VALLE MAKOFF LLP
JEFFREY B. VALLE (State Bar No. 110060)
jvalle@vallemakoff.com
SUSAN L. KLEIN (State Bar No. 115927)
sklein@vallemakoff.com
11911 San Vicente Blvd., Suite 324
Los Angeles, California 90049
Telephone: (310) 476-0300
Facsimile: (310) 476-0333

Attorneys for Defendants
American Broadcasting Companies, Inc.
and Ayo Davis

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHANNAN LYNETTE WYNN, an individual; PASTOR LESTER EUGENE BARRIE, an individual,

Plaintiffs,

v.

OPRAH G. WINFREY, an individual; HARPO PRODUCTIONS, an Illinois corporation; OWN; OPRAH WINFREY NETWORK, LLC, a Delaware corporation; LIONSGATE ENTERTAINMENT CORPORATION, a Canadian corporation; ABC, INC. dba DISNEY-ABC TELEVISION GROUP, a New York corporation; CRAIG WRIGHT, an individual; AYO DAVIS, an individual; and DOES 1 through 10 inclusive,,

Defendants.

Case No. 2:18-cv-03279-JFW-AFM

DEFENDANTS AMERICAN BROADCASTING COMPANIES, INC. AND AYO DAVIS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND JOINDER IN MOTION TO DISMISS FILED BY DEFENDANTS OPRAH WINFREY, HARPO, OWN, LIONSGATE AND CRAIG WRIGHT

Date: August 6, 2018
Time: 1:30 p.m.
Courtroom: 7A
Judge: Hon. John F. Walter

Complaint filed: April 19, 2018

Trial Date: None Set

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 6, 2018 at 1:30 p.m. or as soon thereafter as this matter may be heard before the Honorable John F. Walter, Courtroom 7A, 350 W. 1st Street, Los Angeles, California 90012, Defendants American Broadcasting Companies, Inc., named incorrectly as ABC, Inc., dba Disney-ABC Television Group ("ABC"), and Ayo Davis ("Davis"), will move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing without leave to amend the Complaint and each of the claims for relief asserted against ABC and Davis filed by plaintiffs Shannan Lynette Wynn and Pastor Lester Eugene Barrie.

This Motion is based on the ground that Plaintiffs' claims for copyright infringement against ABC and Davis, and the claims for breach of implied-in-fact contract (idea theft) and breach of written contract against ABC, fail to state a claim upon which relief can be granted for the following reasons:

1. Plaintiffs' first claim for relief for copyright infringement against ABC and Davis fails because (a) there is no substantial similarity of protected expression between Plaintiffs' treatment and the television show *Greenleaf*, as shown in the Motion to Dismiss filed by Defendants Oprah Winfrey, Harpo Productions, OWN: Oprah Winfrey Network, LLC, Lionsgate Entertainment and Craig Wright (collectively, the "*Greenleaf* Defendants"); (b) Plaintiffs' conclusory allegations against all Defendants together as a group are insufficient; (c) liability for direct infringement must be based on a showing that the Defendants themselves actually used the work in violation of at least one exclusive right granted to copyright holders under 17 U.S.C. § 106 which Plaintiffs have not alleged and cannot allege as to ABC or Davis; (d) Plaintiffs' own allegations establish that any sharing of their treatment with Wright was both encouraged and authorized; (e) absent direct

infringement, Plaintiffs cannot maintain claims for vicarious or contributory copyright infringement; (f) Plaintiffs cannot state a claim for vicarious copyright infringement because they do not and cannot allege that ABC or Davis supervised and had a direct financial interest in any alleged third party copyright infringement; (g) Plaintiffs cannot state a claim for contributory copyright infringement because they do not and cannot allege that ABC or Davis had knowledge of a third party's alleged infringement and either materially contributed to or induced that infringement.

2. Plaintiffs' second claim for relief against ABC for breach of implied-in-fact contract (idea theft) fails because (a) Plaintiffs do not and cannot allege that ABC actually used Plaintiffs' work; and (b) a breach of implied-in-fact contract claim does not survive if the works at issue are not substantially similar.

3. Plaintiffs' third claim for relief against ABC for breach of written contract fails because (a) ABC is not a party to the alleged contract; (b) Plaintiffs' own allegations demonstrate they encouraged and authorized sharing their treatment with Craig Wright; and (c) Plaintiffs have not alleged facts to support the claim that ABC's alleged act in violation of the contract caused them any damage.

ABC and Davis join in the Motion To Dismiss filed by the *Greenleaf* Defendants as to the first claim for relief for copyright infringement and the second claim for relief for breach of implied-in-fact contract (idea theft) which shows there is no substantial similarity between Plaintiffs' treatment and the television show *Greenleaf*, rendering Plaintiffs' entire Complaint deficient as a matter of law. ABC and Davis hereby incorporate by reference the arguments, authorities and evidence submitted with the *Greenleaf* Defendants' Motion.

PRE-MOTION CONFERENCE

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on June 27, 2018.

In addition, and in accordance with this Court's Standing Order paragraph 5 (b), this motion is made following the conference of counsel and is being filed more than two days after the filing of counsels' joint statement. Despite good faith effort by counsel for ABC and Davis, and as is set forth in the joint statement, the parties were unable to reach a resolution that would eliminate the need to bring this motion.

DATED: July 9, 2018

VALLE MAKOFF LLP

By: /s/ *Susan L. Klein*
Susan L. Klein
Attorneys for Defendants
American Broadcasting Companies, Inc.
and Ayo Davis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have sued ABC and Ayo Davis claiming copyright infringement and breach of contract based on the television series *Greenleaf*, even though neither ABC nor Davis have any connection at all to *Greenleaf* -- not creatively and not financially. Nor do Plaintiffs even allege such a connection. This is a frivolous lawsuit against them which should be dismissed.

Plaintiffs Shannon Lynette Wynn and Pastor Lester Eugene Barrie allege that a television series on OWN (the Oprah Winfrey Network) titled *Greenleaf* misappropriates their treatment for their proposed television show titled *Justice & Glory*. They sue the producers, creator, and distributor of *Greenleaf* -- Defendants Oprah Winfrey; OWN; Harpo Productions; Lionsgate; and Craig Wright (hereinafter referred to as the "*Greenleaf* Defendants"). Plaintiffs allege they submitted their treatment for *Justice & Glory* to OWN in 2014.

Plaintiffs also sue ABC and Davis (who works in Casting at ABC), even though the Complaint does not (and cannot) allege that they had or have anything whatsoever to do with *Greenleaf*. Plaintiffs allege that they pitched their ideas to Davis in 2012. But Plaintiffs do not and cannot allege that ABC or Davis used Plaintiffs' work or benefitted from the use of their work in any way. Because Plaintiffs do not and cannot allege that ABC or Davis used their work, or that ABC or Davis created, produced or distributed *Greenleaf*, or have or had any financial connection at all to *Greenleaf*, they cannot maintain their claims against them.

The entirety of Plaintiffs' allegations against ABC and Davis is that Plaintiffs "believe" (and therefore allege on information and belief) that Davis shared their treatment with former ABC producer Craig Wright, who years later (and not with any involvement of ABC or Davis) became one of the producers of

Greenleaf.[1] Even assuming for purposes of this Motion that this allegation is true, it is insufficient to support Plaintiffs' purported claims against ABC and Davis for copyright infringement, and against ABC for breach of implied-in-fact contract (idea theft) and breach of written contract. In addition to the fact that Plaintiffs' treatment and *Greenleaf* are not substantially similar, as the *Greenleaf* Defendants' Motion shows,[2] Plaintiffs have not stated a copyright infringement claim against ABC or Davis because they do not allege ABC or Davis copied their work, transmitted their work to the public, prepared a derivative work, performed their work, or displayed their work -- the rights exclusively granted to copyright holders of written works under the Copyright Act. Nor have they alleged a claim for vicarious or contributory infringement. First, such a claim does not lie where, as here, a plaintiff does not state a claim of direct infringement by a third party. Second, Plaintiffs do not and cannot allege that ABC or Davis supervised, had knowledge of, materially assisted or induced, or financially benefited from the alleged infringement in any way, which are necessary elements for a claim of liability for someone else's alleged infringement under a vicarious or contributory infringement theory.

Similarly, Plaintiffs' claim for breach of implied-in-fact contract (idea theft) against ABC (they do not assert this claim against Davis) fails because Plaintiffs do not and cannot allege that ABC *used* Plaintiff's work, the essential element of such a claim. This claim also cannot survive for the same reason their copyright claim fails – because there is no substantial similarity between *Justice & Glory* and *Greenleaf*.

Finally, Plaintiffs' claim for breach of written contract against ABC fails

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[1] Davis did not disclose Plaintiffs' materials or treatment to Wright, but ABC and Davis understand that for purposes of this motion the Court must accept as true whatever non-conclusory factual allegations Plaintiffs make.

[2] ABC and Davis join in the *Greenleaf* Defendants' Motion on this issue.

because (1) ABC is not a party to, or even mentioned in, the written contract (which is attached to the Complaint); (2) Plaintiffs' own allegations demonstrate they consented to, and indeed wanted, Davis to share their work with Craig Wright; and (3) even if the alleged 2012 disclosure by Davis was not authorized, the allegations in the Complaint do not show this resulted in any damage -- to the contrary, Plaintiffs themselves disclosed the treatment to OWN in 2014, and OWN went on to produce and air *Greenleaf* in 2016 with no involvement at all from ABC or Davis (and none is alleged).

For all these reasons, ABC and Davis do not belong in this lawsuit. Their motion to dismiss should be granted, without leave to amend because the defects in the Complaint cannot be cured.

II. SUMMARY OF ALLEGATIONS IN THE COMPLAINT

The crux of Plaintiffs' Complaint is that they created the concept and a treatment for a television show called *Justice & Glory* and Defendants (lumped together) allegedly stole their work and used it to create the television show *Greenleaf* broadcast on OWN: the Oprah Winfrey Network. The *Greenleaf* Defendants' Motion to Dismiss contains a summary analysis of Plaintiffs' treatment for *Justice & Glory* compared to the television show *Greenleaf.* That summary and the *Greenleaf* Defendants' Motion is incorporated here by reference.

Plaintiffs' additional allegations, to show "access," are that in the Fall of 2014 they submitted their materials and treatment for *Justice & Glory* through an agent to OWN. An in-person meeting with various producers at OWN was set up, but OWN cancelled the meeting and passed on their project after it had received and considered Plaintiffs' submission of *Justice & Glory*. Complaint ("Cmplt") ¶ 23.

As Plaintiffs themselves allege, all Defendants other than ABC and Davis at least have some connection to *Greenleaf.* Defendant Oprah Winfrey is an

executive producer and co-star of *Greenleaf*; her network, defendant OWN, distributes the show; and her production company, defendant Harpo, is credited on the show. *Id.* ¶¶ 9, 10, 11. Defendant Lionsgate produces *Greenleaf*. *Id.* ¶12. Defendant Craig Wright is credited as the writer, creator and executive producer of *Greenleaf*. *Id.* ¶ 14.

Plaintiffs do not allege that ABC or Davis created, produces or distributes *Greenleaf* or has any business or financial connection at all to *Greenleaf*. Nor do they claim that OWN is affiliated with ABC or Davis.

The allegations against ABC and Davis are that in July 2012 -- six years ago -- Plaintiffs sent some version of their treatment to a producer named Efuru Flowers who "put Plaintiffs into contact with Defendant ABC." *Id.* ¶ 24 n.3. They allege Davis, who worked in Casting at ABC (not in Production), signed a confidentiality agreement with Plaintiffs after which they pitched their concepts and treatment for *Justice & Glory* to her. *Id.* ¶ 24. Notably, the agreement they attach as Exhibit A to their Complaint does not mention ABC, or indicate in any way that Davis was acting on behalf of ABC.

According to their own allegations, Plaintiffs themselves indicated on their treatment that their project was in the vein of one of ABC's other shows, *Dirty Sexy Money*, and they allege that when they met with Davis six years ago, Davis said she knew the producer and creator of *Dirty Sexy Money*, Craig Wright. *Id.* ¶ 24. Plaintiffs further allege Davis said she would pass their treatment along to third parties (including Wright) with Plaintiffs' consent if ABC was not interested in it. *Id.* ¶ 28. Davis allegedly "induced" them to provide additional materials to ABC but before any other steps were taken they were informed ABC was not interested in pursuing the project. They allege "on information and belief" that they "believe" Davis sent their materials to Craig Wright "on behalf of Defendant ABC." *Id.* ¶ 24. They also allege that Wright and the other Defendants "accepted Plaintiffs' submission upon the understanding that Plaintiffs would be

compensated if their property was used." *Id.* ¶¶ 21, 28.

Plaintiffs assert three claims against ABC: Copyright infringement, breach of implied-in-fact contract (idea theft) and breach of written contract. They assert one claim, copyright infringement, against Ayo Davis.

The Complaint alleges a list of purported substantial similarities between *Greenleaf* and *Justice & Glory* which, as the *Greenleaf* Defendants explain in great detail, are pure fiction.

Significantly, ***the Complaint does not allege that ABC or Davis has any financial or business relationship of any kind related to the creation, production or distribution of Greenleaf***. Plaintiffs base their claims against ABC and Davis entirely on the thin allegation that even though Plaintiffs themselves disclosed their treatment materials to OWN in 2014, two years before that Plaintiffs disclosed their work to Davis, who worked in Casting for ABC, that ABC passed on their show, but Plaintiffs "believe" Davis shared their materials with Craig Wright, who years later (and after Plaintiffs' disclosure to OWN) created and produced *Greenleaf*. Plaintiffs do not allege any facts by which, even if *Greenleaf* could be considered an infringement (which it is not), it could be traced back to ABC or Davis -- who have no allegations against them beyond 2012 -- rather than to the 2014 disclosure by Plaintiffs themselves to OWN.

III. ARGUMENT

A. Motion To Dismiss Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate "where the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). To withstand a motion to dismiss, "a plaintiff's obligation to provide the 'grounds' of

his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. Specifically, a "'threshold of plausibility must be crossed at the outset before a…case should be permitted to go into its inevitably costly and protracted discovery phase'". *Id.* at 558 (citation omitted).

In addition, while factual allegations in a complaint are assumed true at the motion to dismiss stage, courts are "'not bound to accept as true a legal conclusion couched as a factual allegation,'" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Twombly*, 550 U.S. at 555-56. Thus, "a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Tech., Inc. v. High-Line Med. Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996), citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.). *See also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("'[w]e do not ... necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations'") (citation omitted). And a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-96 (9th Cir.1998); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

B. Plaintiffs Do Not State A Claim For Copyright Infringement

1. Plaintiffs' Conclusory Allegations Against All Defendants As A Group Are Insufficient

Plaintiffs' claim of copyright infringement consists solely of boilerplate bare allegations of direct, contributory and vicarious infringement lumping together all Defendants. Their allegations are as follows:

> "Defendants, and each of them, have directly, contributorily and/or vicariously infringed upon Plaintiff's copyright through their copying, reproduction, distribution, performance, display, publication, creation, broadcast, selling, licensing and other exploitation of Plaintiff's copyrighted materials through their incorporation of it in the show *Greenleaf*. Moreover, Defendants, and each of them, continue to copy, display, distribute, reproduce, perform, publish, create, broadcast, sell, license and exploit said work, infringing upon Plaintiff's intellectual property rights, to this day.

Cmplt ¶ 51. Despite these conclusory allegations, nowhere do Plaintiffs allege any facts to back them up. They do not allege that ABC or Davis has any involvement with *Greenleaf*. Plaintiffs' broad sweeping allegations do not meet their obligation to give each defendant notice of his particular infringing acts. Their bare allegations of copyright infringement against ABC and Davis, devoid of any facts of specific infringing conduct, and lumping all Defendants together without specifying who allegedly did what, are precisely the kind of boilerplate courts have found insufficient to state a copyright claim and survive a motion to dismiss. *See, e.g.*, *ThinkBronze, LLC v. Wise Unicorn Ind. Ltd.*, 2013 WL 12120260, at *10 (C.D. Cal. Feb. 7, 2013) (granting motion to dismiss copyright infringement claim where plaintiff made undifferentiated allegations against "all defendants in the aggregate"); *L.A. Printex Indus., Inc. v. T.J. Maxx of Cal., LLC*, 2010 WL 11519577, at *4 (C.D. Cal. Jan. 11, 2010) (dismissing contributory and

vicarious liability claims for copyright infringement because the allegations were "'formulaic recitation of the elements of a cause of action'" that the Supreme Court rejected in *Twombly*, 550 U.S. at 555").

2. Plaintiffs Do Not Allege That ABC Or Davis Violated Any Exclusive Rights Under The Copyright Act

To survive a motion to dismiss, a claim for copyright infringement must allege: (1) ownership of a valid copyright, and (2) the defendant's copying of protected elements of the copyrighted material. *See, e.g.*, *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).[3] An essential element to establish copying is that "'the works at issue are substantially similar in their protected elements.'" *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1132-33 (C.D. Cal. 2007), quoting *Cavalier*, 297 F.3d at 822.

The *Greenleaf* Defendants in their Motion to Dismiss provide a detailed review of the works at issue, refuting Plaintiffs' self-serving description, and demonstrating there is no legally cognizable similarity between Plaintiffs' treatment and *Greenleaf*, let alone a substantial one. ABC and Davis join in the *Greenleaf* Defendants' Motion, which shows there is no substantial similarity between Plaintiffs' treatment and the television show *Greenleaf*, rendering Plaintiffs' copyright infringement claim deficient as a matter of law. Even without more, Plaintiffs' copyright infringement claim against ABC and Davis should be dismissed on this ground alone, without leave to amend.

But in addition, the claim against ABC and Davis should be dismissed because liability for direct infringement must be based on a showing that the Defendants *themselves* actually used the work in violation of at least one

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[3] "'The word "copying" is shorthand for the infringing of any of the copyright owner's [six] exclusive rights'" under 17 U.S. C. §106. *Range Rd. Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153–54 (9th Cir. 2012), quoting *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir.1989).

exclusive right granted to copyright holders under 17 U.S.C. § 106. *See* 17 U.S.C. § 501(a) (infringement occurs when alleged infringer engages in activity listed in § 106); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (to prove a claim of direct copyright infringement, a plaintiff must show that "the defendant himself violated one or more of the plaintiff's exclusive rights under the Copyright Act").[4] *Totally Her Media v. BWP Media USA, Inc.*, 2015 WL 12659912, at *6 (C.D. Cal. Mar. 24, 2015) (direct copyright infringement claim requires a showing that the defendant himself "'committed the act of copying, displaying or distributing [the] copyrighted content'" (citation omitted)).

It is apparent that Plaintiffs here do not plead any facts to support the allegation that ABC or Davis engaged in any acts of infringement. Plaintiffs certainly cannot be claiming that ABC or Davis "prepared derivative works", or "publicly performed" or "displayed" their work in violation of 17 U.S.C. §106 (2), (4) or (5). And sending materials to Wright, who Plaintiffs themselves allegedly identified to Davis was someone who (as the creator of the show *Dirty, Sexy, Money*) they would want to develop and produce their project (Cmplt ¶¶ 20, 24, 27-28), is not a claim that ABC or Davis "reproduced" their work (§106 (1)),

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[4] 17 U.S.C. §106 provides in pertinent part:

" [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phono records;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;" and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

or "distribute[d] copies…to the public" (§106 (3)), in violation of their rights.

Indeed, it would strain the notion of distribution to the public beyond comprehension if the sharing of a treatment with a proposed producer for the project (which is what is alleged here) constituted "distributing copies of the work ***to the public***" under 17 U.S.C. §106(3) (emphasis added). Although in some instances distribution of copies of a work to a single member of the public can constitute "distribution to the public," the key to the analysis is whether the distribution was effectively made available to the public at large, even if only one member of the public actually received it. For example, if a copyrighted work is offered for sale without authorization from the copyright owner, the fact that only a single sale is made does not mean it was distributed to the public. But the sharing of Plaintiffs' treatment with a potential producer Plaintiffs themselves identified, who they themselves admit and allege was aware he was not free to use it on his own (Cmplt. ¶¶ 21, 28), does not and logically cannot constitute "distribution to the public" if "to the public" is to mean anything. Since in this case the *only* allegation is that ABC and Davis shared Plaintiff's treatment with a potential producer (Wright), there simply is no allegation that ABC or Davis violated any of the exclusive rights under the Copyright Act.[5]

3. Plaintiffs' Own Allegations Establish That Any Sharing Of Their Treatment With Wright Was Both Encouraged and Authorized

Plaintiffs' allegations demonstrate that they wanted Davis to provide their treatment to Wright. They allege that their treatment "specifically mentioned Defendant Wright's show *Dirty Sexy Money* as a comparison show". Cmplt ¶ 27.

[5] Plaintiffs allege they believe Davis shared their treatment with Wright, and try to suggest (without actually alleging it) that Wright then used it to help create *Greenleaf*. Even if that were alleged and were true, that might support a claim of direct copyright infringement against Wright, but not against ABC or Davis.

They even suggest their treatment or "pitch" identified the creator of *Dirty Sexy Money* (i.e. Wright) as a potentially good producer for their show "evidencing an intent to try and engage Defendant Wright. *Id.* see also ¶¶ 20, 21. Plaintiffs also allege that Davis said she knew Wright, who was employed by ABC to produce *Dirty Sexy Money*. *Id.* ¶¶ 24, 27. And they allege that all Defendants (i.e. including Wright) were "acutely aware" "that Plaintiffs would be compensated if their property was used." *Id.* ¶¶ 21, 28.

These allegations, as a whole, demonstrate that Plaintiffs encouraged, desired and had no objection to the sharing of their treatment with Wright. Indeed, it is precisely what they wanted. In the face of their own allegations, Plaintiffs cannot plausibly argue that they had any objection to Davis sharing their treatment with Wright (the producer they wanted, and who they expressly acknowledge was aware he was not free to use it without compensating Plaintiffs). It is axiomatic that authorized distribution is not copyright infringement. *See* *Sony Corp. of America. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) ("anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute…is not an infringer of the copyright with respect to such use"). Thus, even if the sharing of Plaintiffs' treatment with Wright somehow constituted a "distribution to the public," it was authorized in any event.

In sum, even accepting (at the motion to dismiss stage) that Davis provided a copy of the treatment to Wright, that act was not an infringement because:

-- it was not a violation of any of the exclusive rights of the copyright holder;

-- it was not unauthorized;

-- it was not connected to *Greenleaf* (ABC and Davis have nothing to do with *Greenleaf* and Plaintiffs themselves allege they submitted it to *Greenleaf*'s producers two years later, before the production of Greenleaf); and

-- in any event, *Greenleaf* does not infringe the treatment for *Justice & Glory*.

4. Plaintiffs Do Not State A Claim For Vicarious Or Contributory Copyright Infringement

Because Plaintiffs have not stated a claim for direct copyright infringement by the *Greenleaf* Defendants, as set forth in the *Greenleaf* Defendants' Motion to Dismiss, they cannot state a claim for secondary liability against ABC or Davis in the form of vicarious or contributory infringement. Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n. 2 (9th Cir. 2001); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 n.13 (9th Cir. 2007) ("'[s]econdary liability for copyright infringement [such as vicarious or contributory liability] does not exist in the absence of direct infringement by a third party'", citing *Napster*). Even without more, Plaintiffs fail to state a claim against ABC or Davis for this reason.

But, in addition to their failure to state the predicate claim of direct infringement, Plaintiffs also have not alleged a single fact to support a claim of vicarious or contributory infringement against ABC or Davis.

Vicarious infringement is rooted in the agency principles of *respondeat superior*. *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1071 (9th Cir. 2013). To state a claim for vicarious infringement, the plaintiff must allege the defendant had both "'(1) the right and ability to supervise the infringing activity' and (2) 'a direct financial interest' in the activity". *Id.* (citation omitted); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 802 (9th Cir. 2007). Here Plaintiffs allege neither. They have not alleged any facts that ABC or Davis has "the right and ability to supervise" the purported infringing conduct related to *Greenleaf* or has "a direct financial interest" in *Greenleaf*. Nor can they allege any such facts.

Similarly, Plaintiffs' boilerplate allegations do not suffice to state a claim for contributory copyright infringement. Contributory copyright infringement is "'a form of secondary liability with roots in the tort-law concepts of enterprise liability and imputed intent.'" *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 670 (9th Cir. 2017), quoting *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 794–95 (9th Cir. 2007). To state a claim for contributory infringement Plaintiffs must allege that the defendant "'(1) has *knowledge* of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement.'" *Id.* (emphasis added); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, supra* 494 F.3d at 795 (upholding dismissal of contributory and vicarious infringement claims under Rule 12(b) (6) with prejudice).

Plaintiffs cannot overcome the first hurdle to state a claim for vicarious infringement because they have not alleged that ABC or Davis had knowledge of the other defendants' purported infringement. "Knowledge," in this context, "requires more than a generalized knowledge...of the possibility of infringement." *Luvdarts LLC v. AT&T Mobility, LLC, supra*, 710 F.3d at 1072. Nothing in the Complaint even suggests that ABC or Davis had knowledge of purported copyright infringement by the other Defendants so Plaintiffs' claim fails on this ground alone. *Id.*, 710 F.3d at 1073 n. 2 (granting motion to dismiss contributory infringement claim because plaintiff "failed to allege adequately the first prong of contributory liability" that the defendant "had the necessary specific knowledge of infringement"). The last (and only) alleged act by ABC or Davis was in 2012, consisting of merely (allegedly) giving the treatment to a person Plaintiffs were interested in as a potential producer of their material. As the Complaint alleges, Plaintiffs themselves gave the materials to the *Greenleaf* Defendants in 2014. Plaintiffs do not allege any fact showing that ABC or Davis had anything to do with the *Greenleaf* Defendants at that time or afterward, or anything to do with *Greenleaf*. There is no alleged factual basis on which to impose liability on ABC

or Davis.

They also have not alleged facts showing that ABC or Davis materially contributed to or induced the alleged infringement. Even assuming *arguendo* that Davis gave Plaintiffs' materials to Wright as alleged, Plaintiffs do not connect this to the actual alleged "infringement" itself since they do not allege ABC and Davis did this for the purpose, or with knowledge of, an infringement likely occurring and they are not involved with *Greenleaf* in any way.[6]

Again, Plaintiffs' bare allegations of copyright infringement, devoid of any facts of specific infringing conduct, and lumping all Defendants together, are precisely the kind of boilerplate that courts have found insufficient to survive a motion to dismiss. *See, e.g,.* *ThinkBronze, LLC v. Wise Unicorn Ind. Ltd.*, 2013 WL 12120260, at *10 (C.D. Cal. Feb. 7, 2013) (granting motion to dismiss copyright infringement claim where plaintiff made undifferentiated allegations against "all defendants in the aggregate"); *L.A. Printex Indus., Inc. v. T.J. Maxx of Cal., LLC*, 2010 WL 11519577, at *4 (C.D. Cal. Jan. 11, 2010) (dismissing contributory and vicarious copyright infringement claims because the allegations were only "'formulaic recitation of the elements of a cause of action" rejected by the Supreme Court in *Twombly*); *Muench Photography, Inc. v. Pearson Educ., Inc.*, 2013 WL 6172953, at *6 (N.D. Cal. Nov. 25, 2013) (dismissing contributory

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[6] The "material contribution" or "inducement" requirement is significant and has to connect defendant's intentional conduct with the alleged infringement itself. In *Metro–Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.*, the Supreme Court adopted from patent law the concept of "inducement" and found that "[o]ne infringes contributorily by *intentionally* inducing or encouraging direct infringement." 545 U.S. 913, 930 (2005) (emphasis added); *see also* *Perfect 10, Inc. v. Amazon.com, Inc*, 508 F.3d 1146, 1171 (9th Cir. 2007) ("an actor may be contributorily liable [under *Grokster*] for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement"); *Perfect 10, Inc. v. Visa Int'l, supra* 494 F.3d at 796 (upholding dismissal with prejudice of contributory infringement claim against credit card companies for processing credit card payments finding they "cannot be said to materially contribute to the infringement…because they have no direct connection to that infringement").

infringement claim based on "information and belief" allegations and "conclusory allegations"); *Drive-In Music Co., Inc. v. Sony Music Entm't*, 2011 WL 13217236, at *4 (C.D. Cal. Apr. 18, 2011) (granting motion to dismiss finding plaintiff "cannot salvage its claim simply by lumping Universal into its generic definition of defendants").

Since Plaintiffs cannot allege any facts to support a claim of copyright infringement, their first claim for relief should be dismissed without leave to amend because the defects cannot be cured. *See, e.g.*, *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (dismissal without leave to amend proper "where no amendment would have been able to cure" the defect); *Leadsinger, Inc. v. BMG Music Publ'g*, 429 F. Supp. 2d 1190, 1197 (C.D. Cal. 2005) (dismissing complaint without leave to amend where "amendment would be futile"); *Thomas v. Walt Disney Co.*, 2008 WL 425647, at *9 (N.D. Cal. Feb. 14, 2008), aff'd, 337 F. App'x 694 (9th Cir. 2009) (dismissing copyright infringement claim with prejudice because amendment would be futile where dismissal based on comparison of the works themselves and not on plaintiff's pleadings); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010) (dismissing copyright claim and state law claims with prejudice since the defects could not be cured by amendment); *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068 (9th Cir. 2013) (upholding dismissal of plaintiff's copyright infringement claims with prejudice); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 810 (9th Cir. 2007) (upholding dismissal with prejudice of all claims).

C. Plaintiffs Have Not Stated A Claim For Breach Of Implied-In Fact Contract

Plaintiffs' claim of breach of implied-in-fact-contract (idea theft) against ABC is premised on the allegation that ABC agreed by accepting Plaintiffs' materials not to use them without compensating Plaintiffs. Cmplt. ¶ 59. Notably,

Plaintiffs' allegations do not show they actually submitted their materials to ABC -- as opposed to Davis, individually, who is not named as a defendant in this claim. That in itself is enough to defeat their claim. But even beyond that, their claim cannot survive because they do not allege facts to support the basic element of the claim: that ABC actually *used* Plaintiffs' work.

To state a claim for breach of implied-in-fact contract, a plaintiff must allege the defendant "found the ideas valuable and *actually used* them -- that is, the defendants based their work substantially on the plaintiffs' ideas, rather than on their own ideas or ideas from other sources." *Spinner v. American Broadcasting Companies*, 215 Cal. App. 4th 172, 184 (2013) (emphasis in original); *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010) (to state a claim for breach of an implied-in-fact contract based on the submission of a screenplay, a plaintiff must allege that defendant actually used the screenplay); *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1191 (9th Cir. 2017) (same).

Plaintiffs' own allegations recognize this law, alleging that the implied contract required Plaintiffs to be compensated if Defendants "*used* any of [Plaintiffs'] ideas or materials in a television show or otherwise." Cmplt. ¶ 57 (emphasis added).

But there are no allegations that ABC "used" Plaintiffs' work, other than conclusory allegations that "all defendants" used Plaintiffs' materials. The factual allegations in the Complaint belie this non-specific conclusory allegation, and show that ABC did not use any of Plaintiffs' ideas or materials, since ABC is not alleged to be in any way involved with *Greenleaf*.

There is no factual allegation that ABC or Davis had anything to do with *Greenleaf* at any time whatsoever – and the alleged use in *Greenleaf* is the only use alleged in the Complaint. This claim should be dismissed without leave to amend for this reason alone.

In addition, as the *Greenleaf* Defendants explain in their motion in which ABC and Davis join, a breach of implied-in-fact contract claim does not survive if the works at issue are not substantially similar. *Ryder v. Lightstorm Entertainment, Inc.*, 246 Cal. App. 4th 1064, 1073 (2016) ("'The requirement of substantial similarity for implied-in-fact contract claims "aligns this field with copyright infringement…[and] also means that copying less than substantial material is non-actionable"'", quoting *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620, 630 (9th Cir. 2010)). If the *Greenleaf* Defendants did not breach because *Greenleaf* did not use any ideas from the treatment, then *a fortiori* ABC -- which had nothing to do with *Greenleaf* -- could not have breached.

D. Plaintiffs Have Failed To State A Claim for Breach Of Written Contract

1. ABC Is Not A Party To The Contract

Plaintiffs attach as Exhibit A the agreement upon which their breach of written contract claim is based. As is clear from the agreement itself, ABC is not a party to this contract. The contracting party is Ayo Davis, referred to as "the recipient." And only the recipient agrees not to disclose the materials submitted pursuant to the contract. See Ex. A, paragraph 4 ("The recipient agrees not to disclose…").

An essential element of a claim for breach of contract is the existence of a contract between the parties. It is axiomatic that only parties to a contract can be liable for breach of that contract. *Ng v. Wells Fargo Foothill LLC*, 2013 WL 12125565, at *3 (C.D. Cal. Mar. 14, 2013) (dismissing breach of contract claim where the complaint failed to allege defendants were parties to the agreement explaining that "'[a]s a general matter, a non-party, or nonsignatory, to a contract is not liable for a breach of that contract'") (citation omitted); *F.B.T. Prods., LLC v. Aftermath Records*, 827 F. Supp. 2d 1092, 1104 (C.D. Cal. 2011) ("a contract cannot bind a nonparty");

(2002) ("It goes without saying that a contract cannot bind a nonparty").

Obviously aware of this fundamental problem, Plaintiffs rely on Exhibit B, an email between not Plaintiffs but producer Efuru Flowers (who is not affiliated with ABC) and Nate Reeves, an ABC employee, to try to show that Davis was acting "on behalf of ABC" when she signed the agreement. The email establishes no such thing and is inconsistent with the contract language itself, which lists Davis alone as the contracting party and nowhere even mentions ABC.

Because the written contract attached to the Complaint shows ABC was not a party to that agreement, Plaintiffs' conclusory allegations to the contrary are unavailing. The court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998) (upholding dismissal with prejudice for failure to state a claim); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir.), *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001) (upholding dismissal of plaintiff's claim because the attachments to the complaint contradicted and proved fatal to his allegations); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1146 (9th Cir. 2003) (upholding dismissal of copyright claims without leave to amend based on agreements that contradicted plaintiff's allegations).

2. Plaintiffs' Own Allegations Demonstrate They Consented To Sharing Their Treatment With Craig Wright

Even accepting as true Plaintiffs' allegation on information and belief that Davis shared Plaintiffs' treatment with Wright, as explained above Plaintiffs' own allegations demonstrate that they consented to her doing so. Plaintiffs allege they specifically referred to Wright as a good producer for their show in their pitch and treatment; they specifically discussed with Davis that their project was in the vein of *Dirty Sexy Money*, which Wright created and produced for ABC; their project would be perfect for him; their treatment "evidenc[ed] an intent to try and

engage" Wright; Davis said she knew Wright, who was an ABC employee, and that she said she would pass their materials along to him. Cmplt. ¶¶ 20-21, 24, 27, 28. Plaintiffs do not allege, nor could they credibly do so, that they objected to Davis sharing the treatment with Wright which is exactly what Plaintiffs wanted.

Moreover if, as Plaintiffs claim, the agreement was with ABC and not Davis personally, and Wright was an ABC employee (as they also allege), how would it be a breach of the agreement for one ABC representative to share Plaintiffs' treatment or ideas with another ABC representative? It is clear that the alleged sharing of the treatment with Wright would not be a breach of the contract, but wholly consistent with the terms and purpose of the contract and also with Plaintiffs' desires.

3. Plaintiffs Have Not Alleged Causation Or Damages

To state a claim for breach of contract an essential element is "damages *resulting from the breach*". *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060 (2002) (emphasis in original) (causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach, citing *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229, 233 (1997) and Cal. Civ. Code §§ 3300, 3301). Plaintiffs recognize that they would not be damaged at all if Davis simply shared their treatment or concept with Craig Wright. That is why Plaintiffs engage in pure speculation to imply that Davis not only shared their treatment with Craig Wright but that he then took their treatment and used it to create *Greenleaf* for ABC's competitor, OWN. There is no basis whatsoever for this suggestion in the Complaint – and Plaintiffs do not even try to allege this expressly in any event.

Even if Plaintiffs' allegations on "information and belief" that Davis shared their treatment with Wright were accepted as sufficient, and even if this purported sharing were held not to be authorized by Plaintiffs, they have failed to allege how the alleged act caused them any damage. That is because Plaintiffs expressly

allege they independently submitted their treatment and concept to OWN directly, the company that actually produced *Greenleaf*. Cmplt. ¶¶ 23, 27. Having alleged that they directly submitted their treatment to the entity they claim misappropriated it, a separate alleged submission years six years ago to a different company with no connection to *Greenleaf* cannot be the cause of any misappropriation. The direct submission is an independent and superseding cause of any alleged harm to Plaintiffs and warrants the granting of the motion to dismiss their claim. They simply have not connected the alleged breach itself to any alleged damage. *See, e.g.*, *Rich v. Shrader*, 2010 WL 3717373, at *6 (S.D. Cal. Sept. 17, 2010) (granting motion to dismiss plaintiff's contract claim where plaintiff's allegations "identified the intervening event that broke the chain of causation"); *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229, 233 (1997) (upholding sustaining of demurrer without leave to amend because "[c]ausation of damages in contract cases…requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain," and plaintiff's allegations were too speculative); *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 831 (1968) (upholding sustaining of demurrer to contract claims without leave to amend because "a cause of action for breach of contract accrues at the time of the breach" and plaintiff had not alleged facts showing he was damaged by the alleged breach).

Moreover, Plaintiffs specifically allege that each Defendant was aware that if they used Plaintiffs' ideas or concepts they would need to compensate Plaintiffs. Cmplt. ¶¶ 21, 28. In other words, Plaintiffs allege that OWN and Wright were aware they were not free to copy and use Plaintiffs' ideas. Thus, even if Davis shared Plaintiffs' treatment with Wright in connection with the alleged submission to ABC, and even if that sharing was not authorized, Plaintiffs allege that Wright was aware he was not permitted to misappropriate the work without compensating Plaintiffs. If he did so, that would be an independent and

superseding wrongful act for which ABC cannot be held liable (established by Plaintiffs' own allegations). Plaintiffs certainly do not allege, nor could they credibly allege, that Davis provided their treatment to Wright for the purpose of taking it to a competitor and using it against the interests of ABC.

IV. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OF PLAINTIFFS' STATE LAW CLAIMS

If the Court dismisses Plaintiffs' copyright infringement claim, which provides the sole basis for federal jurisdiction in this case, the Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims if either of the two survive. Under 28 U.S.C. § 1367(c)(3) a district court has the discretion to decline to exercise supplemental jurisdiction over a claim where "the district court has dismissed all claims over which it has original jurisdiction." In exercising that discretion, courts consider whether the exercise of supplemental jurisdiction is in the interests of economy, convenience, fairness, and comity. *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). However, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine...will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* at n. 7, citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir.1981) ("[w]hen the state issues apparently predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim").

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V. CONCLUSION

For the foregoing reasons, ABC and Davis respectfully request that the Court grant their motion to dismiss the claims Plaintiffs asserted against them in the Complaint, without leave to amend.

DATED: July 9, 2018

VALLE MAKOFF LLP

By: /s/ *Susan L. Klein*
Susan L. Klein
Attorneys for Defendants American Broadcasting Companies, Inc., and Ayo Davis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes