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11 PUBLISHING CORPORATION

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15
16 PAMELA DUMOND, an individual,
17 Plaintiff,
18 vs.
19 FARRAH REILLY, a/k/a EMMA
20 CHASE, an individual; EMMA CHASE,
CORPORATION, d/b/a EVERAFTER
21 ROMANCE,
22 Defendants.

Case No. 2:19-cv-08922-GW-AGR

**NOTICE OF MOTION AND
MOTION OF ALL DEFENDANTS
TO DISMISS FIRST AMENDED
COMPLAINT**

Date: March 19, 2020
Time: 8:30 a.m.
Crtrm: 9D

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on March 19, 2020 at 8:30 a.m., in Courtroom
3 9D of the United States District Court for the Central District of California, First
4 Street Courthouse, located at 350 W. 1st Street, Los Angeles, California, 90012,
5 Defendants Farrah Reilly, Emma Chase, LLC, Diversion Publishing Corporation
6 (“Diversion”) (collectively, “Defendants”) will and hereby do move to dismiss with
7 prejudice the First Amended Complaint (“FAC”) filed by Plaintiff Pamela DuMond
8 (“Plaintiff”) in its entirety.

9 This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on
10 the following grounds: Plaintiff’s copyright claim fails because there is no
11 substantial similarity of protected expression between the works at issue. *See*
12 Memorandum, Section III.

13 This Motion is based on the Notice of Motion; the attached Memorandum of
14 Points and Authorities; the concurrently-filed Request for Judicial Notice (“RJN”),
15 Notice of Lodging with Exhibits A-B, and Declaration of Cydney Freeman
16 (“Freeman Decl.”) with Exhibits C-I; all other matters of which this Court may take
17 judicial notice; the pleadings, files, and records in this action; and on such other
18 argument as may be heard by this Court.

19 Pursuant to Local Rule 7-3, counsel for Defendants met and conferred with
20 Plaintiff’s counsel on December 11, 2019 and December 19, 2019 regarding the
21 grounds for this motion.

22 DATED: January 24, 2020

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23 By: /s/ Elizabeth A. McNamara
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28 LLC, and DIVERSION PUBLISHING
CORPORATION

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Plaintiff Pamela DuMond is the author of *Part-Time Princess*, a romance novel published in 2014 (“Plaintiff’s Novel”). In this copyright action, she claims that Defendant Farrah Reilly’s *New York Times* bestseller *Royally Screwed* (“Defendants’ Novel”) infringes her work, relying only on a chart of fifteen common words used or other random similarities between the Novels.¹ Under well-established copyright principles, this Court need only look at the works at issue to dispose of Plaintiff’s claim on a motion to dismiss—no other evidence is required. *White v. Twentieth Century Fox Corp.*, 572 F. App’x 475, 477 (9th Cir. 2014). And even a cursory review of the Novels reveals that the works are strikingly dissimilar.

While both Novels involve at the highest and most abstract level a generic plot device—specifically, both riff on *Cinderella*’s trope of rags to riches via royal romance—neither Plaintiff nor anyone else can claim exclusive rights in a basic plot premise that is a fairy tale staple. Copyright law protects only an original expression of this generic concept, and has no application to two Novels that tell entirely different stories. Plaintiff’s Novel is a PG-13 comedy about a broke ex-waitress who lands a high paying job to impersonate a titled lady betrothed to a crown prince, but then finds herself swept up in an increasingly complicated situation as the lady she is impersonating is targeted in a murder plot, and she herself develops feelings for the wrong prince. Defendants’ Novel, in contrast, is a bodice-ripper told alternately from the male and female protagonists’ perspectives. It chronicles the story of a European crown prince under orders from the queen to find a suitable bride who bucks these expectations by falling for an American pie-baking barista, and abdicating the throne to marry her.

¹ Plaintiff also asserts that the Novels “are replete with other [unstated] similarities” that apparently did not merit inclusion in her complaint for copyright infringement. First Amended Complaint (“FAC”) ¶ 16.

1 From these dramatically different stories, Plaintiff’s threadbare claim rests on
2 such trivial commonalities as that both heroes are named “Nicholas” (but otherwise
3 have entirely different names), or there are a few common words (e.g., “pies, shop,
4 open, chocolate” and the like), or both reference modern celebrities and staples of
5 popular culture (e.g., Kardashian, Beyoncé). Yet, to state a claim for copyright
6 infringement, a plaintiff must plausibly allege the works at issue are substantially
7 similar with respect to *protectable* expression. The Court evaluates substantial
8 similarity by filtering out unprotected elements (like ideas and general plot) and
9 generic elements (like common tropes), and compares *only* the works’ original
10 protected expression. *See* Section III, *infra*. Courts in the Ninth Circuit have no
11 trouble dismissing claims like Plaintiff’s, which fail on their face to plead
12 substantial similarity of protected expression, on pre-discovery motions like this
13 one. *See, e.g., Silas v. Home Box Office, Inc.*, 201 F. Supp. 3d 1158, 1171 (C.D.
14 Cal. 2016) (Wu, J.) (granting motion to dismiss copyright claim), *aff’d*, 713 F.
15 App’x 626 (9th Cir. 2018). For these and other reasons discussed below, Plaintiff
16 cannot demonstrate the requisite “substantial similarity” of protected expression
17 between Plaintiff’s Novel and Defendants’ Novel. Consequently, her copyright
18 claim for direct infringement must be dismissed with prejudice.

19 Plaintiff’s tag-along claims for vicarious and contributory copyright
20 infringement must also be dismissed.² These claims cannot survive unless Plaintiff
21 states a claim for direct copyright infringement by a third party, and for the reasons
22 set forth in this Motion, Plaintiff cannot meet that requirement. *See* Section III, n.4,
23 *infra*.

24 Plaintiff’s claims are each fatally deficient as a matter of law. This Court
25 should dismiss the FAC with prejudice in its entirety.

27 ² Plaintiff conclusorily alleges claims for direct, vicarious, and contributory
28 infringement against each Defendant, not even attempting to sort out which party
allegedly did what.

II. STATEMENT OF FACTS

A. The Parties

Plaintiff Pamela DuMond is the author of Plaintiff's Novel (*Part-Time Princess*). Defendant Farrah Reilly is the author of Defendants' Novel (*Royally Screwed*) and other romance novels under her pen name, "Emma Chase." Defendant Diversion published the paperback edition of Defendants' Novel.

B. The Works

Since "a determination of substantial similarity requires a detailed examination of the works themselves," *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1075 (9th Cir. 2006) (quoting *Williams v. Crichton*, 84 F.3d 581, 583 (2d Cir. 1996)), a summary of each of the works at issue follows.³

1. Plaintiff's Novel, *Part-Time Princess*

Plaintiff's Novel, described by the author as a "modern fairytale[]"⁴ is the first in a four-part series chronicling protagonist Lucy Trabbicio's *Cinderella*-style transformation from American cocktail waitress to European royalty. Told from Lucy's first-person perspective, Plaintiff's Novel introduces her as a 21-year old Chicago native recently fired from her job serving drinks in a biker bar. As Lucy pays the bill for her uncle's expensive care in a private psychiatric institution—he

³ When ruling on a motion to dismiss, a court may consider material that properly is the subject of judicial notice, including materials referred to in the complaint that form the basis of the claims, but that are not physically attached to the pleading. *See Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007) (court deciding Rule 12(b)(6) motion may consider "documents incorporated into the complaint by reference"); *Knieval v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (12(b)(6) motion properly granted by considering web pages referred to in the complaint and attached to defendant's motion). Here, the FAC relies on the contents of both Plaintiff's Novel and Defendants' Novel. FAC ¶ 14. Accordingly, the Defendants are submitting for the Court's review a copy of each novel. *See* Request for Judicial Notice (filed concurrently), Freeman Decl. Exs. A, B.

⁴ *See* Pamela DuMond Author Profile, *GoodReads.com*, available at https://www.goodreads.com/author/show/4430293.Pamela_DuMond.

1 was traumatized in the motorcycle accident that killed Lucy’s parents—she quickly
2 finds a new job.

3 After answering a mysterious online posting, Lucy is hired to impersonate
4 Lady Elizabeth Billingsley of the fictitious country of Fredonia for “ten days tops”
5 while Elizabeth attends to some unspecified personal business in the U.S. While
6 undercover, Lucy must maintain the affection of the Crown Prince of Fredonia, to
7 whom Elizabeth is betrothed in order to seal a business deal between their families.
8 In a *My Fair Lady*-esque segment of the book, Lucy is buffeted through an
9 expensive makeover, a crash course in high-society etiquette, and an immersive
10 briefing on the details of Elizabeth’s life before jetting off to Fredonia.

11 The flight to Europe immediately tests Lucy’s impersonation skills, as she
12 encounters the second-born prince of Fredonia, Nicholas “Nick” Frederick Timmel,
13 with whom Elizabeth has been having an affair—and who was not mentioned at all
14 in Lucy’s training. Although she finds herself personally attracted to Nick as well,
15 Lucy must focus on Cristoph, as he officially proposes to Elizabeth earlier than
16 planned. Still undercover, Lucy endures interminable wedding planning, media
17 attention, and bachelorette party hijinks with Elizabeth’s “Ladies in Waiting,” who
18 continually reveal that Elizabeth’s past is far more scandalous than Lucy was told.
19 Lucy’s unawareness of her past escapades—which she explains away due to a
20 recent head injury—is played for laughs throughout the book. Lucy’s efforts to
21 dodge Cristoph’s attempts to consummate his and Elizabeth’s relationship also
22 receives comedic treatment.

23 In an unexpected turn, Nick rescues Lucy from a murder attempt at the hands
24 of the mother of Cristoph’s ex-girlfriend, prompting the couple to confess their
25 love. After their implied (but not explicitly described) sexual encounter, Nick
26 agrees that the woman he still believes is Elizabeth must marry his brother, because
27 the wedding will seal the business deal necessary to pay off Fredonia’s royal debts.
28

1 On the eve of the wedding, Lucy learns that Elizabeth is never coming
 2 back—she fell in love with an American, is pregnant with twins, and plans to stay
 3 in the United States. Elizabeth’s assistants and her Ladies—who have sussed out
 4 that Lucy is an imposter, but prefer her to the real Elizabeth—convince her to stay
 5 in Fredonia, live her life as Elizabeth and go through with the wedding. Lucy
 6 initially agrees, reasoning she has no real ties to Chicago because her only living
 7 family member is institutionalized, but ultimately decides she cannot go through
 8 with the marriage to Cristoph because she is madly in love with Nick. Lucy
 9 dramatically confesses she is an imposter during the wedding, and flees back to
 10 Chicago. Several weeks later, the Ladies-in-Waiting track Lucy down in Chicago
 11 and present her with papers styling her as a royal lady—Lucy apparently captured
 12 the heart of the Fredonian citizens, who petitioned madly for her return. Nick
 13 proposes and Lucy accepts, setting the scene for the sequel.

14 **2. Defendants’ Novel, *Royally Screwed***

15 Described by reviewers as a “sexy fairy tale”,⁵ Defendants’ Novel is the first
 16 installment of Emma Chase’s four-part *Royally* series. The *Royally* books tell
 17 separate but interrelated romance stories involving the royal family of Wessco (a
 18 fictional country in the British Isles), with each work focusing on a different couple.

19 Defendants’ Novel, which is narrated alternately from the perspectives of the
 20 male and female protagonists, opens from the viewpoint of Nicholas Arthur
 21 Frederick Edward Pembroke, Crown Prince of Wessco. Wessco is in crisis due to
 22 mounting unemployment, low wages, and trade disputes, and Nicholas’
 23 grandmother, the Queen, fears Parliament will strip away the monarchy’s ruling
 24 power and convert it to a ceremonial sovereignty. The Queen instructs Nicholas to
 25 travel to New York and retrieve his wayward younger brother, as tabloid coverage
 26

27
 28 ⁵ “Royally Screwed,” [Amazon.com](https://www.amazon.com/Royally-Screwed-Book-1-ebook/dp/B01MEEICTH), available at
<https://www.amazon.com/Royally-Screwed-Book-1-ebook/dp/B01MEEICTH>

1 of Henry’s hard-partying antics is compounding the monarchy’s public relations
2 problems. She also gives Nicholas an ultimatum—find a suitable woman to marry
3 in the next five months, so the royal family can capitalize on the royal wedding for
4 positive media coverage.

5 Annoyed but cognizant of his royal duties, Nicholas plans to use his trip to
6 the United States as a “last hurrah” to bed as many women as possible. His
7 priorities unexpectedly change when he meets Olivia, a feisty New Yorker who
8 runs her family’s beloved but financially struggling pie and coffee shop. As Olivia
9 works hard running the shop to pay the mortgage, put her sister through college and
10 take care of her alcoholic father, she has no time for tabloid gossip and is thus
11 unaware of and unimpressed by Nicholas’ royal status. Intrigued, Nicholas pursues
12 Olivia, who ultimately caves to join him on a date. Nicholas and Olivia fall madly
13 in love, and consummate their relationship, which the novel repeatedly describes in
14 explicit detail. Olivia’s new found celebrity as Nicholas’ companion dramatically
15 increases business at her family’s bakery and their pies become famous, but also
16 earns her hateful online attention.

17 Nicholas’ time in New York is cut short when Henry is arrested after some
18 particularly wild partying, and the princes must return to Wessco to deal with the
19 public relations fallout. Nicholas convinces Olivia to accompany him home.
20 Though initially hesitant to leave her family business, and her family, Olivia agrees
21 to make the trip after Nicholas arranges for his staff to run the bakery in her
22 absence. The Queen is thoroughly displeased that Nicholas has returned with a
23 commoner instead of a suitable fiancée, because Wesconian law prevents the
24 prince from marrying a non-royal commoner. Even though the Queen grows to like
25 Olivia’s spunkiness, she cannot sanction the marriage, as it would be politically
26 unwise to push for a change in the law given the current unrest in the country over
27 the monarchy.

28

1 As the Queen’s deadline for Nicholas’ marriage draws near, Olivia and
2 Nicholas decide she will stay in Wessco as his mistress, while he enters a marriage
3 of convenience with another royal. This plan is derailed when a scandalous story
4 from Nicholas’ teenage years is leaked to the tabloids, and he blames Olivia for the
5 leak after his staff discovers that the mortgage on her family’s store was recently
6 paid off in full. Shaken by Nicholas’ lack of trust, Oliva returns to the United States,
7 but Nicholas quickly discovers it was all a misunderstanding—his best friend plans
8 to launch a pie company, and bought the exclusive rights to Olivia’s family’s
9 famous pies from her father. Devastated, Nicholas publicly abdicates the throne and
10 chases Oliva down in New York City to propose. The Queen grants the couple
11 ceremonial royal titles and the wedding receives enough positive press that political
12 unrest about the royal family is temporarily quashed, allowing the Queen to push
13 through critical legislation to stabilize the economy. Nicholas, free from the weight
14 of his royal responsibilities, lives happily ever after with Olivia.

15 **C. The FAC**

16 Plaintiff brings this action for copyright infringement and bases her claim on
17 a list of fifteen purported similarities between the works. Eight entries on this chart
18 are instances of allegedly similar names, such as “Prince Nicholas Frederick
19 Timmel” (vs. Prince Nicholas Arthur Frederick Edward Pembroke) or “Lizzie” (vs.
20 Livvy). Two are lists of random words that appear in close proximity in both works.
21 Three entries are names of contemporary celebrities and modern famous fictional
22 characters, such as Linda Blair or Lucille Ball. And the last is that both works
23 feature a sentence that includes the word “prostitute.” FAC ¶ 14. The FAC also
24 avers that the novels are “replete with other similarities of identical word use and
25 placement,” *id.* ¶ 16, but fails to identify any such additional similarities.

1 **III. PLAINTIFF’S COPYRIGHT CLAIM FAILS BECAUSE THE WORKS**
 2 **ARE NOT SUBSTANTIALLY SIMILAR**

3 Plaintiff’s claim of copyright infringement claim requires her to prove
 4 “(1) ownership of a valid copyright and (2) copying by the defendant of protectable
 5 elements of the work.” *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999);
 6 *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017);
 7 *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). Where, as here,
 8 there is no allegation or evidence of direct copying, Plaintiff must prove that
 9 Defendants had “access” to Plaintiff’s copyrighted work, and that there is
 10 “substantial similarity” of protected expression between the copyrighted work and
 11 defendants’ work. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir.
 12 2000); *see also Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1225 (C.D.
 13 Cal. 1997). Because the FAC does not plausibly allege substantial similarity,
 14 Plaintiff cannot meet these requirements.⁶

15 **A. The Absence of Substantial Similarity Can Be Determined by the Court**
 16 **on a Motion to Dismiss.**

17 It is well-established a court may compare the works forming the basis of a
 18 copyright-infringement claim and dismiss the claim as a matter of law. As a court in
 19 this district explained, ““there is ample authority for holding that when the
 20 copyrighted work and the alleged infringement are both before the court, capable of
 21 examination and comparison, non-infringement can be determined on a motion to
 22 dismiss.”” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal. 2007)
 23 (quoting *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945)). Indeed,
 24

25 _____
 26 ⁶ Nor has Plaintiff sufficiently alleged facts demonstrating that Defendants
 27 had access to Plaintiff’s Novel. Her allegations of access are limited to the wholly
 28 conclusory statement that “Defendants had access to the Work.” FAC ¶ 17. Such
 “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 conclusory statements” are insufficient to withstand a motion to dismiss. *Ashcroft v.*
Iqbal, 556 U.S. 662, 678 (2009).

1 “[f]or fifty years, courts have followed this rather obvious principle and dismissed
2 copyright claims that fail from the face of the complaint (and in light of all matters
3 properly considered on a motion to dismiss).” *Zella*, 529 F. Supp. 2d at 1130. *See*
4 *also Reflex Media, Inc. v. Pilgrim Studios, Inc.*, 2018 WL 6566561, at *8 (C.D. Cal.
5 Aug. 27, 2018) (Wu, J.) (“A court may dismiss a complaint on a 12(b)(6) motion,
6 however, for failing to satisfy the extrinsic test.”); *Silas*, 201 F. Supp. 3d at 1171
7 (granting motion to dismiss copyright claim); *Heusey v. Emmerich*, 2015 WL
8 12765115, at *3 (C.D. Cal. Apr. 9, 2015) (same), *aff’d*, 692 F. App’x 928 (9th Cir.
9 2017); *Wild v. NBC Universal, Inc.*, 2011 WL 13272427, at *8 (C.D. Cal. June 28,
10 2011) (same), *aff’d*, 513 F. Appx. 640 (9th Cir. 2013).

11 In evaluating whether a plaintiff has stated a plausible copyright claim, it also
12 is proper for the Court “to consider matters subject to judicial notice pursuant to
13 Federal Rule of Evidence 201.” *Zella*, 529 F. Supp. 2d at 1128 (citing *Mir v. Little*
14 *Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988)). These include “generic
15 elements of creative works,” *Zella*, 529 F. Supp. 2d at 1129, and “elements that are
16 common to a given genre,” *Silas*, 201 F. Supp. 3d at 1170. *See, e.g., DuckHole Inc.*
17 *v. NBC Universal Media*, 2013 WL 5797279, at *4 (C.D. Cal. Sept. 6, 2013) (taking
18 judicial notice of generic elements of veterinary-themed sitcoms that “can be
19 verified simply by watching television for any length of time,” including (1)
20 settings of an operating room, exam room, and lobby; (2) pets; (3) a comedic tone;
21 and (4) romantic relationships). *See also* Request for Judicial Notice (“RJN”)
22 (concurrently filed).

23 Here, by comparing Plaintiff’s Novel to Defendants’ Novel, and by
24 considering judicially noticeable facts, this Court can and should find that the two
25 works share—at most—only generic, unprotectable attributes, and do not contain
26 protectable expression that is substantially similar.

27
28

1 **B. The Works Are Not Substantially Similar.**

2 To determine whether there is substantial similarity of protected expression
3 on a motion to dismiss, the Ninth Circuit uses the “extrinsic test,” which focuses on
4 objective ““articulable similarities”” between the works at issue. *Zella*, 529 F. Supp.
5 2d at 1133 (quoting *Funky Films*, 462 F.2d at 1077); *see also Silas*, 201 F. Supp. 3d
6 at 1167 (dismissing under Rule 12(b)(6) for lack of similarity in extrinsic
7 elements).⁷

8 Importantly, in comparing the extrinsic elements of the works, “[c]ourts must
9 filter out and disregard unprotectable elements of a plaintiff’s work and inquire only
10 into whether the protectable elements, standing alone, are substantially similar.”
11 *Silas*, 201 F. Supp. 3d at 1171 (internal brackets and quotation marks omitted)
12 (quoting *Cavalier*, 297 F.3d at 822). *See also Rice v. Fox Broad. Co.*, 330 F.3d
13 1170, 1174 (9th Cir. 2003) (explaining that courts “may place no reliance upon any
14 similarity in expression resulting from unprotectable elements”) (internal quotation
15 marks omitted). After all of the unprotected elements are filtered out, the extrinsic
16 test focuses on whether there are ““articulable similarities between the plot, themes,
17 dialogue, mood, setting, pace, characters, and sequence of events in the two
18 works.”” *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir.
19 1994) (finding no substantial similarity between two works featuring a method of
20 shrinking humans in size, and depicting “a life struggle of kids fighting
21 insurmountable dangers”) (quoting *Berkic v. Crichton*, 751 F.2d 1289, 1292 (9th
22 Cir. 1985)); *Gold Glove Prods. v. Handfield*, 648 F. App’x 679, 680-81 (9th Cir.
23
24
25

26 ⁷ “Intrinsic” similarities—i.e., those similarities of expression subjectively
27 determined from the standpoint of the “ordinary reasonable observer”—are not
28 considered on a motion to dismiss because “[w]ithout extrinsic similarity, a
copyright claim cannot survive [a motion to dismiss].” *Silas*, 201 F. Supp. 3d at
1167, 1171.

1 2016) (extrinsic test not met where “setting, mood, and pace of [the works] are
2 obviously different, as is the dialogue”).

3 Courts repeatedly find that lists of “random similarities scattered throughout
4 the works,” like the chart set out in the FAC alleging fifteen purported incidental
5 similarities, are insufficient to satisfy the extrinsic test. *See Litchfield v. Spielberg*,
6 736 F.2d 1352, 1356 (9th Cir. 1984). Such lists are “*inherently subjective and*
7 *unreliable.*” *Id.* (emphasis added); *accord Cavalier*, 297 F.3d at 825. The
8 skepticism shown in this Circuit is rooted in the *objective* nature of the extrinsic test
9 for substantial similarity, which requires a comparison of “the actual concrete
10 elements that make up the total sequence of events and the relationships between
11 the major characters.” *Berkic*, 761 F.2d at 1293. In other words, the law requires
12 review of the actual expression of the respective works, not Plaintiff’s
13 characterization or itemization of them. “[T]he works themselves, not descriptions
14 or impressions of them, are the real test for claims of infringement.” *Walker v. Time*
15 *Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (cited with approval in *Olson v. Nat’l*
16 *Broad. Co., Inc.*, 855 F.2d 1446, 1451 (9th Cir. 1988)); *Campbell v. Walt Disney*
17 *Co.*, 718 F. Supp. 2d 1108, 1113 (N.D. Cal. 2010) (rejecting allegations of
18 similarity that were “contradicted by the two stories themselves”).

19 Indeed, courts have readily disposed of copyright claims even where the
20 pleaded laundry list of supposed similarities is far more extensive than the one
21 offered by Plaintiff here. *See, e.g., Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1073
22 (2d Cir. 1992) (70-page appendix of purported similarities insufficient to establish
23 substantial similarity); *Gallagher v. Lions Gate Entm’t Inc.*, 2015 WL 12481504, at
24 *14 (C.D. Cal. Sep. 11, 2015) (granting dismissal of complaint based on list of
25 thirty-three “specific scene similarities”). Moreover, because Plaintiff’s list of
26 fifteen purported “similarities” are drawn from the totality of the two works’
27 combined 600 pages renders the list even more unpersuasive, as the Ninth Circuit
28 has explicitly cautioned against relying on minor similarities scattered through

1 lengthy works. *Cavalier*, 297 F.3d at 825 (finding unpersuasive a list of alleged
2 similarities in part because the items on the list were drawn from a combined 280
3 pages of texts between the two works).

4 Applying this Circuit’s test for analyzing substantial similarity, and reading
5 the actual works at issue, only one conclusion can plausibly be reached: Plaintiff’s
6 Novel and Defendants’ Novel are not substantially similar.

7 **1. Any Similarities Between The Works Are Outside The Scope**
8 **of Copyright Protection**

9 In filtering out unprotectable material, “[i]t is an axiom of copyright law that
10 the protection granted to a copyrighted work extends only to the particular
11 expression of the idea and never to the idea itself.” *Sid & Marty Krofft Television*
12 *Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Harper &*
13 *Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“no author may
14 copyright facts or ideas”); 17 U.S.C. § 102. This basic copyright principle has
15 particular resonance when comparing literary works, like here. It is well-established
16 that plot concepts and premises are nothing more than unprotectable “ideas.” *See*
17 *Berkic*, 761 F.2d at 1293 (no protection for premise of “criminal organizations that
18 murder healthy young people, then remove and sell their vital organs to wealthy
19 people in need of organ transplants”).

20 Similarly, courts also filter out so-called *scenes a faire*, or generic plot
21 elements, scenes, and situations that flow naturally or necessarily from a basic plot
22 premise. *Cavalier*, 297 F.3d at 823; *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir.
23 2003) (scenes a faire are forms of expression that are “standard, stock, or common
24 to a particular subject matter or medium.”). For example, in *Benay v. Warner Bros.*
25 *Entm’t, Inc.*, 607 F.3d 620 (9th Cir. 2010), the Ninth Circuit held that where both
26 works shared the same unprotected “basic plot premise” of “an American war
27 veteran [who] travels to Japan in the 1870s to train the Imperial Army in modern
28 Western warfare,” certain scenes that flowed naturally from that shared premise,

1 including “the protagonist sailing into Japan, scenes in the Imperial Palace, scenes
 2 on the Imperial Army’s training grounds, and battle scenes in various places in
 3 Japan,” were outside the scope of copyright protection. *Id.* at 625-26, 628. Likewise,
 4 in *Walker*, 784 F.2d at 50, elements such as “drunks, prostitutes, vermin and derelict
 5 cars” were found unprotectable because they “would appear in any realistic work
 6 about the work of policemen in the South Bronx.” And recently, a court in this
 7 district found that that tropes including “princes,” “castles” and “love” are generic
 8 elements of fairy tales, and are unprotectable. *Abdullah v. Walt Disney Co.*, 2016
 9 WL 5380930, at *5 (C.D. Cal. Mar. 14, 2016), *aff’d*, 714 F. App’x 758 (9th Cir.
 10 2018).

11 Here, Plaintiff’s FAC cobbles together a list of fifteen purported similarities,
 12 which consist mostly of stock elements that appear in innumerable works;
 13 exaggerations or misstatements of the works’ contents; and names common in
 14 English-speaking European counties. FAC ¶ 14.⁸ Such generic elements have no
 15 relevance to the extrinsic test, as they are filtered out. *Cavalier*, 297 F.3d at 822-23.

16 For example, the fact that both works are set in the present day and take place
 17 in English-speaking European countries are fundamentally basic plot premises far
 18 outside the scope of copyright protection. *See* RJN at 5. Then, several of the
 19 purported similarities are nothing more than elements that flow naturally and
 20

21 ⁸ Plaintiff’s list strains to identify purported similarities, several of which
 22 require tremendous leaps in logic. For example, she claims that the passing
 23 reference in Defendants’ Novel to a “Mrs. McGillacutty” “copies” a statement in
 24 Plaintiff’s Novel where the main character is named after Lucille Ball. Plaintiff
 25 reasons that because Lucille Ball is best known for playing fictional character Lucy
 26 Ricardo, whose maiden name was “McGillicuddy,” a single reference to the name
 27 “McGillacutty” constitutes evidence of infringement. FAC ¶ 15. Even putting aside
 28 the “McGillicuddy/McGillacutty” distinction, this type of manufactured similarity
 does not remotely support a finding of infringement. Further, at least one entry on
 the list is inaccurate—Plaintiff pleads that a butler who appears in Defendants’
 Novel is named “David Henry,” but in fact, the butler is simply named David.
 FAC ¶ 15, Freeman Decl. Ex. B, pp. 85, 105, 112, 164.

1 necessarily from these shared unprotectable premises. Indeed, references to modern
 2 celebrities and other famous works from English-language popular culture appear in
 3 an inestimable number of works set in the modern era. FAC ¶ 14; RJN at 6-7.
 4 Works set in the present day also frequently reference famous brands like “Marie
 5 Callender’s.” FAC ¶ 14; RJN at 6. And, royalty-based novels set in Europe
 6 necessarily refer to titled nobles with traditional European names. RJN at 5-6.

7 After these unprotectable elements are filtered out, the Court must compare
 8 what—if anything—is left to determine whether there are substantial similarities.
 9 As the FAC’s woefully thin pleadings foreshadow, once the few paradigmatically
 10 generic similarities it does allege are stripped away, there are simply no articulable
 11 similarities between the two works.

12 **C. Any Remaining Expression Is Not Substantially Similar.**

13 A comparison of the two works’ extrinsic elements (“‘plot, themes, dialogue,
 14 mood, setting, pace, characters, and sequence of events,’” *Kouf*, 16 F.3d at 1045)
 15 reveals that the works are not substantially, or even remotely, similar. As the lack of
 16 substantial similarity is inherent to the works, and does not depend on Plaintiff’s
 17 description of the works, Plaintiff cannot cure the defects in her claim by further
 18 amending her FAC and dismissal should be with prejudice. *See e.g., Silas*, 201 F.
 19 Supp. 3d at 1184 (granting defendant’s motion to dismiss with prejudice where the
 20 works “are not extrinsically similar and no amendment could possibly cure that
 21 defect in Plaintiffs’ case”). Each of the extrinsic elements is discussed in turn.

22 **1. Plot and Sequence of Events**

23 For the purposes of the extrinsic test, “[p]lot’ is defined as the ‘sequence of
 24 events by which the author expresses his theme or idea’ that is sufficiently concrete
 25 to warrant a finding of substantial similarity if it is common in both works.” *Zella*,
 26 529 F. Supp. 2d at 1135 (quoting 4 NIMMER ON COPYRIGHT § 13.03[A][1][b], at 13-
 27 42 (2003)). As “[g]eneral plot ideas are not protected by copyright law,” *Berkic*,
 28 761 F.2d at 1293, the substantial similarity test compares “the actual concrete

1 elements that make up the total sequence of events and the relationships between
2 the major characters,” *id.*, based on “the actual objective details of the works.”
3 *Silas*, 201 F. Supp. 3d at 1173; *accord*, *Kullberg v. Pure Flix Entm’t*, 2016 WL
4 7324155, at *2 (C.D. Cal. Oct. 12, 2016) (while works shared “the general premise
5 of an atheist professor challenging a Christian student’s religious beliefs,” the plots
6 were not substantially similar because they “tell materially different stories”).

7 Here, the plots of Plaintiff’s Novel and Defendants’ Novel are materially
8 different, both overall and with respect to concrete, objective details. As described
9 *supra*, Plaintiff’s Novel tells the story of Lucy, an ex-cocktail waitress who lands a
10 high paying job to impersonate a titled Fredonian lady betrothed to the crown
11 prince, and must navigate a surprise proposal, wedding planning, a scandalous
12 bachelorette party, and even a murder attempt while undercover. Lucy’s efforts to
13 remain undercover are a major plot point, as is her internal conflict over the two
14 princes vying for her affection—the woman she is impersonating is betrothed to
15 Cristoph, but Lucy begins to fall in love with Nick. Lucy’s conflict over the two
16 princes drives the dramatic climax of the story—she realizes she cannot marry
17 Cristoph (undercover or not) due to her feelings for Nick, dramatically halts the
18 wedding to confess her deception, and flees back to Chicago. And, eventually, she
19 lives happily ever after—with the right prince.

20 Defendants’ Novel tells an entirely different story of Wessconian crown
21 prince Nicholas who ignores a directive from the queen to find a suitable royal
22 bride, falls in love with Olivia, a pie-baking barista from New York, and convinces
23 her to leave her family and her business to come to Wessco with him. No one
24 impersonates anyone else, no one is planning a wedding, no one plots a murder, and
25 there is no other prince competing for Olivia’s affection. Instead, the plot focuses
26 on the couple’s details of the physical relationship (a facet of the story absent from
27 Plaintiff’s Novel) and on their struggle to find a solution that allows them to be
28 together in a world that legally prohibits their union—as heir to the throne, Nicholas

1 cannot marry a foreign commoner. Their plan, involving a marriage of convenience,
2 is derailed when Nicholas wrongly accuses Olivia of betrayal and she flees to New
3 York. Nicholas ultimately learns that he was mistaken and that he drove away the
4 love of his life leading to the novel’s major plot twist—Nicholas abdicates the
5 throne so he can be with Olivia.

6 Such materially different stories are only similar at the highest level of
7 abstraction. Although the works share the unprotectable premise of a prince falling
8 in love with a commoner and marrying her—a staple of fairy tales and romance
9 novels (*see* RJN at 7-8)—once this high-level generic concept is removed, it is clear
10 that the two novels have entirely different storylines, shaped by distinct premises
11 and different key events, and lack similarity in their “actual concrete” plot elements.
12 *Berkic*, 761 F.2d at 1293.

13 Indeed, courts routinely fail to find substantial similarity where plots have far
14 more in common than anything remotely present here. For example, in *Funky Films*,
15 462 F.3d at 1081, the Ninth Circuit upheld a finding of no substantial similarity
16 where the works shared “certain plot similarities: the family-run funeral home, the
17 father’s death, and the return of the ‘prodigal son,’ who assists his brother in
18 maintaining the family run business.” *See also Cline v. Reetz-Laiolo*, 329 F. Supp.
19 3d 1000, 1039 (N.D. Cal. 2018) (no substantial similarity of plot where both
20 teenage protagonists were left alone at home while their single mothers went on
21 dates, observed their mothers come home tipsy after the date, were sent to live with
22 their father/father figures after committing burglary, and had an uncomfortable
23 conversation with their father/father figure during a car ride). If these plots
24 commonalities are not substantially similar, it is manifestly clear that the entirely
25 divergent plots of Plaintiff’s Novel and Defendants’ Novel are not either.

26 2. Characters

27 Plaintiff makes no real attempt to claim that the characters in Defendants’
28 Novel bear any resemblance to characters in Plaintiff’s Novel, since they do not.

1 Instead, she relies entirely on assertions that a smattering of mostly minor
 2 characters in the works have similar names.⁹ But bare allegations of analogous
 3 names do not plead substantial similarity, as Ninth Circuit has explicitly found that
 4 “[u]se of the same names does not sufficiently support infringement.” *Cavalier*, 297
 5 F.3d at 828. Even precisely identical names are “insufficient to establish substantial
 6 similarity between the characters.” *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 311
 7 (S.D.N.Y. 1999) (cited approvingly by *Cavalier*, 297 F.3d at 828). Indeed, the
 8 characters at issue in *Hogan* had more in common than anything Plaintiff identifies
 9 in her FAC—both shared the distinctive name “Nicholas Gaunt” and were half-
 10 human, half-vampires—but the court determined they were not substantially
 11 similar. *Id.* at 312. Similarly, the Ninth Circuit recently upheld a decision that
 12 *Frozen*’s Elsa, who possesses magical ice powers and freezes a kingdom using her
 13 powers, was not substantially similar to a character who also possessed a kingdom
 14 using her magical ice powers. *Abdullah*, 2016 WL 5380930, at *5. With this as the
 15 law, it is clear that Plaintiffs’ far more specious allegations of substantial similarity
 16 based on partial overlap between names simply do not pass muster.

17 Furthermore, the pairs of characters highlighted in Plaintiff’s FAC have
 18 “noticeable differences,” which further cut against a finding of similarity. *Silas*, 201
 19 F. Supp. 3d at 1177. This is especially true when a character trait that is not shared
 20 drives the plot of one of the works. *Berkic v. Crichton*, 761 F.2d 1289 (character
 21 whose marriage constituted a “significant part of the story” not similar to character
 22 _____

23 ⁹ Even here, Plaintiff overstates the similarity of the names—“Lizzie,” a
 24 nickname for Elizabeth, bears little resemblance, if any, to “Livvy,” a nickname for
 25 Olivia, and as discussed at note 6, *supra*, no character named “David Henry”
 26 actually appears in Defendants’ Novel. FAC ¶ 15. Furthermore, the Ninth Circuit
 27 has held that characters are not copyrightable unless they are “sufficiently
 28 delineated” and “especially distinctive,” *DC Comics v. Towle*, 802 F.3d 1012,
 1021 (9th Cir. 2015)) (quoting *Rice*, 330 F.3d 1175). Tomas, referenced once in
 passing, is not sufficiently well-defined to be protectable in the first place.
 FAC ¶ 15.

1 whose relationship with her boyfriend was not a major part of the story.). *Id.* at
 2 1293. Here, Prince Nicholas and Prince Nick are the only characters Plaintiff
 3 identifies who share more than a name—they are both royal protagonists—but a
 4 noticeable difference between them is critical to the plot of the Defendants’ Novel.
 5 Nicholas is the crown prince whose future kingly responsibilities drive key plot
 6 points, including his quest to find a suitable bride and his ultimate abdication of the
 7 throne. In Plaintiff’s Novel, Prince Nicholas is second-born, and his royal
 8 responsibilities are far less pressing and accordingly are not important to the story.
 9 The other pairs of characters Plaintiff identifies are even more distinct.¹⁰ Plaintiff
 10 did not plead similarities beyond the characters’ names because she could not—they
 11 so dramatically different that they do not begin to approach substantial similarity.

12 3. Dialogue

13 Copyright law does not protect “fragmentary words and phrases” or “forms
 14 of expression dictated solely at functional considerations.” *Stern v. Does*, 978 F.
 15 Supp. 2d 1031, 1040 (C.D. Cal. 2011) (citation omitted), *aff’d sub nom.*, *Stern v.*
 16 *Weinstein*, 512 F. App’x 701 (9th Cir. 2013). Accordingly, “for a plaintiff to
 17 demonstrate substantial similarity of dialogue, it must show ‘extended similarity of
 18 dialogue.’” *Silas*, 201 F. Supp. 3d at 1181 (quoting *Olson*, 855 F.2d at 1450).
 19 Plaintiff has not done so here. The FAC identifies only a *single instance* of

20 _____
 21 ¹⁰ In Plaintiff’s Novel, Lucy is the main character and protagonist, while in
 22 Defendants’ Novel Lucille is a minor villain introduced in the final third of the
 23 book. FAC ¶ 15. In Plaintiff’s Novel, “Lizzie” is a member of the Fredonian
 24 nobility impersonated by the female protagonist, while “Livvy” is a pie-baking
 25 barista from New York. The Lady Esmeralda in Plaintiff’s novel is a close friend of
 26 the royal lady impersonated by the Princess’ female protagonist who flirts with
 27 nearly every man she encounters, while “Ezzy” (or Lady Esmerelda) in Defendants’
 28 Novel is a friend of the male protagonist and a “committed lesbian.” FAC ¶ 15,
 Freeman Decl. Ex. B at 8. Christoph is the Crown Prince of Fredonia in Plaintiff’s
 Novel; Christopher from Defendants’ Novel is the Queen’s personal assistant.
 David Henry Billingsley is a wealthy member of the Fredonian nobility, David is a
 butler.

1 purportedly similar dialogue. (FAC ¶ 15), which is insufficient to establish
 2 “extended similarity.” *See, e.g., Gallagher*, 2015 WL 12481504 at *10 (three
 3 instances of similar dialogue could not demonstrate “extended
 4 similarity”); *Silas*, 201 F.Supp.3d at 1181 (finding that one instance of
 5 similar dialogue was insufficient to survive motion to dismiss). Moreover, the two
 6 lines quoted—“I don’t want to be a prostitute” and “Because I’m not a prostitute”—
 7 are not even identical, sharing only the words “a prostitute.” Plaintiff cannot
 8 premise a copyright claim on this incredibly brief phrase. *Ets–Hokin v. Skyy Spirits,*
 9 *Inc.*, 225 F.3d 1068, 1081 n.14 (9th Cir. 2000) (“[S]hort phrases or expressions
 10 cannot be copyrighted”) (internal quotation marks and citation omitted).¹¹

11 As the FAC fails to identify any overlapping dialogue, and a comparison of
 12 the two works makes clear that the dialogue is not the same, Plaintiff has not pled
 13 this extrinsic element.

14 4. Setting and Pace

15 Neither the setting nor the pace of the works are substantially similar. The
 16 main events of Plaintiff’s Novel take place over a two-month period, and occur
 17 primarily in Fredonia, a fictitious country in the Alps, with some scenes in Chicago.
 18 The central events in Defendants’ Novel occur over a five-month period and are
 19 split between New York and Wessco, a fictional country in the British Isles. Courts
 20 routinely dismiss cases where the settings have more overlap—indeed even “[t]he
 21 mere fact that the two shows are set in the same city does not give rise to a finding
 22 of substantial similarity of copyrightable expression.” *Silas*, 201 F. Supp. 3d at
 23

24 ¹¹ To the extent Plaintiff identifies other, non-dialogue instances of words in
 25 common (FAC ¶ 14 “penthouse, hand-painted, crystal, marble floor, pies, shop,
 26 open, chocolate, berries, counter”), these single words are not copyrightable. *Ets-*
 27 *Hokin*, 225 F.3d 1081 n. 14. Furthermore, Plaintiff’s attempt to find a handful of
 28 common words that appear on one page or in a chapter does little more than to
 establish the lengths to which Plaintiff goes in to generate a list of “similarities,”
 and does not demonstrate that there is overlapping *dialogue* in the two works.

1 1176. Here, two works without a single setting in common and that are told at
2 different speeds cannot be substantially similar with regard to these two extrinsic
3 elements.

4 **5. Theme and Mood**

5 Plaintiff also fails to allege any similarities between the two novels' theme
6 and mood, and again, the "significant differences" between the two works prevent a
7 finding of substantial similarity. *Silas*, 201 F. Supp. 3d at 1180 (no substantial
8 similarity where there were "significant differences" between the works' moods).
9 Plaintiff's Novel is lighthearted and humorous, befitting its billing on the cover as a
10 "romantic comedy," Freeman Decl. Ex. A, and many scenes are obviously played
11 for laughs. Even a romantic moment between Lucy impersonating Elizabeth and
12 Cristoph is given comedic treatment—Lucy was instructed not to consummate their
13 relationship while undercover, and is forced to send a frantic "911" text to her
14 Ladies-In-Waiting, who burst in and interrupt the couple, abruptly ruining the
15 moment. Significantly, Plaintiff's Novel does not explicitly describe any sexual
16 encounters in this scene, or in any other scene. Although it is strongly implied that
17 Lucy and Nick have sex after he prevents her murder, the actual intercourse is not
18 covered in detail—rather, the scene is set, and then fades to black.¹² This is a sharp
19 contrast to Defendants' Novel, which spills significant ink painstakingly detailing
20 six separate sexual encounters between Olivia and Nicholas. Freeman Decl. Ex. B,
21 pp. 97-99, 107-113, 156-158, 212-215, 233-234, 239. These explicit descriptions of
22 the characters' romantic rendezvous create a more passionate and serious tone, that
23 is quite unlike Plaintiff's Novel's comedic vibe.

24
25 _____
26 ¹² Freeman Decl. Ex. A 274 ("He stopped smiling and gazed into my eyes,
27 his look intense. He peeled my arm away from my breasts. My breath quickened
28 and I lost myself in my own personal fantasy, as the most gorgeous guy in the world
made me feel like I was the only girl in his." [Cut to a scene of Lucy and Nick
drinking coffee.]).

1 At bottom, a review of the two works demonstrates that Plaintiff's Novel is
 2 exceedingly different from Defendants' Novel with respect to every extrinsic
 3 element. Because Plaintiff cannot show that the two works have substantial
 4 similarity of protectable expression, her copyright claim fails as a matter of law, and
 5 should be dismissed with prejudice.¹³

6 IV. CONCLUSION

7 For all the reasons set forth above, this Court should dismiss Plaintiff's First
 8 Amended Complaint with prejudice, and should award Defendants their costs and
 9 reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

10
 11 DATED: January 24, 2020

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12
 13
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15 Attorneys for Defendants
 16 FARRAH REILLY, EMMA CHASE,
 17 LLC, and DIVERSION PUBLISHING
 18 CORPORATION

19
 20
 21 ¹³ Plaintiff's FAC also includes cursory allegations against all the defendants
 22 for contributory and vicarious copyright infringement. FAC ¶ 22. However, a
 23 prerequisite for both claims is a *direct* copyright infringement by a third party.
 24 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 n.13 (9th Cir. 2007)
 25 (“[s]econdary liability for copyright infringement (such as contributory liability)
 26 *does not exist* in the absence of direct infringement by a third party.”) (emphasis
 27 added) (quoting *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1013 n.2 (9th Cir.
 28 2001)); *Tarantino v. Gawker Media*, 2014 WL 2434647, at *3 (C.D. Cal. Apr. 22,
 2014) (“Plaintiff must first establish direct infringement by third parties because
 secondary liability cannot exist in the absence of direct infringement by a third
 party.”). Because Plaintiff's direct copyright infringement claim fails for the reasons
 stated above, her derivative claims for contributory and vicarious copyright
 infringement also fail. *Id.*