

1 ELIZABETH A. MCNAMARA (admitted *pro hac vice*)
lizmcnamara@dwt.com
2 KATHLEEN E. FARLEY (admitted *pro hac vice*)
kathleenfarley@dwt.com
3 DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
4 New York, NY 10020
Telephone: (212) 489-8230
5 Fax: (212) 489-8340

6 CYDNEY SWOFFORD FREEMAN (State Bar No. 315766)
cydneyfreeman@dwt.com
7 DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, 24th Floor
8 Los Angeles, California 90017-2566
Telephone: (213) 633-6800
9 Fax: (213) 633-6899

10 Attorneys for Defendants FARRAH REILLY,
11 EMMA CHASE, LLC, and DIVERSION
12 PUBLISHING CORPORATION

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

15 PAMELA DUMOND, an individual,
16
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

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION
TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

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

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1 expression is substantially similar. And here, a comparison of the Novels
 2 demonstrates that they are *not* similar. *See* Section II.

3 When Plaintiff finally actually engages in the substantial similarity analysis –
 4 the only issue before the Court – it becomes evident that her claim rests on cherry-
 5 picked lists of generic, unprotectable, and often mischaracterized elements scattered
 6 randomly throughout the works at issue. This is precisely the sort of subjective list
 7 that the Ninth Circuit has cautioned courts against relying on to determine
 8 substantial similarity. *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).
 9 *See* Section III.B. When the actual works are considered, not Plaintiff’s
 10 characterization of them, it is clear that Plaintiff’s romantic comedy about a broke
 11 bartender hired to impersonate nobility and seal an engagement and marriage to the
 12 crown prince of a fictional Franco-Germanic European country is substantially
 13 *dissimilar* to Defendants’ bodice-ripper told from both the male and female
 14 protagonists’ perspectives, in which the crown prince of a fictional nation in the
 15 British Isles is ordered to find a suitable bride, but instead abdicates the throne to
 16 sleep with and ultimately marry an American pie-baking barista.

17 In the end, Plaintiff fails to demonstrate the requisite substantial similarity of
 18 protected expression between the two Novels. Accordingly, her copyright claims
 19 must be dismissed with prejudice.

20 **II. COURTS ROUTINELY DISMISS CLAIMS ON THE PLEADINGS**
 21 **WHEN THE WORKS ARE NOT SUBSTANTIALLY SIMILAR**

22 Courts in the Ninth Circuit routinely dismiss copyright infringement cases
 23 where the plaintiff fails to plausibly allege substantial similarity, as determined via
 24 the extrinsic test. *See, e.g., Reflex Media, Inc. v. Pilgrim Studios, Inc.*, 2018 WL
 25 6566561, at *8 (C.D. Cal. Aug. 27, 2018) (Wu, J.) (dismissing complaint for failure
 26 to plead substantial similarity); *Silas v. Home Box Office, Inc.*, 201 F. Supp. 3d
 27 1158, 1171 (C.D. Cal. 2016) (Wu, J.) (same), *aff’d*, 713 F. App’x 626 (9th Cir.
 28 2018); *Heusey v. Emmerich*, 2015 WL 12765115, at *3 (C.D. Cal. Apr. 9, 2015)

1 (same), *aff'd*, 692 F. App'x 928 (9th Cir. 2017); *Wild v. NBC Universal, Inc.*, 2011
2 WL 13272427, at *8 (C.D. Cal. June 28, 2011) (same), *aff'd*, 513 F. App'x 640 (9th
3 Cir. 2013). *See also* Dkt. 27 at 8-10.

4 Despite acknowledging that the Ninth Circuit's extrinsic test governs the
5 determination of whether the two works are substantially similar (Opp. at 11),
6 Plaintiff suggests that the Court should nonetheless skip the analysis under three
7 unsupported theories, each of which disregards established Ninth Circuit law.

8 *First*, Plaintiff contends that a motion to dismiss is somehow inappropriate in
9 this case because Defendants copied her work via software-facilitated "text
10 spinning." Opp. at 12. But the alleged method of copying *does not matter* when
11 the works are not substantially similar. To state a claim for copyright infringement,
12 a plaintiff must plead that (1) she owns a valid copyright in her work, and (2) the
13 defendant copied protected aspects of the work. *Skidmore v. Led Zeppelin*, --- F.3d
14 ----, 2020 WL 1128808, at *8 (9th Cir. Mar. 9, 2020). The Ninth Circuit recently
15 reaffirmed that allegations of copying alone *do not satisfy this second prong*—
16 rather, a plaintiff *still* must plausibly allege that the defendant's copying rendered
17 the two works "substantially similar." *Id.* at *9. Plaintiff's eleventh-hour assertion
18 that Defendants used a complex method of computer-assisted copying as a means to
19 allegedly copy does not suddenly render the two entirely distinct works at issue
20 substantially similar. Plaintiff cannot avoid dismissal by invoking this new theory.¹

21 *Second*, Plaintiff suggests that the Court cannot evaluate substantial similarity
22 without expert testimony (Opp. at 13), but this argument is belied by the many cases
23 dismissing infringement claims for lack of substantial similarity on the pleadings,
24

25 ¹ Plaintiff's argument is akin to a theory repeatedly rejected by courts: that
26 you can show copying by deconstructing the creation process through a review of
27 unpublished drafts of a work. As this Court has observed, "[b]ecause published
28 works cause injury under copyright law, courts consider the final version of [a
work], rather than unpublished scripts." *Silas*, 201 F. Supp. 3d at 1169 (citing
Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1360 (C.D. Cal. 1984)).

1 without any expert testimony. This Court is fully equipped to read and compare
2 two romance novels. Expert testimony is hardly necessary to evaluate extrinsic
3 similarity in a case, like this one, “where the works are targeted at a general
4 audience and deal with subject matter readily understandable by any ordinary
5 person, including the Court.” *Abdullah v. Walt Disney Co.*, 2016 WL 7496125, at
6 *2 n.1 (C.D. Cal. May 31, 2016) (granting motion to dismiss); “[C]ourts routinely
7 disregard expert testimony in conducting the extrinsic test, even where it is
8 otherwise properly before the court[.]” *Shame on You Prods., Inc. v. Banks*, 120 F.
9 Supp. 3d 1123, 1147 (C.D. Cal. 2015) (“Where, as here, the court conducts an
10 extensive analysis of the alleged similarities between [the] works, ... it is not
11 required to consider expert testimony concerning substantial similarity.”), *aff’d*, 690
12 F. App’x 519 (9th Cir. 2017). As in *Abdullah* and *Shame on You*, the Court does
13 not need expert testimony to analyze romance novels targeted to the general public.

14 *Finally*, Plaintiff attempts to duck the substantial similarity analysis by
15 contending that the two novels are just too long and contain too much material for
16 the Court to compare on a motion to dismiss. Invoking the easily compared two
17 maps considered 75 years ago in *Christianson v. West Publishing Co.*, Plaintiff
18 suggests that the Court is somehow incapable of reviewing and comparing two
19 books containing hundreds of pages and “different fonts [and] book dimensions.”
20 Opp. at 12 (citing *Christianson*, 149 F.2d 202, 203 (9th Cir. 1945)). This flies in the
21 face of common sense and established law. Courts in this circuit routinely compare
22 and examine lengthy works and complicated works on a motion to dismiss. *See*,
23 *e.g.*, *Reflex Media*, 2018 WL 6566561, at *6 (comparing multiple episodes of two
24 television series on a motion to dismiss); *Silas*, 201 F. Supp. 3d at 1168 (comparing
25 television series with a motion picture screenplay, trailer, and treatment); *Zindel v.*
26 *Fox Searchlight Pictures*, 2018 WL 3601842, at *5 (C.D. Cal. July 23, 2018)
27 (comparing a play with a film and a novel), *appeal filed*, No. 18-56087 (9th Cir.
28 Feb. 21, 2018); *Cline v. Reetz-Laiolo*, 329 F. Supp. 3d 1000 (N.D. Cal. 2018)

1 (comparing a novel and a screenplay). *See also Rentmeester v. Nike, Inc.*, 883 F.3d
2 1111, 1123 (9th Cir. 2018) (affirming that granting a motion to dismiss may be
3 appropriate whenever both works at issue “are properly before [the court] and thus
4 ‘capable of examination and comparison’”) (citation omitted)). The works before
5 the Court are straightforward romance novels and each may be read in just a few
6 hours. As courts routinely evaluate works like novels targeted to the general public
7 on a motion to dismiss, this Court should do so here.

8 **III. PLAINTIFF’S NOVEL AND DEFENDANTS’ NOVEL ARE NOT** 9 **SUBSTANTIALLY SIMILAR**

10 In response to Defendants’ detailed showing that there is simply no
11 substantial similarity between the Novels, Plaintiff first weakly makes an effort to
12 argue that the protectable elements of the two works are substantially similar,
13 before retreating to the theory that the works are substantially similar due to
14 Plaintiff’s Novel’s “original selection and arrangement of unprotected elements.”
15 Opp. at 21 (quoting *Metcalf v. Bochco*, 294 F.3d 1074, 1074 (9th Cir. 2002)).
16 Neither argument is persuasive and in fact only serves to underscore the inescapable
17 reality that there is simply no substantial similarity between the Novels.²
18
19
20

21 ² Defendants asked this Court to take judicial notice of true and correct
22 physical copies of Plaintiff’s Novel and Defendant’s Novel. *See* Dkt. 28 at 1-3.
23 Plaintiff concedes that these physical copies are accurate and has not opposed
24 Defendants’ Request for Judicial Notice (for the books or the additional generic
25 literary elements identified therein). *See* Dkt. 35 at 2. Instead, Plaintiff
26 inexplicably states that “paper copies of modern romance books are generally
27 regarded as an old-fashioned media” and that “[e]-books and audio books are the
28 modern media for the romance genre.” Opp. at 1. The Court should consider the
paper copies (*see* Defendants’ concurrently filed Objections to Plaintiff’s Request
for Judicial Notice), but whether the Court considers the paper copies or the digital
versions Plaintiff submitted, the end result is the same: the works clearly are not
substantially similar.

1 **A. The Novels’ Protectable Elements Are Not Substantially Similar.**

2 The Ninth Circuit’s extrinsic test requires the Court to filter out unprotected
3 elements – including basic plot ideas and “standard, stock, or common” elements
4 (*Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003)) – and then to compare the
5 works’ “articulable similarities between the plot, themes, dialogue, mood, setting,
6 pace, characters, and sequence of events[.]” *Kouf*, 16 F.3d at 1045. *See also* Dkt.
7 27 at 10-12. Under controlling law, Plaintiff cannot show substantial similarity
8 between the protectable elements of her Novel and Defendants’ Novel.

9 **Plot**

10 In an effort to argue that the Novels’ plots are similar, Plaintiff resorts to a
11 comparison at the highest level of abstraction, essentially averring that they are both
12 similar because the heroines “undergo[] a series of romantic adventures” after
13 meeting her love interest. *Opp.* at 15. Unfortunately, this is the basic premise of
14 essentially every romance novel, and such a generic plot concept is not protectable
15 under copyright law. *See, e.g., Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.
16 1985); *see also* RJN, Dkt. 28 at 7-8. Indeed, Plaintiff’s own summaries make clear
17 that the two works express this unprotectable premise in extraordinarily different
18 ways. In Plaintiff’s Novel, the heroine’s adventure involves taking a job to
19 impersonate Lady Elizabeth, accepting a proposal of marriage from the crown
20 prince while undercover, falling in love with his younger brother, and dramatically
21 revealing that she is an impersonator to the packed church on her wedding day.
22 *Opp.* at 4-6. In Defendants’ Novel, the heroine’s adventure involves falling for
23 Prince Nicholas when he wanders into her family coffee shop in New York,
24 agreeing to travel to his home country and be his mistress while he enters into an
25 arranged marriage with another woman for legal reasons, and then nearly losing
26 him over accusations that she sold the prince out to a tabloid. *Opp.* at 7-9. The
27 “actual concrete elements” that make up the respective plots are dramatically
28

1 different. *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th
2 Cir. 2006).

3 Plaintiff's abstract assertions of similarity ultimately must be discarded. A
4 down-on-her-luck protagonist is a stock character in romance novels, as are
5 characters who are "sad" after leaving their lover, and the inevitable and ultimate
6 professions of love. *See* RJN, Dkt. 28 at 7-8. More troublingly, several of
7 Plaintiff's purported similarities "significantly misrepresent[] the works in multiple
8 ways." *Silas*, 201 F. Supp. 3d at 1173. Thus, for example, Olivia never "freezes"
9 after meeting Nicholas's grandmother. *Opp.* at 16. Prince Nicholas is not engaged,
10 and Olivia never contends she "should have [been told] about [his] engagement."
11 *Id.* Olivia never expresses "homesick[ness]" after a royal party. *Id.* Prince
12 Nicholas's friend does not "buy [Olivia's] place of employment" (he buys the rights
13 to the recipes for her family's pies). *Id.*

14 Over and over, Plaintiff's purported plot similarities are mischaracterizations
15 of one or both of the works at issue, or leave out key differences regarding the
16 context of the scenes. For example:

- 17 • Plaintiff alleges that both works involve the "Heroine/Hero reminisc[ing]
18 about their lives including 'special reporters.[']" *Opp.* at 16. In Plaintiff's
19 Novel, however, Lucy flashes back to a plane flight where she was seated
20 near a reporter (Ex. A at 8); whereas, in Defendants' Novel, Prince Nicholas
21 describes his early life during a television interview (Ex. B at 4).
- 22 • Plaintiff alleges that in both works, the heroine "is offered a lot of money by
23 a Royal Man." *Opp.* at 16. In Plaintiff's Novel, Lady Elizabeth offers Lucy
24 a large sum of money to impersonate her (Ex. A at 25, 38); in marked
25 contrast, however, in Defendants' Novel, Prince Nicholas drunkenly offers
26 Olivia a large sum for sexual favors (Ex. B at 33-34).
- 27 • Plaintiff alleges that in both works, a "Young Woman helps Heroine pick
28 underwear." *Opp.* at 16. Yet, in Plaintiff's Novel, Lucy is given new

1 underwear as part of her new wardrobe to impersonate Lady Elizabeth (Ex. A
 2 at 65-66); in Defendants' Novel, Olivia's sister helps her pick out underwear
 3 for a date with Nicholas (Ex. B at 70).

- 4 • Plaintiff alleges that in both works, the "Hero/Heroine 'flees' a royal
 5 ceremony abandoning royal 'job.'" Opp. at 16. However, one of the key
 6 distinctions between the plots of the two works is that in Plaintiff's Novel,
 7 Lucy flees a wedding after revealing herself as an imposter (Ex. A at 305); in
 8 Defendants' Novel, the prince abdicates the throne to be with Olivia (Ex. B at
 9 287). There is nothing similar in how this abandonment occurs.
- 10 • Perhaps most revealing of her strained efforts, Plaintiff alleges that in both
 11 works, "Heroine munches Cinnamon cereal while Hero comments." Opp. at
 12 16. In Plaintiff's Novel, Lucy eats a cinnamon-raisin granola bar to keep
 13 from fainting after a stressful plane flight (Ex. A at 110); in Defendants'
 14 Novel, Olivia and Nicholas eat Cinnamon Toast Crunch after a sexual
 15 encounter (Ex. B at 118).

16 These examples underscore that in an effort to manufacture any similarities at all,
 17 Plaintiff resorts to twisting reality beyond permissible bounds. The works speak for
 18 themselves, and even a cursory review reveals that their plots are entirely dissimilar
 19 beyond unprotectable, generic premises that must be filtered out. *See also* Dkt. 27
 20 at 14-16.

21 **Dialogue**

22 As Defendants explained in their opening brief, for a plaintiff to demonstrate
 23 substantial similarity of dialogue, it must show "extended similarity of dialogue."
 24 *Silas*, 201 F. Supp 3d at 1181 (citation omitted). "[F]ragmentary words and
 25 phrases" do not count towards any claimed similarities. *Stern v. Does*, 978 F. Supp.
 26 2d 1031, 1040 (C.D. Cal. 2011) (citation omitted), *aff'd sub nom. Stern v.*
 27 *Weinstein*, 512 F. App'x 701 (9th Cir. 2013). Accordingly, Plaintiff's sole example
 28

1 of shared dialogue between the works—the single two-word phrase “a prostitute”
 2 (FAC ¶ 14)—is woefully inadequate. *See also* Dkt. 27 at 18-19.

3 In opposition, Plaintiff attempts to bolster this claim by proffering two
 4 additional examples of similarly unprotected short phrases, but seeks to disguise
 5 this fact through the clever use of ellipses. An actual examination of these passages
 6 in context reveals no similarity. The passages Plaintiff identifies as containing
 7 “similarities in dialogue” (Opp. at 17) are reproduced in full here, with the words
 8 Plaintiff excerpted in her opposition underlined:

Plaintiff’s Novel	Defendants’ Novel
<p>11 “I’ll be right back,” I said. <u>“Must hit the</u> 12 <u>Ladies Room.”</u> “I’m coming with you,” 13 Esmeralda said.” “No, no,” I said. 14 “Some things a girl has to do in private.” 15 “You never had to do that in private 16 before,” she said. “I need to talk to you 17 about the thing.” “You don’t know what 18 I’m doing in private,” I said. “Well 19 whatever it is, you’ve always done it in 20 front of me before. I remember that time 21 in Morocco...” “Yes, yes, I know, but 22 Morocco was the exception to the rule,” 23 I said. <u>“Whatever,” Esmeralda said.</u> 24 “Look. I called—” “Must see a man 25 about a horse,” I said. <u>“Back in a few.”</u> Ex. A at 231.</p>	<p>“<u>I have to head to the little lads’ room.</u>” I look at him over my shoulder. “Okay.” Our eyes meet and I know him well enough to recognize the look burning in his. He wants to kiss me—badly. He stares at my mouth like a starving man. But then he pulls back, looks around the room, remembers where we are. “Ezzy—mind Olivia for me a bit?” “Yeah sure.” She nods and Nicholas walks away. But fifteen minutes later, he still hasn’t come back. <u>And</u> <u>Esmerelda spots</u> a group of friends she hasn’t spoken into “in ages.” With a pat to my arm, <u>she says she’ll be “back in a</u> <u>jiffy”</u> and she heads off to them.” Ex. B at 201-202.</p>
<p>“<u>Don’t leave Fredonia, Lucille. Stay³</u> here, marry Prince Cristoph and have the best life in the world with a million people who already adore you.” Ex. A at 287.</p>	<p>“<u>Don’t go back to New York. Stay.”</u> Ex. B at 244.</p>

27 _____
 28 ³ Plaintiff’s opposition incorrectly and misleadingly places a period here to
 cut off the continued dialogue. Opp. at 17.

1 These passages plainly demonstrate that there is no “extended similarity of
2 dialogue,” *Silas*, 201 F. Supp. 3d at 1181, and Plaintiff stretches her already strained
3 credibility by contending otherwise.

4 **Mood**

5 On this motion, Defendants showed that Plaintiff’s Novel has a comic mood,
6 pointing to numerous scenes that are played for laughs, while Defendants’ Novel
7 has a more passionate mood, due to its focus on explicitly described sexual
8 encounters. Dkt. 27 at 20. Rather than examining the works themselves – the
9 operative point of analysis – Plaintiff turns to how the two Novels were designated
10 by a popular online retailer of the books, noting that they were both placed in
11 “romantic comedy” categories. Opp. at 18. But whether the Novels are placed on
12 adjacent virtual shelves is irrelevant to the actual mood conveyed within them, and
13 a comparison of the two makes clear that one is a PG-13 romantic comedy, while
14 the other is a bodice-ripper that tells an explicit tale of intensely physical romance.

15 **Setting**

16 There is no dispute that Plaintiff’s Novel takes place in Chicago, and in a
17 fictional Franco-Germanic European country; while Defendants’ Novel is set in
18 New York City and in a fictional country in the British Isles. Again, Plaintiff
19 resorts to abstraction to paper over these concrete differences, arguing that the
20 settings are substantially similar because both works take place in a “large
21 American city” and a “fictional European country.” Opp. at 18. But, in fact, the
22 Novels do not have *any* setting in common. As courts in the Ninth Circuit have
23 declined to find substantial similarity of setting even when the works take place in
24 the same city, *e.g.*, *Silas*, 201 F. Supp. 3d at 1176, two works without any overlap in
25
26
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28

1 settings cannot be considered substantially similar with regard to this extrinsic
2 element.⁴

3 Pace

4 Plaintiff insists that the Novels are told at the same pace because the events in
5 both transpire over five months. Opp. at 19. This entirely overlooks that Plaintiff's
6 novel spends 310 of its 324 pages detailing a period of just over two months—
7 Lucy's adventure begins in early June (Ex. A at 30), she travels to Fredonia in July
8 (*id.* at 306), and returns home about a month later. (*Id.* at 310.) The remaining 14
9 pages of the novel skim over the next three months of her life, culminating in her
10 happy reunion with Nick. It is far more accurate to say that the majority of
11 Plaintiff's work takes place over a two month period. *Marcus v. ABC Signature*
12 *Studios, Inc.*, 279 F. Supp. 3d 1056, 1071 (C.D. Cal. 2017) (considering the
13 duration of "the majority" of the action in a work when determining its pace). By
14 contrast, the majority of Defendants' Novel takes place over a five month period.
15 *E.g.*, Ex. B at 260. Furthermore, Defendants' Novel features an epilogue that takes
16 place eight months later. If Plaintiff insists that her Novel takes place over five
17 months because it references a three month period in a rush at the very end, then it
18 is only fair to say that the Epilogue of Defendants' Novel increases its length to 13
19 months. Either way, works' paces are not substantially similar.

20 Characters

21 Plaintiff boldly argues without basis that Defendants failed to explain why
22 the characters identified in the Complaint that have "shockingly similar names"⁵ are
23

24 ⁴ Plaintiff bizarrely argues that the settings are not a scenes-a-faire, observing
25 that Defendants' Novel could have been set anywhere, such as a small American
26 farm town with Olivia traveling to Mexico. Opp. at 18. But this makes no sense.
27 Prince Nicholas would hardly look to party in a small farm town and Olivia could
28 not follow Prince Nicholas to his home in Mexico, where there is no monarchy.
Defendants' Novel rests on Prince Nicholas abdicating the throne so a monarchy is
essential, thus the fictional Wessco.

1 not substantially similar. Opp. at 19. This is false. Defendants explained in detail
 2 why the characters are dramatically different. Dkt. 27 at 17-18. Indeed, “noticeable
 3 differences” between characters cut against a finding that they are substantially
 4 similar. *Silas*, 201 F. Supp. 3d at 1177. Of particular emphasis in any analysis, as
 5 Plaintiff acknowledges, is a review of how the characters interact with other
 6 characters in the works. Opp. at 20 (citing *Hogan v. DC Comics*, 48 F. Supp. 2d
 7 298, 311 (S.D.N.Y. 1999) (cited approvingly by *Cavalier v. Random House, Inc.*,
 8 297 F.3d 815, 828 (9th Cir. 2002))). Here, the characters Plaintiff argues are
 9 similar in fact play very different roles in the Novels, and accordingly interact very
 10 differently with the other characters therein:

- 11 • “David,” a hotel butler referenced in Defendants’ Novel four times in passing
 12 (Ex. B at 85, 105, 112, 164) interacts with Nicholas and Oliva only once
 13 when taking their coats (*id.* at 85). In contrast, in Plaintiff’s Novel, Lord
 14 “David” Henry Billingsley is the father of the royal lady whom the heroine
 15 impersonates, and she interacts with him extensively, sharing several
 16 intimate, emotionally intense conversations with him after she is hospitalized,
 17 and before her wedding. Ex. A at 124, 294.
- 18 • Tomas, the head of the Fredonian Secret Service in Plaintiff’s Novel, is
 19 referenced once in conjunction with the heroine’s appearance at an orphanage
 20 (Ex. A at 222); Tommy, referenced 35 times in Defendants’ Novel is a long-
 21 time member of Nicholas’s personal security team and has a close enough
 22 relationship with Nicholas to offer him romantic advice (Ex. B at 63).
- 23 • Lady Esmeralda, a close friend to the royal lady the heroine impersonates in
 24 Plaintiff’s Novel is a major character in the story and shares intensely
 25 personal conversations with the heroine (*e.g.*, Ex. A at 280); “Ezzy,” a friend
 26

27
 28 ⁵ As Defendants explained in their moving papers, Plaintiff misstates the
 similarity of the names. Dkt. 27 at 17 n.9.

1 of Nicholas's, is referenced in only two scenes in Defendants' Novel and
2 makes conversation with the heroine at a cocktail party (Ex. B at 200).

- 3 • As Plaintiff admits, Lucy in her Novel is the heroine, who is the sole narrator
4 and drives the story by interacting with all other characters referenced. Lucy
5 in the Defendants' Novel, however, is just an old flame of Nicholas's. She
6 appears once at a party and speaks briefly to the heroine. Ex. B at 200.
- 7 • Finally, Nick interacts with the heroine in Plaintiff's Novel as part of a love
8 triangle—the royal lady she is impersonating is betrothed to his older brother,
9 Crown Prince Cristoph. The heroine nearly marries Cristoph, but leaves him
10 at the altar due to her feelings for Nick. Ex. A at 305. In Defendants' Novel,
11 Prince Nicholas is the heroine's sole love interest, and he abdicates his throne
12 to marry her. Ex. B at 287.⁶

13 At bottom, these characters have nothing in common beyond minor
14 similarities in their names, and are not substantially similar. *Cavalier*, 297 F.3d at
15 828.

16 **B. Plaintiff's Selection-and-Arrangement Argument Fails.**

17 Having failed to establish that any protectable elements of Plaintiff's Novel
18 were actually duplicated in Defendants' Novel, Plaintiff in the end contends that the
19 "totality" of common unprotectable elements still merits a finding of substantial
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22 ⁶ See also Dkt. 27 at 18 (further explaining the differences between Plaintiff's
23 Prince Nick and Defendants' Prince Nicholas). Plaintiff's observes that "of all the
24 princes in the world that Defendants could have selected to play the hero, they
25 chose 'Prince Nicholas'" (Opp. at 20), but ignores that Nick/Nicholas is hardly a
26 unique name, as is evident by the countless other romance novels that also feature
27 "Prince Nicholas" as the love interest. See, e.g., RJN, Dkt. 28, at 5-6 (collecting
28 examples). And her attempt to distinguish *Hogan v. DC Comics*, 48 F. Supp. 2d at
311, is unavailing. There, the court failed to find substantial similarity even when
the names at issue were identical and highly original, because of other distinctions
between the characters. Here, the names are even less similar and the characters are
more distinct. As in *Hogan*, the characters here are not similar.

1 similarity. Opp. at 15. Plaintiff hangs this argument on the Ninth Circuit’s decision
 2 in *Metcalf*, 294 F.3d 1069, which repeatedly has been limited to its particular facts.⁷
 3 *Metcalf*’s result was driven by the plaintiff’s showing of a particular and detailed
 4 overlap of a strikingly similar sequence of events, involving nearly identical
 5 characters: in both works at issue in *Metcalf*, a young muscular black surgeon turns
 6 down a lucrative opportunity in private practice to work in the inner-city hospital
 7 near his childhood home and breaks up with his young professional girlfriend to
 8 date a mid-thirties, divorced, childless hospital administrator, all while the
 9 hospital’s reaccreditation bid is opposed by a Hispanic politician. *Metcalf*, 294 F.3d
 10 at 1073-74.

11 Here, Plaintiff offers no comparable chain of concrete characters and events
 12 that are the same in Defendants’ Novel. She cannot state a claim for infringement
 13 on a selection-and-arrangement theory simply by again offering lists of abstract
 14 similarities with no effort to move from the general to the specific. Indeed, *Metcalf*
 15 itself clarifies that a theory based on “random similarities scattered throughout the
 16 works” does *not* pass muster. *Metcalf*, 294 F.3d at 1074-75 (quoting *Cavalier*, 297
 17 F.3d at 825). The Ninth Circuit has made clear that these random, scattered
 18 similarities are insufficient to support a claim of substantial similarity because they
 19 are “inherently subjective and unreliable.” *See Litchfield*, 736 F.2d at 1356.
 20 Rather, “a combination of unprotectable elements is eligible for copyright
 21 protection only if those elements are numerous enough and their selection and
 22 arrangement original enough that their combination constitutes an original work of
 23 authorship.” *Satava*, 323 F.3d at 811 (distinguishing *Metcalf*).

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 25
 26 ⁷ “Courts since *Metcalf* have been reluctant to extend such a claim to
 27 situations where the overlap between the nonprotectable elements were not quite as
 28 significant.” *8th Wonder Entm’t, LLC v. Viacom Int’l, Inc.*, 2016 WL 6882832, at
 *8 (C.D. Cal. Nov. 22, 2016). *Accord Zella*, 529 F. Supp. 2d at 1138 (same;
 collecting cases).

1 Underscoring Plaintiff’s reliance on the most abstract description of the
2 respective works, coupled with random commonalities scattered throughout the
3 works—many of which stretch the definition of similarity to its breaking point—
4 Plaintiff argues that Defendants “stole” her original selection and arrangement of
5 the following sequence of events: heroine travels from her American metro
6 hometown to a fictional European city, later to return home, with a prince in
7 pursuit. Opp. at 21. This argument fails for two reasons.

8 *First*, the sequence of events that Plaintiff purports to have “created” is too
9 generic and abstract to constitute an original selection and arrangement that merits
10 copyright protection. “American woman travels to Europe and is pursued back to
11 her home city by her royal European lover” is no more than an unprotectable plot
12 premise. *See, e.g., Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 625 (9th Cir.
13 2010) (finding unprotectable the “basic plot premise” of “an American war veteran
14 [who] travels to Japan in the 1870s to train the Imperial Army in modern Western
15 warfare”). Plaintiff cannot seriously contend that she owns such a basic plot idea.

16 *Second*, Plaintiff dramatically misstates the Novels’ sequence of events,
17 highlighting only the ones that are remotely similar and conveniently leaving out
18 the radically different series of events that happen in between the three she has
19 highlighted. For example, in Plaintiff’s Novel, in between traveling to Fredonia and
20 returning home, Lucy accepts a proposal of marriage from the Crown Prince, plans
21 a wedding, survives a murder attempt, falls in love with the Crown Prince’s brother,
22 and dramatically reveals herself as an imposter during her televised state wedding.
23 In Defendants’ Novel, the sequence of events between Olivia’s journey to Wessco
24 and her return home to New York City is dramatically different—Olivia and
25 Nicholas plan for her to stay in Wessco as his mistress, but she returns to New York
26 after Nicholas incorrectly blames her for leaking highly personal information about
27 his teenage years to a tabloid. These entirely distinct sequences are in stark contrast
28 to the detailed overlap in plot points and sequence of events that existed in *Metcalfe*.

1 *Metcalf*'s striking and objective similarities do not compare with the abstract,
2 scattered similarities Plaintiff alleges are shared by the works at issue here.

3 Finally, Plaintiff's selection-and-arrangement argument does not gain traction
4 when she observes that the Novels have similar themes and that themes play into the
5 *Metcalf* analysis. Opp. at 17 n.8. This claim is inconsistent with *Metcalf*'s central
6 premise that "the particular sequence in which an author strings a significant number
7 of unprotectable elements can itself be a protectable element." *Id.* at 14 (quoting
8 *Metcalf*, 294 F.3d at 1074). A theme, which Plaintiff agrees is the "unifying or
9 dominant" idea inherent in a given work (Opp. at 16), is not the type of objective
10 elements that are capable of being strung together in a sequence. Unsurprisingly,
11 Plaintiff cites no cases where courts find unprotectable themes contributed to a
12 court's finding of substantial similarity.⁸

13 IV. CONCLUSION

14 One need only read Plaintiff's Novel and Defendants' Novel to surmise that
15 the works are substantially *dissimilar*, and accordingly, that Defendants have not
16 infringed Plaintiff's Novel. For all the reasons set forth above, and on this motion,
17 this Court should dismiss Plaintiff's First Amended Complaint with prejudice, and
18 should award Defendants their costs and reasonable attorneys' fees pursuant to 17
19 U.S.C. § 505, in an amount to be determined by subsequent motion.

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27 ⁸ Plaintiff's opposition does not even address Defendants' arguments against
28 her cursory claims for contributory and vicarious infringement, and accordingly
concedes that those claims must be dismissed along with her direct-infringement
claim. *Compare Opp. with Dkt. 27 at 21 n.13.*

1 DATED: March 26, 2020

2 DAVIS WRIGHT TREMAINE LLP
3 ELIZABETH A. MCNAMARA
4 KATHLEEN E. FARLEY
5 CYDNEY SWOFFORD FREEMAN

6 By: /s/ Elizabeth A. McNamara
7 Elizabeth A. McNamara

8 Attorneys for Defendants
9 FARRAH REILLY, EMMA CHASE,
10 LLC, and DIVERSION PUBLISHING
11 CORPORATION
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