' claims for violation
10 of the Lanham Act. See Whitehead v. Millennium Films,
11 No. CV 15-03564-RGK (AGRx), 2016 U.S. Dist. LEXIS
12 187805, at *7 (C.D. Cal. May 4, 2016)(dismissing claim
13 under Lanham Act where plaintiff alleged defendant made
14 a false claim of creation as to the plaintiff's
15 script); Friedman v. Zimmer, No. CV 15-502 GHK (Ex),
16 2015 U.S. Dist. LEXIS 143941, at *16 (C.D. Cal. July
17 10, 2015)(granting motion to dismiss Lanham Act claim
18 based on allegation that movie score infringed
19 plaintiff's copyright in a musical composition).

20 Here, Plaintiff's unfair competition claim under
21 the Lanham Act is essentially a duplicate of his
22 copyright claim. He does not allege that Defendants
23 stole his physical script, repackaged it as their own,
24 and then sold it. Rather, he is alleging that
25 Defendants stole the ideas in the *Across the Tracks*
26 script. See Compl. ¶ 34. Because Plaintiff does not
27 allege that Defendant misappropriated his tangible
28 goods, he cannot proceed with his unfair competition

1 claim. See Dastar, 539 U.S. at 38. The Court
2 therefore **GRANTS** Defendants' Motion to Dismiss as to
3 Plaintiff's unfair competition claim.

4 c. *Plaintiff's Claim for Declaratory Relief*

5 Plaintiff's allegations regarding his claim for
6 declaratory relief are succinct and essentially only
7 seek a judicial determination that Defendants infringed
8 Plaintiff's copyright in *Across the Tracks*. Compl. ¶¶
9 54-55. As noted above, Plaintiff does not have a
10 viable claim for copyright infringement. "[A]bsent a
11 viable underlying claim," Plaintiff is not entitled to
12 the declaratory relief he requests. See Shaterian v.
13 Wells Fargo Bank, N.A., 829 F. Supp. 2d 873, 888 (N.D.
14 Cal. 2011)(dismissing claim for declaratory relief
15 after dismissing underlying claims upon which plaintiff
16 sought declaratory relief). Accordingly, the Court
17 **GRANTS** Defendants' Motion to Dismiss as to Plaintiff's
18 declaratory relief claim.

19 d. *Plaintiff's Claim for Injunctive Relief*

20 Plaintiff's final claim is a claim for injunctive
21 relief. As with his declaratory relief claim,
22 Plaintiff premises his claim for injunctive relief on
23 Defendants' alleged infringement of Plaintiff's
24 copyright. However, "[i]njunctive relief is a remedy
25 and not, in itself, a cause of action." Biederman v.
26 Nw. Tr. Servs., No. CV 15-02283-AB (JCx), 2015 U.S.
27 Dist. LEXIS 82221, at *5 (C.D. Cal. June 24, 2015).
28 Because the Court has dismissed Plaintiff's other

1 claims, he does not have any claim for which he can
2 seek injunctive relief. Massacre v. Davies, No.
3 13-cv-04005 NC, 2014 U.S. Dist. LEXIS 114787, at *17
4 (N.D. Cal. Aug. 18, 2014)(dismissing prayer for
5 injunctive relief "because [plaintiff] has not pled a
6 cause of action that could entitle him to that
7 relief"). As such, the Court **GRANTS** Defendants' Motion
8 to Dismiss as to Plaintiff's injunctive relief claim.

9 3. Leave Amend Would be Futile

10 Federal Rule of Civil Procedure 15(a) provides that
11 a party may amend their complaint once "as a matter of
12 course" before a responsive pleading is served. Fed.
13 R. Civ. P. 15(a). After that, the "party may amend the
14 party's pleading only by leave of court or by written
15 consent of the adverse party and leave shall be freely
16 given when justice so requires." Id. Leave to amend
17 lies "within the sound discretion of the trial court."
18 United States v. Webb, 655 F.2d 977, 979 (9th Cir.
19 1981). The Ninth Circuit has noted "on several
20 occasions . . . that the 'Supreme Court has instructed
21 the lower federal courts to heed carefully the command
22 of Rule 15(a), F[ed]. R. Civ. P., by freely granting
23 leave to amend when justice so requires.'" Gabrielson
24 v. Montgomery Ward & Co., 785 F.2d 762, 765 (9th Cir.
25 1986)(quoting Howey v. United States, 481 F.2d 1187,
26 1190 (9th Cir. 1973))(citations omitted).

27 In motions to dismiss a copyright infringement
28 claim, courts have held that "[b]ecause substantial

1 similarity is 'a defect that cannot be cured by an
2 amended complaint,'" dismissal without leave to amend
3 is proper. Schkeiban v. Cameron, No. CV 12-0636-R
4 MANX, 2012 WL 5636281, at *1 (C.D. Cal. Oct. 4, 2012),
5 aff'd, 566 F. App'x 616 (9th Cir. 2014); see Campbell,
6 718 F. Supp. 2d at 1116.

7 Here, while Plaintiff attached his proposed Amended
8 Complaint to the parties' stipulation to extend time to
9 file an Amended Complaint [26], Plaintiff never filed
10 the proposed Amended Complaint. However, the
11 allegations in the proposed Amended Complaint do
12 nothing to change the fact that Plaintiff cannot plead
13 substantial similarity. As noted above, a comparison
14 of the plot, themes, dialogue, mood, setting, pace,
15 characters, and sequence of events of the two works
16 failed to reveal any substantial similarities. This
17 defect cannot be cured by amendment, see Silas, 201 F.
18 Supp. 3d at 1184, and thus, granting Plaintiff leave to
19 amend would be futile. Therefore, the Court **GRANTS**
20 Defendants' Motion to Dismiss without leave to amend.

21 4. Defendants' Motion to Strike and for Sanctions
22 is DENIED as MOOT

23 In light of the Court's **GRANT** of Defendants' Motion
24 to Dismiss, the Court **DENIES as MOOT** Defendants' Motion
25 to Strike and for Sanctions.

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III. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motion to Dismiss [35] **without leave to amend**. Accordingly, the Court **DENIES as MOOT** Defendants' Motion to Strike and for Sanctions [42].

This matter is closed. The Clerk shall terminate this case.

IT IS SO ORDERED.

DATED: September 13, 2017

s/ RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge