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8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 ELIJAH SCHKEIBAN, an individual,
13 Plaintiff,

14 v.

15 JAMES CAMERON, an individual;
LIGHTSTORM ENTERTAINMENT,
16 INC., a California corporation;
TWENTIETH CENTURY FOX FILM
17 CORPORATION, a Delaware
corporation; DUNE
18 ENTERTAINMENT LP, a Delaware
limited partnership,

19 Defendants.
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CASE NO. CV 12-0636-R (MANx)
HONORABLE MANUEL L. REAL

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
DISMISS THE SECOND AMENDED
COMPLAINT IN ITS ENTIRETY
PURSUANT TO FED. R. CIV. P.
12(B)(6)**

Time: 10 a.m.
Date: September 17, 2012
Ctm.: 8

1 **I. INTRODUCTION**

2 The Court previously dismissed the original Complaint and the First
 3 Amended Complaint (“FAC”) because Plaintiff failed to allege that Defendants,
 4 creators and distributors of the movie *Avatar*, had access to Plaintiff’s script or
 5 novel, both titled *Bats and Butterflies* (“B&B”), which are the only works Plaintiff
 6 has registered with the Copyright Office, and thus the only works before the Court.
 7 Plaintiff’s Second Amended Complaint (“SAC”) adds no substantive access
 8 allegations, and his Opposition (“Opp.”) mischaracterizes the SAC and rehashes
 9 the meritless arguments that Plaintiff made in response to the previous motions to
 10 dismiss. The SAC is also fatally flawed for a second reason: as a matter of law,
 11 *B&B* and *Avatar* are not substantially similar in expression. Although the Court
 12 did not reach that issue in ruling on the prior motions to dismiss, *B&B*, a story
 13 about a boy who helps a race of butterflies defeat a race of ruthless bats, is nothing
 14 like *Avatar*, a movie about a paraplegic ex-marine who travels to a distant moon to
 15 help a mining conglomerate displace the indigenous population, but instead falls in
 16 love with an alien while inhabiting a genetically-engineered avatar body.¹ For both
 17 of these reasons, the case should be dismissed without leave to amend.

18 **II. ARGUMENT**

19 **A. Plaintiff Has Again Failed to Plead Access.**

20 Plaintiff must state a claim for relief that is “plausible on its face.” *Ashcroft*
 21 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citation omitted). He cannot rely on
 22 “‘naked assertions’ devoid of further ‘factual enhancement.’” *Id.*

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 24 ¹ Plaintiff’s “franchise of [*B&B*] products” (Opp. at 3, 6, 7), which he has not
 25 submitted to the Court (with the possible exception of one image of a character,
 26 Staryna, inserted into page 21 of the Opposition), but which he repeatedly
 27 references and claims to have registered with the Writer’s Guild of America
 (“WGA”), is a red herring. Plaintiff has only applied with the U.S. Copyright
 Office for registrations for his novel and script. *Id.* at 6. Plaintiff cannot sue for
 infringement on registrations issued by the WGA. Thus, only Plaintiff’s novel and
 script are relevant. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010).

1 As the Court previously held, Plaintiff's vague and speculative allegation
 2 that Billy Zane, an individual "in the film industry," "indicated" that he gave a
 3 copy of *B&B* to James Cameron, does not sufficiently plead access. Docket No. 42
 4 at 2-3. Instead, "courts will not infer access simply because a defendant and a third
 5 party worked together on unrelated projects prior to the third party's receipt of the
 6 work. '[A]t a minimum, the dealings between the intermediary and the alleged
 7 copier must involve some overlap in subject matter to permit an inference of
 8 access.'" *Id.* at 2 (citation omitted). Nevertheless, as discussed in Defendants'
 9 Motion ("Mot."), Plaintiff's SAC continues to rely on the same hollow allegation
 10 that Zane "indicated to Schkeiban that [Zane] had given a copy of the work to
 11 Cameron." SAC ¶14.² Now, inexplicably, Plaintiff's Opposition claims that the
 12 SAC alleges that Zane "told" Plaintiff that Zane gave a copy of *B&B* to Cameron.
 13 Opp. at 7 (referring to Plaintiff's purported "allegation that Zane told him, during a
 14 phone conversation on November 18, 2005, that he [gave a copy to Cameron]").
 15 This is a gross mischaracterization of the SAC, which nowhere states that Zane
 16 *told* Plaintiff that Zane gave a copy of *B&B* to Cameron. Plaintiff's inaccurate
 17 characterization of the SAC cannot overcome his failure to meet his pleading
 18 obligations.

19 Plaintiff's attempt to distinguish *Towler v. Sayles*, 76 F.3d 579, 583 (4th Cir.
 20 1996) and *Meta-Film Associates v. MCA, Inc.*, 586 F. Supp. 1346, 1358 (C.D. Cal.
 21 1984) is unavailing for the same reason. Those cases stand for the rule that access
 22 can be shown by proving that a plaintiff gave a copy of his work to a third party
 23 who (i) contributed creative ideas to the defendant or (ii) communicated with the

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 25 ² Plaintiff's SAC does offer a few new allegations, but none of them address the
 26 deficiencies the Court previously identified. Instead, Plaintiff alleges that Zane is
 27 "an actor and producer" who is famous for "a lead acting role in the 1997 movie
Titanic, for which Cameron was the writer and director." SAC ¶13. Plaintiff also
 alleges that Plaintiff met Zane at a party in 2005; called Zane later that year; and
 was told by Zane that "he was still in touch with Cameron." SAC ¶14.

1 defendant regarding overlapping subject matter (*i.e.*, the allegedly infringed or
 2 infringing works at issue). Plaintiff argues that “there is no need to allege that
 3 Zane routinely contributes creative ideas to Cameron when, on its face, the SAC
 4 makes it clear that the communication between Zane and Cameron involved the
 5 allegedly infringed Work.” Opp. at 9. But this argument has no basis in the SAC
 6 itself, which, as discussed above, does not plead that Zane and Cameron
 7 communicated at all regarding *B&B*. Moreover, Plaintiff is simply wrong to assert
 8 that “it would be premature and improper to apply the same ruling as in *Towler*”
 9 until after Plaintiff has had “a chance to uncover substantiating evidence and have
 10 his case be fully heard.” Opp. at 8. Instead, under current pleading standards,
 11 “[p]laintiffs must convince the court, which takes on a gatekeeper function, that
 12 there is a sufficient factual predicate to proceed to the discovery phase of
 13 litigation.” 2-8 MOORE’S FEDERAL PRACTICE - CIVIL §8.04 (2012).

14 Finally, Plaintiff again insists that he does not have to plead access because
 15 *B&B* and *Avatar* are strikingly similar. Opp. at 9. However, the Court’s original
 16 order of dismissal could not have been clearer: “In this case there are sufficient
 17 differences between ‘Bats and Butterflies’ and ‘Avatar’ ... they are not strikingly
 18 similar.” Docket No. 29 at 4. Plaintiff simply ignores the Court’s ruling.

19 To summarize, Plaintiff has now filed three complaints in this action, all of
 20 which fail to provide the necessary factual enhancement. His inability to do so
 21 shows that the Court should dismiss his claims without leave to amend.

22 **B. The Court Can Rule on Substantial Similarity as a Matter of Law.**

23 Plaintiff claims “Defendants’ arguments [regarding substantial similarity] ...
 24 are largely factual, and are therefore improper for a motion to dismiss pursuant to
 25 Rule 12(b)(6).” Opp. at 2. Plaintiff is wrong; “substantial similarity may often be
 26 decided as a matter of law.” *Funky Films, Inc. v. Time Warner Entm’t, Inc.*, 462
 27 F.3d 1072, 1076-77 (9th Cir. 2006) (citation omitted). In fact, the Ninth Circuit

1 has expressly held that a court may rule on substantial similarity when a defendant
 2 moves to dismiss for failure to state a claim and no reasonable juror could find the
 3 works to be substantially similar. *Christianson v. West Pub. Co.*, 149 F.2d 202,
 4 203 (9th Cir. 1945) (“There is ample authority for holding that when the
 5 copyrighted work and the alleged infringement are both before the court, capable
 6 of examination and comparison, non-infringement can be determined on a motion
 7 to dismiss.”). *Accord Peter F. Gaito Arch., LLC v. Simone Dev. Corp.*, 602 F.3d
 8 57, 63-5 (2d Cir. 2010); *Nelson v. PRN Prods.*, 873 F.2d 1141, 1143-44 (8th Cir.),
 9 *cert. denied*, 493 U.S. 994 (1989). Indeed, Defendants cited seven copyright cases
 10 decided by courts in the Ninth Circuit within the last five years that resulted in
 11 dismissals on the pleadings due to lack of substantial similarity. Mot. at 11, n.9.

12 **C. Avatar and B&B Are Not Substantially Similar.**

13 The most recent Ninth Circuit cases on substantial similarity make it
 14 abundantly clear that comparisons of abstract similarities taken out of context do
 15 not suffice where differences exist between the works at the level of protected
 16 expression.³ *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 626 (9th Cir.
 17 2010); *Funky Films*, 462 F.3d at 1078-79; *Bissoon-Dath v. Sony Comp. Entm’t*
 18 *Am., Inc.*, 694 F. Supp. 2d 1071, 1078 (N.D. Cal. 2010), *aff’d and adopted by*, 653
 19 F.3d 898 (9th Cir. 2011) (published without opinion). Plaintiff ignores these cases
 20 and lists purportedly similar generalizations that do not satisfy the extrinsic test.

21 ***Plot and Sequence of Events.*** The flaw in Plaintiff’s purported comparison
 22 of *B&B* and *Avatar* is readily apparent from Plaintiff’s discussion of the works’
 23 plots and sequences of events. In every instance, Plaintiff describes expressive
 24

25 ³ Contrary to Plaintiff’s contention (Opp. at 10-11), he cannot rely on the so-called
 26 “inverse ratio rule,” which posits that where a defendant *concedes* access, a
 27 plaintiff’s burden of proving substantial similarity is less stringent. Because
 Defendants vehemently contest Plaintiff’s access allegations, the inverse ratio rule
 is inapplicable. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003).

1 elements of the works that differ significantly, only to pull back from those details
2 to extrapolate abstract, unprotected alleged similarities and erroneously claim that
3 they are legally actionable.⁴ For example:

- 4 • Plaintiff claims that each work’s protagonist “appears weak in the eyes of
5 others.” Opp. at 11 However, Plaintiff concedes that Joshua from *B&B*
6 appears weak in the eyes of others because he is a bullied school boy with a
7 fractured arm. In contrast, Sully from *Avatar* is “a former Marine, crippled and
8 bound to a wheelchair.” *Id.* Even at this basic level of idea, the characters
9 differ. Being seen as weak is not protectable expression.
- 10 • Plaintiff claims that each work involves two villains who are motivated, for
11 different reasons, to attack the good guys. *Id.* at 13-14. To conjure this
12 similarity, Plaintiff compares *B&B* characters Sirius (the king of the bats who
13 wants to kill his long time enemies, the butterflies, in a quest for power) and
14 Sardonique (a bat who descended from royal blood and wants to enslave
15 butterflies to obtain silk) with *Avatar* characters Colonel Quaritch (a mercenary
16 leader who enjoys battle and kills for money) and Parker Selfridge (a wimpy
17 corporate executive who orders Quaritch and his troops to attack the Na’vi in a
18 quest to obtain unobtainium, a valuable mineral). There are no concrete
19 similarities between these sets of characters, their motivations, or the related
20 plots or sequences. Again, bad guys attacking good guys is not copyrightable.
- 21 • Plaintiff claims that each work includes flying on the back of a creature past
22 a waterfall and swinging from trees. *Id.* at 14. But in *B&B*, Gabriella, a
23

24 ⁴ At times, Plaintiff also mischaracterizes the content of the works. For example,
25 Plaintiff claims that Joshua and Sully both encounter the indigenous species of
26 Altair and Pandora, respectively, after finding themselves in the middle of battle
27 scenes. Opp. at 12. This is incorrect. There is no battle in *Avatar* prior to Jake’s
encounter with Neytiri and the rest of the Na’vi. Instead, Jake is attacked by
viperwolves, from which Neytiri saves him. This is distinct from the full-scale
battle between the bats and butterflies in the scene from *B&B* at issue.

1 caterpillar, and Joshua fly on the back of Gabriella's servant, Gus, who is also a
 2 butterfly. In *Avatar*, Sully and Neytiri fly on the backs of banshees, which are
 3 dinosaur-like creatures that the Na'vi have to tame. Moreover, the characters in
 4 *B&B* swing from silk ropes whereas the characters in *Avatar* swing from vines.

5 • Plaintiff claims that each work ends with the protagonist defeating his
 6 enemies and becoming a member of the alien race he has fought alongside. *Id.*
 7 16-17. However, *B&B* concludes with Joshua defeating Sirius and then helping
 8 Gabriella hatch from her cocoon to complete her transformation from a
 9 caterpillar to a butterfly. Next, to become a butterfly himself, Joshua uses a
 10 crystal to seal to his back the wings of a dead butterfly, Queen Galena. In
 11 contrast, Sully defeats Quaritch because Neytiri rescues him. Then, the Na'vi
 12 hold a ceremony in which they harness the power of a sacred tree to transplant
 13 Sully's spirit into his avatar. Again, these elements differ in *expression*.

14 In sum, Plaintiff's attempt to concoct similarities from the "fundamentally different
 15 stories" told in *Avatar* and *B&B* fails as a matter of law. *Benay*, 607 F.3d at 626.

16 **Dialogue.** Plaintiff purports to provide (Opp. at 17-20) examples of
 17 dialogue from *Avatar* that is "near verbatim" to dialogue from *B&B*. None of the
 18 examples satisfies the extrinsic test. *See Olson v. Nat'l Broad. Co.*, 855 F.2d 1446,
 19 1450 (9th Cir. 1988) ("[E]xtended similarity of dialogue [is] needed to support a
 20 claim of substantial similarity."). For example, Plaintiff compares the dialogue
 21 *Everything from my past seems so far away and unrelated to the present. (B&B)*
 22 *with I can barely remember my old life. I'm not sure who I am any more. (Avatar)*
 23 These fragments share only one word: "my," which is clearly not copyright
 24 infringement. Both fragments merely convey a vague sense feeling distant from
 25 the past, which is an unprotected idea. *See Idema v. Dreamworks, Inc.*, 162 F.
 26 Supp. 2d 1129, 1185 n. 67 (C.D. Cal. 2001) ("the 'idea' conveyed by a particular
 27 piece of dialogue" is distinct from "the protectable 'expression' thereof").

1 **Characters.** Plaintiff rehashes (Opp. at 20-22) alleged similarities between
 2 characters from *Avatar* and *B&B* that Defendants already refuted in their Motion.
 3 *See* Mot. at 18-19. However, nothing Plaintiff can say will make Joshua, the 13
 4 year-old school-boy who is magically transported to a distant planet after his
 5 parents die in a car crash, substantially similar to Sully, the 22-year-old paraplegic
 6 ex-marine who travels for years in a cryogenic sleep to Pandora to operate a
 7 genetically engineered avatar designed for his dead brother.⁵ Likewise, Gabriella
 8 (a caterpillar) and Neytiri (a female Na’vi warrior) are not substantially similar just
 9 because each character loses a sister; Queen Galena (a butterfly) and Mo’at (a
 10 Na’vi who is married to the clan’s political leader, Eytukan) are not substantially
 11 similar just because each could be described as a “spiritual leader;” Kokopelli (a
 12 butterfly knight) and Dr. Augustine (a human scientist) are not substantially similar
 13 just because they could be viewed as “advisors;” King Sirius (a bat) and Colonel
 14 Quaritch (a human mercenary) are not substantially similar just because they lead
 15 destructive armies; Sardonique (a female bat with royal ancestors) and Parker
 16 Selfridge (a human corporate executive) are not substantially similar just because
 17 they covet valuables; and Gus (a butterfly servant) and Seze (a dinosaur-like
 18 banshee) are not substantially similar just because people fly on their backs.

19 Moreover, Defendants identified several characters from *Avatar* and *B&B*
 20 that do not have counterparts in the other work. *See* Mot. at 19-20, n. 15. In his
 21 Opposition, Plaintiff does not dispute these differences.

22 **Theme.** As discussed in the Motion, the themes of the works differ. Mot. at
 23 21. *Avatar* expresses a theme of romantic love overcoming obstacles and a theme
 24 of skepticism regarding technological human society whereas *B&B* expresses a
 25 theme of courage overcoming obstacles and a theme of “don’t judge a book by its

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 27 ⁵ In Plaintiff’s script, only Joshua’s father dies. In addition, in the script, Altair is a
 mysterious part of the forest behind Joshua’s house, not a distant planet.

1 cover.” Regardless, even if the works were thematically similar, which they are
 2 not, similarity in theme alone is insufficient to establish substantial similarity.
 3 *E.g., Weygand v. CBS, Inc.*, 43 U.S.P.Q.2D (BNA) 1120, 1126-27 (C.D. Cal.
 4 1997). Plaintiff contends (Opp. at 22) each work “tells the story of a wounded
 5 male character, stripped of his only family and without direction in life, who leaves
 6 his earthly home and travels through the cosmos to another planet, where he
 7 befriends the planet’s endogenous species, undergoes significant physical,
 8 spiritual, and personal transformations, defeats those who seek to destroy the
 9 species for personal gain, and ultimately becomes one of the aliens.”⁶ Plaintiff
 10 characterizes his description as “theme,” but it is in fact “plot.” However, these
 11 allegedly similar plot elements are so abstract that, like common literary “themes,”
 12 they too are unprotectible ideas and *scènes à faire* that flow naturally from the
 13 works’ subject matter. *See Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir.
 14 1985) (“[D]epictions of the small miseries of domestic life, romantic frolics at the
 15 beach, and conflicts between ambitious young people on one hand, and
 16 conservative or evil bureaucracies on the other [] are [] unprotectible.”); *Benay*,
 17 607 F.3d at 627 (Themes of “the embittered war veteran, the ‘fish out of water,’
 18 and the clash between modernization and traditions . . . arise naturally from the
 19 premise of an American veteran who travels to Japan to fight the samurai.”).

20 ***Pace and Mood.*** Plaintiff claims that the moods of the works are similar
 21 because both works are “serious action/adventure stor[ies], interspersed with
 22 comedic bits and spiritual elements.” Opp. at 23. This abstract and conclusory
 23 statement ignores the significant differences between the works. *B&B* is a straight-
 24 forward children’s story that lacks the depth and complexity of the moods

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 26 ⁶ In the *B&B* script, Joshua remains a human; in the novel, he becomes a butterfly.
 27 Either way, the work is not substantially similar to *Avatar*, in which Jake merges
 with his genetically engineered Na’vi body.

1 expressed in *Avatar*. See Mot. at 20-21. The works also differ in pace. *Avatar*
2 takes place over a period of months (or years, counting Sully’s time in cryogenic
3 sleep) whereas *B&B* takes place in a matter of days.⁷ Nothing in Plaintiff’s works
4 supports Plaintiff’s claim (Opp. at 23) that *B&B* takes place over months. Instead,
5 *B&B* tells a relatively short story that transpires much more quickly than *Avatar*.

6 **Setting.** In his attempt to identify similar settings from the works, Plaintiff
7 again extrapolates uncopyrightable abstractions from dissimilar concrete
8 expression. See Opp. at 23-24. By way of example:

- 9 • Plaintiff claims that *Altair* is similar to *Pandora* because both contain
10 “valuable natural elements/minerals.” Opp. at 23. However, in *B&B* crystals
11 fall from the sky, and some possess magical powers. In *Avatar*, unobtainium is
12 found underground, requiring strip-mining extraction and possesses no magical
13 powers (humans simply generate energy from it).
- 14 • Plaintiff claims that *Altair* and *Pandora* are both “inhabited by multiple clans
15 of a species.” Opp. at 24. But *Altair* is inhabited by warring bats and
16 butterflies, both of which descended from the same species after a calamitous
17 event. In contrast, *Pandora* is populated by many clans of Na’vi as well as a
18 small population of humans from earth. The Na’vi clans are not at war with
19 each other, and no catastrophe occurred to cause them to mutate.
- 20 • Plaintiff claims that both works begin with the protagonist living in quarters
21 that are “tiny and substandard.” Opp. at 23. But Sully lives on Earth in 2148,
22 in a tiny, studio apartment by himself. Joshua lives with foster parents in a
23 house in the present day. He has a small room where he does his homework.

24 Plaintiff also argues that *Pandora* and *Altair* are similar because both are
25 “old, unique, lush, undeveloped habitable alien planets ...” with tall trees and

26 _____
27 ⁷ In the script, when Joshua returns home after his adventure in *Altair*, his mother
informs him he has only been gone for two hours of real time.

1 glowing plants. These stock elements are not protectable. *See Van v. Cameron*,
 2 No. 10-cv-1051(AJB)(WVG), at 3 (S.D. Cal. Sept. 26, 2011) (slip op. involving
 3 *Avatar*, attached to Docket No. 49) (“Comparisons noting beautiful and colorful
 4 planets away from earth, multiple-leveled homes in trees, scientific facilities, and
 5 ships from earth are not expressions of a particular copyrightable setting. Such
 6 settings are *scènes à faire* and not protected ...”). In addition, the plant life in
 7 *Avatar* is central to the plot and connected to the Na’vi deity, who is made up of all
 8 living things. The Na’vi can also experience their ancestors through a connection
 9 with sacred trees. In contrast, the plants in *B&B* are just window-dressing.

10 ***Alleged “Combination” of Similarities.*** Plaintiff argues (Opp. 10) that
 11 allegedly similar uncopyrightable elements, in combination, satisfy the extrinsic
 12 test. Plaintiff is mistaken. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir.) (“[A]
 13 combination of unprotectable elements is eligible for copyright protection only if
 14 those elements are numerous enough and their selection and arrangement original
 15 enough that their combination constitutes an original work of authorship.”), *cert.*
 16 *denied*, 540 US 983 (2003). Here, “the sequences of elements, and the
 17 relationships between them, are entirely dissimilar.” *Bissoon-Dath*, 694 F. Supp.
 18 2d at 1091. Rather, Plaintiff improperly relies only on “random similarities
 19 scattered throughout the works.” *Cavalier v. Random House, Inc.*, 297 F.3d 815,
 20 825 (9th Cir. 2002). Because Plaintiff cannot allege substantial similarity, the SAC
 21 should be dismissed without leave to amend.

22 **III. CONCLUSION**

23 Defendants respectfully request dismissal without leave to amend.

24 DATED: August 31, 2012

MITCHELL SILBERBERG & KNUPP LLP

25 By: s/ Robert H. Rotstein

26 Robert H. Rotstein
 Attorneys for Defendants