

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PAULA SHEPARD,

NO. CIV. 2:10-1863 WBS JFM

Plaintiff,

V.

15 JANE MILER, an individual,
CAREER PRESS, INC., NEW PAGE
16 BOOKS, and DOES 1-100.

MEMORANDUM AND ORDER RE:
MOTION FOR JUDGMENT ON THE
PLEADINGS AND SPECIAL MOTION
TO STRIKE

Defendants.

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20 Plaintiff Paula Shepard brought this action against
21 defendants Jane Miller,¹ Career Press, Inc., and New Page Books,²
22 alleging copyright infringement and related state law claims.
23 Presently before the court are defendants' motion for judgment on
24 the pleadings pursuant to Federal Rule of Civil Procedure 12(c)

¹ Jane Miller is sued erroneously as "Jane Miler." (Ans. at 1:22 (Docket No. 6).)

² New Page Books is an "imprint" of Career Press, Inc.
(Ans. ¶ 4.)

1 and special motion to strike plaintiff's state law claims
2 pursuant to California's anti-Strategic Lawsuits Against Public
3 Participation ("anti-SLAPP") statute, California Civil Procedure
4 Code § 425.16.

5 I. Factual and Procedural Background

6 Defendant Miller is a licensed psychotherapist.
7 (Compl. ¶ 13.) In 2009, she began writing a book about the use
8 of dogs to treat psychiatric disabilities. (Id.) Miller
9 contacted plaintiff, who has experience using and training
10 psychiatric service dogs ("PSDs"), hoping to feature plaintiff in
11 the book. (Id. ¶¶ 12-13.) Plaintiff agreed, and provided
12 information about her personal experiences using a PSD. (Id. ¶
13 14.) Because of plaintiff's practical experience in training
14 PSDs, Miller allegedly asked plaintiff for her help in drafting
15 those portions of the book relating to PSD training and
16 interaction. (Id. ¶ 15.) Plaintiff alleges that she "explicitly
17 told Miller that she . . . expected to be compensated for these
18 additional efforts," and Miller assured plaintiff that she would
19 be compensated by: "(a) receiving attribution in the book for her
20 work, (b) receiving some financial compensation from sales of the
21 book, and (c) being included in speaking engagements in
22 connection with the book" (Id. ¶ 16.) The two then
23 communicated by e-mail and telephone regarding the book
24 throughout early 2009. (Id. ¶ 17.)

25 As the book neared completion, plaintiff allegedly
26 sought to formalize their agreement, which defendants refused to
27 do. (Id.) Instead, defendants advised plaintiff that: "All
28 references to you, your experiences and any writing you did will

1 be removed from the book." (Id. ¶ 18.) The book, entitled
2 "Healing Companions," was published in 2010. (Id. ¶ 19.)
3 Plaintiff alleges that she owns the copyright registration for
4 her "Work" and that portions of the Work were published in
5 "Healing Companions." (Id. ¶¶ 29, 32.)

6 Plaintiff filed this suit on July 16, 2010 (Docket No.
7 1), alleging claims for (1) fraud; (2) copyright infringement;
8 (3) common law misappropriation; and (4) violations of
9 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.
10 Code §§ 17200-17210. Defendants now move for judgment on the
11 pleadings pursuant to Federal Rule of Civil Procedure 12(c) and
12 to strike the state law claims under California Civil Procedure
13 Code section 425.16.

14 **II. Discussion**

15 **A. Motion for Judgment on the Pleadings**

16 "After the pleadings are closed--but early enough not
17 to delay trial--a party may move for judgment on the pleadings."
18 Fed. R. Civ. P. 12(c). A Rule 12(c) motion may ask for judgment
19 on the basis of plaintiff's "[f]ailure to state a claim upon
20 which relief can be granted." Id. 12(h)(2)(B). Such a motion is
21 essentially equivalent to a Rule 12(b)(6) motion to dismiss, so a
22 district court may "dispos[e] of the motion by dismissal rather
23 than judgment."³ Sprint Telephony PCS, L.P. v. Cnty. of San

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25 ³ The motions differ in only two respects:
26
27 (1) the timing (a motion for judgment on the pleadings is
28 usually brought after an answer has been filed, whereas
a motion to dismiss is typically brought before an answer
is filed) . . . and (2) the party bringing the motion (a
motion to dismiss may be brought only by the party

1 Diego, 311 F. Supp. 2d 898, 902-03 (S.D. Cal. 2004).

2 Under Federal Rule of Civil Procedure 8(a)(2), a
3 pleading must contain "a short and plain statement of the claim
4 showing that the pleader is entitled to relief." "To survive a
5 motion to dismiss, a complaint must contain sufficient factual
6 matter, accepted as true, to 'state a claim to relief that is
7 plausible on its face.'" Ashcroft v. Iqbal, --- U.S. ----, 129
8 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550
9 U.S. 544, 570 (2007)). The Supreme Court has explained that the
10 pleading standard rests on two principles. First, "the tenet
11 that a court must accept as true all of the allegations contained
12 in a complaint is inapplicable to legal conclusions." Id. While
13 showing an entitlement to relief "does not require 'detailed
14 factual allegations,' . . . it demands more than an unadorned,
15 the-defendant-unlawfully-harmed-me accusation." Id. (quoting
16 Twombly, 550 U.S. at 555). Second, "only a complaint that states
17 a plausible claim for relief survives a motion to dismiss." Id.
18 at 1950. If the pleadings "do not permit the court to infer more
19 than the mere possibility of misconduct, the complaint has
20 alleged--but it has not 'show[n]'--'that the pleader is entitled
21 to relief.'" Id. (quoting Fed. R. Civ. P. 8(a)(2)).⁴

22
23 against whom the claim for relief is made, usually the
24 defendant, whereas a motion for judgment on the pleadings
25 may be brought by any party).

26 Sprint Telephony PCS, L.P. v. Cnty. of San Diego, 311 F. Supp. 2d
27 898, 902-03 (S.D. Cal. 2004).

28 ⁴ The parties have requested that the court take judicial
29 notice of a large number of documents, most of which are not
30 judicially noticeable. In considering a motion for judgment on
31 the pleadings, a court may consider "documents attached to the

1 Copyright Infringement Claim against All Defendants

2 To establish copyright infringement, a plaintiff must
3 show (1) ownership of a valid copyright in the allegedly
4 infringed material and (2) copying of protected expression by
5 defendants. Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330,
6 1335 (9th Cir. 1995), overruled on other grounds by Cunningham v.
7 Hamilton Cnty., Ohio, 527 U.S. 198 (1999).

8 A copyright registration certificate is *prima facie*
9 evidence of copyright ownership. See 17 U.S.C. § 410(c) ("In any
10 judicial proceedings the certificate of a registration made
11 before or within five years after first publication of the work
12 shall constitute *prima facie* evidence of the validity of the
13 copyright and of the facts stated in the certificate."). While
14 plaintiff has failed to attach a registration certificate, she
15 alleges that she owns a copyright registration. (See Compl. ¶¶
16 18, 29.) This may or may not be sufficient to allege copyright
17 ownership. See Vargas v. Pfizer, Inc., 418 F. Supp. 2d 369, 373
18 (S.D.N.Y. 2005) (dismissing with leave to amend for failure to
19 attach certificate of registration). However, defendants have
20

21 complaint, documents incorporated by reference in the complaint,
22 or matters of judicial notice--without converting the motion . . .
23 . into a motion for summary judgment." United States v. Ritchie,
24 342 F.3d 903, 908 (9th Cir. 2003); see Heliotrope Gen., Inc. v.
25 Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999). The
26 court may also consider documents on which the Complaint
27 necessarily relies if their authenticity is not disputed. See
28 Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001). On that
ground and because the parties have so agreed, the court will
consider Miller's book (Notice of Lodging Document in Paper
Format (Docket No. 23)) and plaintiff's copyright registration
certificate (Defs.' Req. for Judicial Notice Ex. A (Docket No.
10)) and deposit (Defs.' Supplemental Req. for Judicial Notice
Ex. A (Docket No. 22)). The court will not consider any other
documents in deciding the motion for judgment on the pleadings.

1 not contested the issue, so for purposes of this motion, the
2 court assumes that plaintiff has sufficiently alleged ownership.

3 As to the second element, copying of a protected
4 expression, defendants contend that most of plaintiff's Work that
5 appears in "Healing Companions" actually originated in early
6 drafts that Miller e-mailed to plaintiff, and is thus not
7 eligible for protection. (See Defs.' Mem. of P. & A. in Supp. of
8 Mot. for J. on the Pleadings at 9:1-16:27.) However, the court
9 cannot look to the e-mails, which are not subject to judicial
10 notice, on a motion for judgment on the pleadings, and thus the
11 court must consider only the similarity of the Work and the book.

12 "Copying may be shown by circumstantial evidence of
13 access and substantial similarity of both the general ideas and
14 expression between the copyrighted work and the allegedly
15 infringing work."⁵ Apple Computer, Inc. v. Microsoft Corp., 35
16 F.3d 1435, 1442 (9th Cir. 1994). Substantial similarity refers
17 to similarity of expression, not merely similarity of ideas or
18 concepts. See 17 U.S.C. § 102(b).

19 The degree of word-for-word similarity between the
20 works here places the infringement claim in the class of cases
21 referred to by Nimmer as "fragmented literal similarity." 4
22 Nimmer on Copyright § 13.03[A][2] at 13-53. "Fragmented literal
23 similarity exists where the defendant copies a portion of the
24 plaintiff's work exactly or nearly exactly, without appropriating
25 the work's overall essence or structure." Newton v. Diamond, 388

26
27 ⁵ Defendants do not raise the issue of whether they had
28 access to plaintiff's work in this motion. (See Defs.' Mem. of
P. & A. in Supp. of Mot. for J. on the Pleadings at 5 n.5.)

1 F.3d 1189, 1195 (9th Cir. 2004). "Because the degree of
2 similarity is high in such cases," the court should consider
3 "whether the copying goes to trivial or substantial elements,"
4 which is measured by "considering the qualitative and
5 quantitative significance of the copied portion in relation to
6 the plaintiff's work as a whole."⁶ Id.

7 In considering the qualitative and quantitative
8 significance of the copied portion of plaintiff's Work, the court
9 cannot conclude on the pleadings alone that there is not
10 substantial similarity between the works. Large portions from
11 three out of just over nine pages constituting the Work are
12 copied in the book with only slight modifications. (See Defs.'
13 Supplemental Req. for Judicial Notice Ex. A ("Healing
14 Companions") (Docket No. 22).) Plaintiff's Work contains two
15 main sections: her personal story of interactions with her PSDs
16 and her advice on training PSDs. A majority of the latter is
17 found in Chapter Four of "Healing Companions." (Defs.' Req. for
18 Judicial Notice Ex. A (Docket No. 10).) The court is not
19 equipped to determine the qualitative importance of the section
20 on training to the copyrighted Work as a whole on a motion for
21 judgment on the pleadings. On the face of the Complaint and the

22 ⁶ The fact that the majority of the book contains
23 original material is irrelevant. 4 Nimmer on Copyright §
24 13.03[B][1][a] at 13-68 ("If substantial similarity is found, the
25 defendant will not be immunized from liability by reason of the
26 addition in his work of different characters or additional and
27 varied incidents, nor generally by reason of his work proving
28 more attractive or saleable than the plaintiff's.") (footnotes
omitted); see Worth v. Selchow & Righter Co., 827 F.2d 569, 570
n.1 (9th Cir. 1987) ("[T]he relevant inquiry is whether a
substantial portion of the protectible material in the
plaintiff's work was appropriated--not whether a substantial
portion of defendant's work was derived from plaintiff's work.").

1 documents incorporated by reference therein, plaintiff has stated
2 a claim for copyright infringement.

3 Fair Use

4 Even if plaintiff has alleged a prima facie case of
5 copyright infringement, defendants are entitled to dismissal if
6 their use of the copyrighted material is protected as fair use.
7 See 17 U.S.C. § 107. An assertion of fair use "may be considered
8 on a motion to dismiss, which requires the court to consider all
9 allegations to be true, in a manner substantially similar to
10 consideration of the same issue on a motion for summary judgment,
11 when no material facts are in dispute." Leadsinger, Inc. v. BMG
12 Music Publ'q, 512 F.3d 522, 530 (9th Cir. 2008); see Savage v.
13 Council on American-Islamic Relations, Inc., No. C 07-6076, 2008
14 WL 2951281, at *9 (N.D. Cal. July 25, 2008) (granting Rule 12(c)
15 motion for judgment on the pleadings based on fair use defense).

16 "The fair use doctrine confers a privilege on people
17 other than the copyright owner 'to use the copyrighted material
18 in a reasonable manner without his consent, notwithstanding the
19 monopoly granted to the owner.'" Hustler Magazine Inc. v. Moral
20 Majority Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) (quoting
21 Marcus v. Rowley, 695 F.2d 1171, 1174 (9th Cir. 1983)). In
22 determining whether a use is fair, courts engage in a case-by-
23 case analysis and a flexible balancing of the following four non-
24 exclusive factors:

25 (1) the purpose and character of the use, including
26 whether such use is of a commercial nature or is for
27 nonprofit educational purposes; (2) the nature of the
28 copyrighted work; (3) the amount and substantiality of
the portion used in relation to the copyrighted work as
a whole; and (4) the effect of the use upon the potential
market for or value of the copyrighted work.

1 Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 799 (9th
2 Cir. 2003).

3 The first factor in a fair use inquiry requires the
4 court to consider "the purpose and character of the use,
5 including whether such use is of a commercial nature or is for
6 nonprofit educational purposes." 17 U.S.C. § 107(1). Although
7 not controlling, the fact that the work is used for a commercial
8 or profit-making purpose as opposed to a non-profit purpose
9 weighs against a finding of fair use. Elvis Presley Enters.,
10 Inc. v. Passport Video, 349 F.3d 622, 627 (9th Cir. 2003). The
11 "degree to which the new user exploits the copyright for
12 commercial gain--as opposed to incidental use as part of a
13 commercial enterprise--affects the weight" afforded to commercial
14 nature as a factor. Id.; see also Harper & Row Publishers, Inc.
15 v. Nation Enters., 471 U.S. 539, 562 (1985) ("The crux of the
16 profit/nonprofit distinction is not whether the sole motive of
17 the use is monetary gain but whether the user stands to profit
18 from exploitation of the copyrighted material without paying the
19 customary price."). The court must also inquire into whether the
20 new work is transformative and does not simply "supplant" the
21 original work. Mattel, 353 F.3d at 800.

22 The parties do not dispute that "Healing Companions" is
23 being sold for profit. However, the section on training, in
24 which plaintiff's Work is found, is a small portion of the book
25 as a whole, and the commercial value of the book is not based
26 entirely on plaintiff's Work. The book covers many aspects of
27 PSDs, only one of which involves training. Therefore, while the
28 book is being sold for profit and the use of plaintiff's Work may

1 have contributed to its value, the manner of commercial use does
2 not weigh strongly against a fair use determination. See Kelly
3 v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).

4 The more important inquiry under the first factor is to
5 determine whether and to what extent the new work is
6 "transformative." Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d
7 701, 720 (9th Cir. 2007). "A work is transformative when the new
8 work does not merely supersede the objects of the original
9 creation but rather adds something new, with a further purpose or
10 different character, altering the first with new expression,
11 meaning, or message." Id. at 720 (internal quotation marks
12 omitted). The more transformative the new work, the less the
13 significance of other factors that weigh against fair use, such
14 as use of a commercial nature. Campbell v. Acuff-Rose Music,
15 Inc., 510 U.S. 569, 579 (1994).

16 Defendants' use of plaintiff's Work is significantly
17 transformative. Not only were plaintiff's sentences edited,
18 clarified, and generally polished for publication, but also they
19 form a very small portion of the book. The book, at 256 pages,
20 includes chapters about a woman named Mindy, finding the right
21 dog, dogs used to serve veterans with Post-Traumatic Stress
22 Disorder, training (the chapter in which plaintiff's Work is
23 found), helping the PSD become part of the family, coping with
24 the dog's stress, and dealing with aging and death of a dog.
25 ("Healing Companions" at 27-152.) The book also contains several
26 appendices with sample service dog cards, information on laws
27 about service dogs, breeds, tasks that PSDs can perform, and an
28 article about Miller. (Id. at 153-226.) Finally, the book

1 contains a list of abbreviations, a glossary, a list of
2 resources, and an index. (Id. at 227-54.) While plaintiff does
3 not allege the use to which she has put or intends to put her
4 Work, a comprehensive book on the subject of PSDs is
5 transformative of any use to which plaintiff's Work could be put.
6 The first fair use factor thus weighs heavily in favor of a fair
7 use determination.

8 The second factor in a fair use inquiry requires the
9 court to consider the "nature of the copyrighted work." 17
10 U.S.C. § 107(2). "Works that are creative in nature are closer
11 to the core of intended copyright protection than are more fact-
12 based works," Kelly, 336 F.3d at 820 (quoting A&M Records, Inc.
13 v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001)), meaning
14 that plaintiff's fact-based Work is more likely to be covered by
15 fair use. However, the fact that a work is published or
16 unpublished is also a critical element of its nature because the
17 author's right to control the first public appearance of her work
18 weighs against the use of her work before its release. Id. When
19 dealing with transformative uses, this factor is not terribly
20 significant in the overall fair use balancing. See Mattel, 353
21 F.3d at 803. Thus, the fact that the fact-based Work was
22 unpublished weighs slightly, but not considerably, against a
23 finding of fair use.

24 The third factor in a fair use inquiry requires the
25 court to examine the "amount and substantiality of the portion
26 used in relation to the copyrighted work as a whole." 17 U.S.C.
27 § 107(3). As explained above, the amount of the copyrighted Work
28 used in the book was significant. Although "entire verbatim

1 reproductions are justifiable where the purpose of the work
2 differs from the original," Mattel, 353 F.3d at 803 n.8,
3 defendants put the section on training PSDs to the same purpose
4 for which plaintiff presumably wrote it: to provide information
5 about training dogs. Thus, this factor weighs against a finding
6 of fair use.

7 The fourth factor in a fair use inquiry focuses on "the
8 effect of the use upon the potential market for or value of the
9 copyrighted work." 17 U.S.C. § 107(4). This factor is
10 "undoubtedly the single most important element of fair use."
11 Harper & Row, 471 U.S. at 566. This factor requires courts to
12 consider not only the extent of market harm caused by the
13 particular actions of the alleged infringer, but also whether
14 unrestricted and widespread conduct of the sort engaged in by
15 defendants would result in a substantially adverse impact on the
16 potential market for the original. Kelly, 336 F.3d at 821. The
17 more transformative the new work, the less likely the new work's
18 use of copyrighted materials will affect the market for the
19 materials. Id. In determining whether the use has harmed the
20 work's value or market, courts have focused on whether the
21 infringing use (1) tends to diminish or prejudice the potential
22 sale of the work, (2) tends to interfere with the marketability
23 of the work, or (3) fulfills the demand for the original work.
24 Hustler, 796 F.2d at 1155-56. If a use has no demonstrable
25 effect upon the potential market for, or the value of, the
26 copyrighted work, then such use need not be prohibited in order
27 to protect the author's incentive to create. Sony Corp. of Am.
28 v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

1 While Miller's book would likely supplant any market
2 demand for plaintiff's Work whether or not it contained the
3 copyrighted material, the court cannot determine on the pleadings
4 whether the alleged copying has any effect on the market.⁷ Thus,
5 although the book is significantly transformative, the amount of
6 alleged copying and the inability of the court to determine
7 market effect preclude the court from finding at this stage that
8 the copying constituted fair use. Accordingly, the court will
9 deny defendants' motion for judgment on the pleadings.

10 B. Special Motion to Strike

11 The California legislature enacted its anti-SLAPP
12 statute, California Civil Procedure Code § 425.16, to "allow
13 early dismissal of meritless first amendment cases aimed at
14 chilling expression through costly, time-consuming litigation."
15 Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir.
16 2001). "California's anti-SLAPP statute allows a defendant to
17 move to strike a plaintiff's complaint if it 'aris[es] from any
18 act of that person in furtherance of the person's right of
19 petition or free speech under the United States or California
20 Constitution in connection with a public issue.'" Vess v.

21
22 ⁷ The court is cognizant of the need to "balance . . .
23 'the benefit the public will derive if the use is permitted and
24 the personal gain the copyright owner will receive if the use is
25 denied.'" Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792,
26 804-05 (9th Cir. 2003) (quoting Dr. Seuss Enters., L.P. v.
27 Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997)).
28 Defendants' argument that "many authors and reporters conduct
interviews by email, and denying fair use here would harm the
public interest by allowing sources to use copyright law to
extort payment for, or exercise a veto over, publication of books
that include information provided via email" (Defs.' Mem. of P. &
A. in Supp. of Mot. for J. on the Pleadings at 24:20-23) is
compelling; nonetheless, it is insufficient for a finding of fair
use at this stage.

1 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003)
2 (quoting Cal. Civ. Proc. Code § 425.16(b)(1)); see also Briqgs v.
3 Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1123
4 (1999) (defendants "need not separately demonstrate that the
5 statement concerned an issue of public significance"). The
6 special motion to strike under the anti-SLAPP statute is
7 available to litigants proceeding in federal court. Thomas v.
8 Fry's Elecs., Inc., 400 F.3d 1206, 1206-07 (9th Cir. 2005).

9 "A court considering a motion to strike under the
10 anti-SLAPP statute must engage in a two-part inquiry." Vess, 317
11 F.3d at 1110. First, "the defendant is required to make a prima
12 facie showing that the plaintiff's suit arises from an act by the
13 defendant made in connection with a public issue in furtherance
14 of the defendant's right to free speech under the United States
15 or California Constitution." Batzel v. Smith, 333 F.3d 1018,
16 1024 (9th Cir. 2003). Second, "[t]he burden then shifts to the
17 plaintiff to establish a reasonable probability that the
18 plaintiff will prevail on his or her [] claim." Id.

19 An "act in furtherance of a person's right of petition
20 or free speech" includes "conduct in furtherance of the exercise
21 of the constitutional right of petition or the constitutional
22 right of free speech in connection with a public issue or an
23 issue of public interest." Cal. Civ. Proc. Code § 425.16(e). To
24 "arise from" the defendant's right of petition or free speech,
25 "the defendant's act underlying the plaintiff's cause of action
26 must itself have been an act in furtherance of the right of
27 petition or free speech." City of Cotati v. Cashman, 29 Cal. 4th
28 69, 78 (2002). "In deciding whether the 'arising from'

1 requirement is met, a court considers 'the pleadings, and
2 supporting and opposing affidavits stating the facts upon which
3 the liability or defense is based.'" Id. at 79 (quoting Cal.
4 Civ. Proc. Code § 425.16(b)). To meet its burden, the "defendant
5 need not show that plaintiff's suit was brought with the
6 intention to chill defendant's speech; the plaintiff's intentions
7 are ultimately beside the point." Bosley Med. Inst., Inc. v.
8 Kremer, 403 F.3d 672, 682 (9th Cir. 2005) (internal quotation
9 marks and citations omitted).

10 Plaintiff's claims for misappropriation and UCL
11 violations arise from defendants' research and publication of a
12 book about mental health issues and therapy, which is an act in
13 furtherance of defendants' right of free speech in connection
14 with an issue of public interest. See, e.g., Taus v. Loftus, 40
15 Cal. 4th 683, 713 (2007) (investigating, writing, and publishing
16 articles about mental health issues are acts in furtherance of
17 the exercise of free speech in connection with a public issue);
18 William O'Neil & Co. v. Validea.com Inc., 202 F. Supp. 2d 1113,
19 1119 (C.D. Cal. 2002) (book is entitled to First Amendment
20 protections). The fact that plaintiff alleges that the protected
21 activity was unlawful does not change this analysis. See, e.g.,
22 Navellier v. Sletten, 29 Cal. 4th 82, 94 (2002) ("Plaintiff's
23 argument 'confuses the threshold question of whether the SLAPP
24 statute [potentially] applies with the question whether [an
25 opposing plaintiff] has established a probability of success on
26 the merits.'" (quoting Fox Searchlight Pictures, Inc. v.
27 Paladino, 89 Cal. App. 4th 294, 305 (2d Dist. 2001)) (alterations
28 in original)); Lieberman v. KCOP Television, Inc., 110 Cal. App.

1 4th 156, 165 (2d Dist. 2003) ("To say that lawful newsgathering
2 is an act in furtherance of one's right to free speech, but
3 unlawful newsgathering is not an act in furtherance of one's
4 right to free speech, begs the question. . . . Once the
5 defendant shows that the cause of action arose from acts done in
6 furtherance of an exercise of free speech, it becomes the
7 plaintiff's burden to establish that the acts are not protected
8 by the First Amendment.").

9 Plaintiff's fraud claim arises not from the book's
10 publication but from conversations between plaintiff and Miller
11 that occurred in the course of Miller's research for the book.
12 These conversations were themselves "in furtherance" of
13 defendants' free speech rights. See Taus, 40 Cal. 4th at 713
14 (investigation is conduct in furtherance of free speech rights);
15 Lieberman, 110 Cal. App. 4th at 165-66 (newsgathering is conduct
16 in furtherance of free speech rights); cf. Shoen v. Shoen, 5 F.3d
17 1289, 1293 (9th Cir. 1993) (book author's conversations with
18 sources are protected by journalist's privilege). Thus,
19 defendants have satisfied the initial burden of demonstrating
20 that plaintiff's state law claims arise from defendants' acts in
21 furtherance of their free speech rights.

22 The court "must then determine whether the plaintiff
23 has demonstrated a probability of prevailing on the claim[s]." Navellier, 29 Cal. 4th at 88. Plaintiff must show that the
24 claims are "both legally sufficient and supported by a sufficient
25 *prima facie* showing of facts to sustain a favorable judgment if
26 the evidence submitted by the plaintiff is credited." Flores v.
27 Emerich & Fike, 416 F. Supp. 2d 885 (E.D. Cal. 2006) (quoting

1 Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 741 (2003)).
2 In contrast to the motion for judgment on the pleadings, on this
3 prong the court "considers the pleadings and evidentiary
4 submissions of both the plaintiff and the defendant." Jarrow, 31
5 Cal. 4th at 741 n.10. "[T]hough the court does not weigh the
6 credibility or comparative probative strength of competing
7 evidence, it should grant the motion if, as a matter of law, the
8 defendant's evidence supporting the motion defeats the
9 plaintiff's attempt to establish evidentiary support for the
10 claim." Id.

11 1. Fraud Claim against Miller

12 In California, the elements of a claim for fraud are
13 "(a) a misrepresentation (false representation, concealment, or
14 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
15 intent to defraud, i.e., to induce reliance; (d) justifiable
16 reliance; and (e) resulting damage." In re Estate of Young, 160
17 Cal. App. 4th 62, 79 (4th Dist. 2008) (quoting Lazar v. Super.
18 Ct., 12 Cal. 4th 631, 638 (1996) (internal quotation marks
19 omitted)). Under the heightened pleading requirement for claims
20 of fraud under Federal Rule of Civil Procedure 9(b), "a party
21 must state with particularity the circumstances constituting
22 fraud" Fed. R. Civ. P. 9(b). A plaintiff must include
23 the "who, what, when, where, and how" of the fraud. Vess v.
24 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)
25 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

26 Plaintiff alleges that the following representations
27 constitute fraud:

28 Miller [sic] assured Shepard that Shepard would be

1 compensated for her writing by: (a) receiving attribution
2 in the book for her work, (b) receiving some financial
3 compensation from sales of the book, and (c) being
4 included in speaking engagements in connection with the
book (together, the "Representations")[.] Shepard agreed
with this arrangement, and proceeded to write her
portions of the book.

5 (Compl. ¶ 16.)⁸ In her declaration, she provides some additional
6 information. In a telephone conversation on February 10, 2009,
7 plaintiff stated that she "would only provide additional
8 material, especially concerning [her] PSD training techniques, if
9 [she] was paid. Ms. Miller said that she agreed, but she did not
10 commit to a specific amount of monetary compensation." (Pl.'s
11 Opp'n to Defs.' Mot. for J. on the Pleadings ("Shepard Decl.") ¶
12 8(Docket No. 26); see id. ¶ 16.) In another telephone
13 conversation on May 29, 2009, plaintiff repeated her request for
14 "tangible acknowledgment and financial compensation," and Miller
15 said that plaintiff would be "taken care of." (Id. ¶ 9; see id.
16 ¶ 24.)

17 Plaintiff's claim for fraud is neither legally
18 sufficient nor supported by the evidence. Even assuming Miller
19 represented to plaintiff that she would receive monetary
20 compensation, plaintiff admits that the amount was never
21 discussed, and does not describe Miller's knowledge of the
22

23 ⁸ Plaintiff does not dispute defendants' contentions
24 that, prior to the disagreement that caused defendants to attempt
25 to remove plaintiff's work from the book, plaintiff was going to
26 be "credited in the acknowledgment section in addition to having
27 her website listed in the resources section" (Mem. of P. & A. in
28 Supp. of Special Mot. of Defs. to Strike at 4:11-12) or that
speaking engagements were dependent on the success of the book.
(Id. at 5:11-17.) Plaintiff only alleges injury resulting from
"not receiving the compensation that was promised." (Compl. ¶
25.) Thus, the only issue is whether Miller misrepresented that
plaintiff would receive monetary compensation.

1 falsity or intent to defraud plaintiff; nor does plaintiff
2 explain how her reliance was justified or what damages she
3 incurred. Plaintiff's allegations fall far short of the
4 particularity required for a claim of fraud, and the claim is
5 thus legally insufficient.

6 Furthermore, plaintiff's fraud claim is not supported
7 by the evidence. Defendants have presented evidence, the
8 authenticity of which plaintiff does not dispute, that clearly
9 show by plaintiff's own admissions that she never received a
10 promise of payment. For example, plaintiff wrote an e-mail to
11 New Page on August 12, 2009, which is referenced in her Complaint
12 (Compl. ¶ 17), explaining that she started out by merely telling
13 Miller her stories but ultimately wrote portions of the book, and
14 stating that "My contributions got to be so much of the book . .
15 . that I asked about special credit in the book which at the time
16 she assured me I would get strongly. . . . For all that work and
17 time I think I deserve some kind of compensation and credit."
18 (Defs.' Req. for Judicial Notice Ex. C (Docket No. 10).) In an
19 e-mail to Miller on August 17, 2009, plaintiff stated that "[i]f
20 I am going to sign [a release] it needs to be a legally binding
21 contract that spells out what I will get both as far as written
22 credit in the book and whatever financial arrangements are made
23 and agreed to if any." (Miller Decl. in Supp. of Defs.' Mot. to
24 Strike Ex. S (Docket No. 11) (emphasis added).) Most explicitly,
25 in an e-mail to Miller's attorney on August 25, 2009, plaintiff
26 stated:

27 I did not agree to provide [my training advice and
28 experience as well as my advocacy experience] for free,
only my personal stories. . . . I agree there was no

1 promise of financial compensation for me to relate my
2 personal stories, there was no discussion about what
would be done for anything beyond that as I did not
3 expect this to happen. Such discussions are happening
now necessarily.

4 (Cullen Decl. in Supp. of Defs.' Mot. to Strike Ex. D (Docket No.
5 14) (emphasis added).) Plaintiff's only response to her own
6 clear admissions that Miller never promised plaintiff financial
7 compensation is to point to her declaration, which vaguely states
8 that Miller promised plaintiff some kind of compensation in
9 telephone conversations on February 10 and May 29, 2009.

10 (Shepard Decl. ¶¶ 8-9.) Since "defendant's evidence supporting
11 the motion defeats the plaintiff's attempt to establish
12 evidentiary support for the claim," Jarrow, 31 Cal. 4th at 741
13 n.10, plaintiff has failed to meet her burden of showing a prima
14 facie case of fraud. Accordingly, the court will grant
15 defendants' special motion to strike plaintiff's claim for fraud.

16 2. Common Law Misappropriation Claim against All
17 Defendants

18 All state law causes of action falling within the scope
19 of the federal Copyright Act are subject to preemption. Laws v.
20 Sony Music Entm't, Inc., 448 F.3d 1134, 1137 (9th Cir. 2006).

21 Preemption occurs when: (1) the work at issue comes within the
22 subject matter of the Copyright Act; and (2) the rights granted
23 under state law are equivalent to those protected by the Act.

24 See 17 U.S.C. § 301(a); Kodadek v. MTV Networks, Inc., 152 F.3d
25 1209, 1212 (9th Cir. 1998); Valente-Kritzer Video v. Pinckney,
26 881 F.2d 772, 776 (9th Cir. 1989); Del Madera Prop. v. Rhodes &
27 Gardner, Inc., 820 F.2d 973, 976 (9th Cir. 1987), overruled on
28 other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

1 The first prong of the test is satisfied wherever the
2 work at issue comes within the subject matter of copyright as
3 defined by 17 U.S.C. §§ 102 and 103.⁹ It is clear that the
4 material upon which plaintiff's claim for misappropriation is
5 based is within the "subject matter" of copyright. Plaintiff's
6 Work is a "work of authorship" within the broad definition given
7 by the Act. See 17 U.S.C. § 102(a)(1).¹⁰

8 The second prong of the test is satisfied whenever the
9 rights protected by state law are equivalent to those protected
10 by the Copyright Act. In order to avoid preemption, "the state
11 cause of action must protect rights which are qualitatively
12 different from the copyright rights," Del Madera Properties, 820
13 F.2d at 977, and the "state claim must have an extra element
14 which changes the nature of the action." Id. (internal quotation
15 marks omitted). A court "should not rely merely on a laundry
16 list of the alleged elements of the state law claims at issue,
17 such that the mere possibility of an extra element protects a
18 claim from preemption." Idema v. Dreamworks, Inc., 162 F. Supp.
19 2d 1129, 1190 (C.D. Cal. 2001) (internal quotation marks
20 omitted). Rather, the court must "engage in a fact-specific

21
22 ⁹ The "subject matter" of copyright includes "original
23 works of authorship fixed in any tangible medium of expression,"
24 including "literary works." 17 U.S.C. § 102(a). Also within the
"subject matter" of copyright are "compilations and derivative
works." 17 U.S.C. § 103(a).

25 ¹⁰ It is irrelevant whether the work in question is
26 actually protected by copyright because "the subject matter of
27 copyright is broader than copyright protection" Firoozye
28 v. Earthlink Network, 153 F. Supp. 2d 1115, 1124 (N.D. Cal.
2001). Rather, "the issue for the purpose of a preemption
analysis is whether the work involved is a kind of work that
comes within the subject matter of the Copyright Act." Id. at
1125.

1 inquiry into the actual allegations underlying the claims at
2 issue in the case, so as to determine whether the gravamen of the
3 state law claim asserted is the same as the rights protected by
4 the Copyright Act." Id. The court considers whether the state
5 law claims as asserted are equivalent to a federal copyright
6 claim. Id.

7 Plaintiff has not alleged any extra element in her
8 misappropriation claim that could save it from preemption.
9 Common law misappropriation "is normally invoked in an effort to
10 protect something of value not otherwise covered by patent or
11 copyright law, trade secret law, breach of confidential
12 relationship, or some other form of unfair competition." City
13 Solutions, Inc. v. Clear Channel Commc'ns, 365 F.3d 835, 842 (9th
14 Cir. 2004) (quoting U.S. Golf Ass'n v. Arroyo Software Corp., 69
15 Cal. App. 4th 607, 618 (1st Dist. 1999)). The elements of a
16 claim for misappropriation, which plaintiff has practically pled
17 verbatim, are:

18 (a) the plaintiff invested substantial time, skill or
19 money in developing its property; (b) the defendant
20 appropriated and used plaintiff's property at little or
no cost to defendant; (c) the defendant's appropriation
and use of the plaintiff's property was without the
21 authorization or consent of the plaintiff; and (d) the
plaintiff can establish that it has been injured by the
defendant's conduct.

22
23 Arroyo, 69 Cal. App. 4th at 618. Plaintiff's misappropriation
24 claim is based solely on rights equivalent to those granted by
25 the Copyright Act, which grants, inter alia, exclusive rights to
26 reproduce the work, prepare derivative works, and distribute
27 copies. 17 U.S.C. § 106. Since a claim for misappropriation of
28 a work protected by copyright contains no extra element to

1 distinguish it from a copyright infringement claim, it is
2 preempted. See Xerox Corp. v. Apple Computer, Inc., 734 F. Supp.
3 1542, 1550 n.15 (N.D. Cal. 1990) ("State law claims of unfair
4 competition based on misappropriation of copyrighted material are
5 preempted by the Copyright Act." (quoting Del Madera, 820 F.2d at
6 977)).¹¹ Since plaintiff cannot establish a probability of
7 prevailing, the court must grant defendants' special motion to
8 strike plaintiff's misappropriation claim.

9 3. UCL Claim against All Defendants

10 Plaintiff's UCL claim is similarly preempted, and thus
11 she cannot establish a probability of prevailing. The claim is
12 based on a theory of "reverse passing-off," which is essentially
13 equivalent to misappropriation: a defendant passes off the
14 plaintiff's work as the defendant's own work.¹² Xerox Corp., 734
15 F. Supp. at 1550. A claim of reverse passing-off brought under
16 the UCL contains no extra element to distinguish it from
17 copyright infringement, and thus it is preempted by the Copyright
18 Act. Id. at 1550 n.15; see Kodadek, 152 F.3d at 1213 ("[I]f B is
19 selling B's products and representing to the public that they are
20 B's products, a claim by A that B's products replicate A's is a

21
22 ¹¹ Plaintiff essentially concedes that this claim is
23 preempted, but argues that the court should view it as an
24 implied-in-fact contract claim under Weitzenkorn v. Lesser, 40
25 Cal. 2d 778 (1953). This argument fails for two reasons. First,
plaintiff has not pled an implied-in-fact contract, and second,
the existence of such a contract would not affect the preemption
analysis. Thus, giving plaintiff leave to amend would be futile.

26 ¹² Reverse passing-off is different from passing-off, "the
27 selling of a good of one's own creation under the name or
trademark of another," Xerox Corp. v. Apple Computer, Inc., 734
28 F. Supp. 1542, 1550 n.15 (N.D. Cal. 1990), which is not preempted
by the Copyright Act. Id.

1 disguised copyright infringement claim and is preempted." (citing
2 1 Nimmer on Copyright § 1.01[B][1][e] at 1-24, n.110)).

3 Accordingly, the court must grant defendants' special motion to
4 strike plaintiff's UCL claim.

5 IT IS THEREFORE ORDERED that defendants' special motion
6 to strike be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that defendants' motion for
8 judgment on the pleadings be, and the same hereby is, DENIED with
9 respect to plaintiff's claim for copyright infringement.

10 DATED: December 14, 2010

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12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE

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