

2023 WL 3034826

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United States District Court, C.D. California.

David FISHER, Plaintiff,

v.

Angela NISSEL et al., Defendants.

Case No.: CV 21-5839-CBM-(KSx)

I

Signed January 20, 2023

Attorneys and Law Firms

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Elaine K. Kim, Mitchell Silberberg and Knupp LLP, Los Angeles, CA, for Defendants.

ORDER RE: DEFENDANTS THE WALT DISNEY COMPANY, ANGELA NISSEL, E. BRIAN DOBBINS, AND KENYA BARRIS'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND ACTION IN THEIR ENTIRETY WITH PREJUDICE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) AND 28 U.S.C. § 1915(E) (2)(B) [77] [JS-6]

CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

*1 The matter before the Court is Defendants The Walt Disney Company ("Disney"), Angela Nissel, E. Brian Dobbins, and Kenya Barris's (collectively, "Defendants' ") Motion to Dismiss Plaintiff's Second Amended Complaint and Action in Their Entirety With Prejudice Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 1915(e)(2)(b). (Dkt. No. 77 (the "Motion").)

I. BACKGROUND

Plaintiff David Fisher filed this copyright infringement action on July 19, 2021 against Defendants Angela Nissel, E. Brian Dobbins, Kenya Barris, ABC Studios, The

Walt Disney Company, Walt Disney Television, and ABC Television Network, Inc. arising from the television show "MIXED-ISH" which Plaintiff alleges infringes on his work "MIXED."¹ The Complaint asserted the following two causes of action against all defendants: 1) copyright infringement, 17 U.S.C. §§ 101 *et seq.*; and 2) conversion. On November 2, 2021, the Court granted The Walt Disney Company's motion to dismiss the original Complaint as follows:

- 1) Plaintiff's copyright infringement claim based on Plaintiff's MIXED Episodes 2 through 5 was dismissed with leave to amend to allege facts demonstrating Plaintiff owns a valid copyright registration for Episodes 2, 3, 4 and 5;
 - 2) Plaintiff's copyright infringement claim based on Plaintiff's MIXED Episode 1 was dismissed with leave to amend to allege sufficient, non-conclusory facts regarding substantial similarity;
 - 3) Plaintiff's conversion claim was dismissed without leave to amend because it is preempted by the Copyright Act since it arises from Defendants' alleged infringement of Plaintiff's MIXED comedy series, and the alleged rights violated which are the basis of Plaintiff's conversion claim are equivalent to the exclusive rights contained in 17 U.S.C. § 106; and
 - 4) To the extent Plaintiff asserted a claim for false representation, that claim was dismissed without leave to amend because it is preempted by the Copyright Act since it arises from Defendants' alleged infringement of Plaintiff's MIXED comedy series and the alleged rights violated which are the basis of the false representation claim are equivalent to the exclusive rights contained in 17 U.S.C. § 106, and it is precluded pursuant to *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).
- (Dkt. No. 30.)

¹ Plaintiff was *pro se* when he commenced this action.

On December 2, 2021, Plaintiff (*pro se*) filed the First Amended Complaint ("FAC") asserting a single cause of action for copyright infringement against Defendants Nissel, Dobbins, Barris, ABC Studios, and The Walt Disney Company. (Dkt. No. 31.) The Walt Disney Company filed a Motion to Dismiss the FAC on December 16, 2021 (Dkt. No. 32), and Defendants Nissel, Dobbins, and Barris filed a Joinder (Dkt. No. 41). Pursuant to Local Rule 7-9, Plaintiff's opposition to the Motion to Dismiss the FAC was due on

January 4, 2022 based on the originally noticed hearing date, but no opposition was filed. The Court issued a minute order on January 7, 2022, ordering Plaintiff to file an opposition or notice of non-opposition to the Motion to Dismiss the FAC no later than January 21, 2022. (Dkt. No. 40.) Plaintiff did not file an opposition by January 21, 2022. On January 27, 2022, the Court granted The Walt Disney Company's Motion to Dismiss the FAC and the Joinder, and dismissed the FAC without prejudice pursuant to Local Rule 7-12 based on Plaintiff's failure to file an opposition to the Motion. (Dkt. No. 42 (the "January 27, 2022 Order").)

***2** On March 18, 2022, the Court ordered Plaintiff to show cause no later than May 2, 2022 why this action should not be dismissed for lack of prosecution. (Dkt. No. 44.) On May 2, 2022, Plaintiff filed a "Memorandum in Opposition to Motion to Dismiss Pursuant to [FRCP 12\(b\)\(6\)](#)" opposing The Walt Disney Company's Motion to Dismiss the FAC. (Dkt. No. 45.) The Court vacated the January 27, 2022 Order in light of Plaintiff's opposition to The Walt Disney Company's Motion to Dismiss the FAC. (Dkt. No. 56.) On August 15, 2022, after the Motion to Dismiss the FAC was fully briefed and heard, the Court ruled on Disney's Motion to Dismiss the FAC and Defendants Nissel, Dobbins, and Barris' Joinder as follows:

- 1) The Court granted the motion to dismiss the FAC and Joinder as to Plaintiff's copyright infringement claim against all Defendants based on Mixed Episodes 2 through 5 without leave to amend based on Plaintiff's failure to satisfy [17 U.S.C. § 411\(a\)](#)'s pre-suit registration requirement; and
- 2) The Court granted the motion to dismiss the FAC and Joinder as to Plaintiff's copyright infringement claim based on Mixed Episode 1 with leave to amend to allege non-conclusory facts regarding the similarities between the parties' works as to the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events. (Dkt. No. 58 (the "August 15, 2022 Order").) The Court further ordered "[t]o the extent Plaintiff chooses to file a second amended complaint to allege non-conclusory similarities between Plaintiff's Episode 1 of Mixed and Defendants' MIXED-ISH, Plaintiff shall file the amended complaint no later than August 29, 2022," and stated "[a] failure to file a second amended complaint by that date shall result in dismissal of Plaintiff's copyright infringement claim as to Episode 1 without further leave to amend." (*Id.*)

Plaintiff subsequently filed an ex parte application requesting an extension of time to file the Second Amended Complaint

("SAC") to September 12, 2022, which was granted by the Court. (Dkt. Nos. 59, 60.) On September 12, 2022 (i.e., the last day for Plaintiff to file the SAC), a substitution of counsel form was filed by Plaintiff seeking to substitute Ronda Baldwin Kennedy as attorney for Plaintiff. (Dkt. No. 62.) On that same date, Plaintiff filed a second request for extension of time to file the SAC in light of the fact that he had retained counsel to represent him in this matter. (Dkt. No. 63.) On September 21, 2022, the Court granted the request to substitute Ronda Baldwin Kennedy as attorney for Plaintiff. (Dkt. No. 66.) On September 21, 2022, the Court also granted Plaintiff's second request for an extension of time to file the SAC, and ordered to the extent Plaintiff sought to file an SAC to allege non-conclusory similarities between Plaintiff's Episode 1 of Mixed and Defendants' MIXED-ISH, Plaintiff shall file the SAC no later than October 10, 2022. (Dkt. No. 67 (the "September 21, 2022 Order").) The September 21, 2022 Order further stated that a failure to file a SAC by October 10, 2022 shall result in dismissal of Plaintiff's copyright infringement claim based on MIXED Episode 1 without further leave to amend. (Dkt. No. 67.) On October 11, 2022, after the deadline to file the SAC had passed, Plaintiff's counsel filed a third ex parte request for extension of time to file the SAC. (Dkt. No. 68.) However, the parties stipulated to a further extension of time to October 20, 2022 for Plaintiff to file the SAC, which was approved by the Court. (Dkt. Nos. 70, 71.) Accordingly, the Court denied Plaintiff's counsel's third ex parte request for extension of time to file the SAC as moot in light of the parties' stipulation. (Dkt. No. 72.)

***3** On October 20, 2022, Plaintiff's counsel filed a Second Amended Complaint. (Dkt. No. 73.) On October 21, 2022 (after the deadline to file the SAC), Plaintiff's counsel filed another Second Amended Complaint without explanation or leave or Court. (Dkt. No. 74.)² The SAC asserts the following three causes of action: (1) copyright infringement, [17 U.S.C. § 504](#); (2) breach of the covenant of good faith; and (3) breach of implied contract. (Dkt. No. 74.)

² The second SAC filed by Plaintiff's counsel (Dkt. No. 74) attaches additional exhibits to the SAC, but the underlying allegations in both versions of the SAC filed appear to be identical. For purposes of this Order, reference to the SAC refers to the second SAC filed on October 21, 2022 (Dkt. No. 74) because Defendants move to dismiss that version of the SAC "despite its lateness." (*See* Motion at 12 n.1.)

On November 3, 2022, Defendants filed the instant Motion to Dismiss the SAC. (Dkt. No. 77.) Pursuant to Local Rule

7-9, Plaintiff's opposition or notice of non-opposition to the Motion was due on November 15, 2022 based on the originally noticed hearing date, but no opposition or notice of non-opposition was filed. Accordingly, on November 17, 2022, the Court issued a minute order continuing the hearing on the Motion to January 10, 2023, ordering Plaintiff to file an opposition or notice of non-opposition to the Motion no later than November 23, 2022, and stating a failure to file an opposition by that date "may be deemed consent to the granting ... of the motion" pursuant to Local Rule 7-12. (Dkt. No. 79 (the "November 17, 2022 Minute Order").) However, no opposition or notice of non-opposition to the Motion was filed. Plaintiff's counsel and Plaintiff appeared at the hearing on the Motion on January 10, 2023. (Dkt. No. 93.)³

³ On January 10, 2023, the Court granted Plaintiff's counsel's motion to withdraw as attorney of record for Plaintiff. (Dkt. No. 93.)

II. JURISDICTION

The SAC alleges the Court has federal question jurisdiction over the action because "[t]his matter rises out of an infringement over copyrighted television series titled 'MIXED.'" (SAC ¶ 10.) The SAC does not assert jurisdiction on the basis of diversity.

III. STATEMENT OF THE LAW

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). On a motion to dismiss for failure to state a claim, courts accept as true all well-pleaded allegations of material fact and construe them in a light most favorable to the non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031-32 (9th Cir. 2008). To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663, (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555. Labels and conclusions are insufficient to meet the Plaintiff's

obligation to provide the grounds of his or her entitlement to relief. *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* If a complaint cannot be cured by additional factual allegations, dismissal without leave to amend is proper. *Id.* A court may consider the allegations contained in the pleadings, exhibits attached to or referenced in the complaint, and matters properly subject to judicial notice in ruling on a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Materials whose contents are alleged in the complaint may also be considered by the Court for purposes of a motion to dismiss. See *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

IV. DISCUSSION

A. Copyright Infringement

*4 Plaintiff's first cause of action for copyright infringement is based on MIXED Episode 1. "To state a claim for copyright infringement, [Plaintiff] must plausibly allege two things: (1) that [he] owns a valid copyright in [the works], and (2) that [Defendants] copied protected aspects of [Plaintiff's works]." *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018) (citations omitted), overruled on other grounds in *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020), *cert. denied sub nom. Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 141 S. Ct. 453 (2020), *reh'g denied*, 2020 WL 7132739 (U.S. Dec. 7, 2020). The second prong has two distinct components: "copying" and "unlawful appropriation." *Skidmore*, 952 F.3d at 1064. "In the absence of direct evidence of copying, ... the plaintiff can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying." *Id.* (internal quotations and citation omitted). To prove unlawful appropriation, the Ninth Circuit uses a two-part test consisting of a subjective intrinsic test and an objective extrinsic test to determine whether the defendant's work is substantially similar to the plaintiff's copyrighted work. *Id.* "Both tests must be satisfied for the works to be deemed substantially similar." *Id.* However, the extrinsic test "is the only test relevant in reviewing the district court's ruling on a motion to dismiss," which "focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works." *Gregorini v. Apple Inc.*, 2022 WL 522307, at *1 (9th Cir. Feb. 22, 2022) (citations omitted).

1) Access

Defendants argue the SAC fails to allege The Walt Disney Company had access to Plaintiff's MIXED Episode 1, or that The Walt Disney Company was involved in creating MIXED-ish.⁴ However, the SAC alleges:

1. "On February 12, 2015, Defendant Eskridge requested and received an email from Plaintiff with five produced "MIXED" episodes, the link to the series trailer, over twenty episodes scripts, themes, plots and character breakdowns within the pitch deck" (SAC ¶ 25);
2. "Emails and text messages show the Defendants Eskridge, Dobbins and Nissel convinced Plaintiff Fisher to allow them, as work for hire, to "punch up" and further develop the comedy series MIXED" (*id.* ¶ 26);
3. "On or about February 19, 2015, Defendant Dobbins packages the "MIXED" trailer and emails it around Hollywood as "Untitled Black Republican Comedy", containing the exact same trailer link from Plaintiff Fisher's comedy series "MIXED" (*id.* ¶ 27); and
4. "In February of 2015, defendant E. Brian Dobbins, (Executive Producer) through defendants Layne Eskridge, Montrel McKay, and writer Angela Nissel; deceived plaintiff David A. Fisher out of receiving a television network deal then sold Fisher's intellectual property "MIXED" to ABC Signature and the Walt Disney Company to be converted into 4 different series, 16 Seasons and over 300 episodes and counting, including "Mixed-ish, Black-ish, Grown-ish, and Old-ish" (*id.* ¶ 22).

⁴ Defendants contend The Walt Disney Company is a holding company that does not conduct business. However, the Court cannot accept Defendants' contention as true for purposes of the instant Rule 12(b)(6) Motion. Here, the SAC alleges The Walt Disney Company "is a Delaware Corporation, and Parent Company of Walt Disney, Walt Disney Television, and ABC Television Network, Inc." (SAC ¶ 5.)

Accepting these allegations as true and in the light most favorable to Plaintiff, the SAC alleges sufficient facts regarding The Walt Disney Company's access to Plaintiff's MIXED. However, the SAC fails to plead sufficient facts regarding substantial similarity to state a claim for copyright infringement for the reasons set forth below.

2) Substantial Similarity

1. "Mixed-Ish"

Defendants argue Plaintiff's copyright infringement claim should be dismissed because the SAC does not contain a clear and detailed description of Plaintiff's MIXED Episode 1, nor identify which of the allegedly similar elements are in MIXED Episode 1 as opposed to MIXED Episodes 2 through 5.

In the Court's order granting Defendants' Motion to Dismiss the FAC, the Court dismissed Plaintiff's copyright infringement claim based on MIXED Episode 1 with leave to amend. (Dkt. No. 58.) The Court found:

*5 While the FAC alleges six purported similarities between the parties' works, it does not identify what is included in Plaintiff's Episode 1 of Mixed (as to which Plaintiff satisfied 17 U.S.C. § 411(a)'s pre-filing registration requirement) as opposed to what was included in Episodes 2 through 5 of Mixed (as to which Plaintiff failed to satisfy 17 U.S.C. § 411(a)'s pre-filing registration requirement). Even assuming that the six alleged similarities are included in Plaintiff's Mixed Episode 1, the FAC fails to allege sufficient detail regarding similarity between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events of the works. Therefore, the FAC fails to plead sufficient non-conclusory facts regarding substantial similarity as to Plaintiff's MIXED Episode 1 and Defendants' MIXED-ISH to state a claim for copyright infringement.

(Dkt. No. 58 at 14.) Here, the SAC includes a single paragraph about the alleged similarities between the parties' works. (See SAC ¶ 52.) Like the deficiency in the FAC identified by the Court in its order dismissing the FAC, paragraph 52 of the SAC does not identify what is included in Plaintiff's Episode 1 of MIXED for which the Court granted leave to amend to allege similarities with Defendants' *Mixed-ish* television show, as opposed to what was included in Episodes 2 through 5 of MIXED for which the Court dismissed without leave to amend. Moreover, in the factual allegations section of the SAC which is incorporated by reference in support of Plaintiff's copyright infringement claim (*see id.* ¶ 39), Plaintiff refers to his work "MIXED" as a television "series" (*Id.* ¶¶ 17, 19, 20, 21, 28), alleges the "MIXED comedy series" is "5 episodes" (*id.* ¶ 21), and identifies the copyright registrations of each of the five episodes of MIXED (*id.* ¶¶ 33-37).⁵

Under his copyright infringement claim, Plaintiff also refers to MIXED as a television “series.” (*See id.* ¶¶ 41, 46, 51.) Therefore, the Court cannot determine which alleged similarities set forth in paragraph 52 of the SAC are included in Plaintiff’s Episode 1 of MIXED, as opposed to in Episodes 2 through 5 of MIXED which cannot be the basis of Plaintiff’s copyright infringement claims.

⁵ See also SAC ¶ 25 (alleging “[o]n February 12, 2015, Defendant Eskridge requested and received an email from Plaintiff with five produced ‘MIXED’ episodes”).

Even assuming the alleged similarities contained in paragraph 52 of the SAC are included in Plaintiff’s MIXED Episode 1, the Court finds the SAC fails to allege sufficient facts regarding similarity between MIXED Episode 1 and Defendants’ Mixed-ish. The SAC includes the same six purported similarities between MIXED and Mixed-ish which were included in the FAC. (*Compare* SAC ¶ 52 *with* FAC

#	MIXED	Mixed-ish
01	The lead female character battles racial stereotypes and affirmative action jokes	Season 1 - Episode 12: The female lead character is battling against racial stereotypes
02	The female lead character goes on an awkward first date with Tariq from work.	Season 1 - Episode 15: The female lead character awkwardly goes on her first date
03	The lead character has constant issues with identify as black or white in both the workplace, and dating	Season 1 - Episode 23: The lead character struggles to identify as either white or black.
04	The lead character has a crush on her parent's client.	Season 2 - Episode 3: The lead character has a crush on parent's Mentee
05	The lead character is a conservative church goer who is ridiculed by her family for praying	Season 2 - The lead character has an interest in church. Episode 4 is titled “Living on a prayer”

⁷ But see 37 C.F.R. § 202.1(a) (“Words and short phrases such as names, titles, and slogans” are “examples of works not subject to copyright.”).

⁸ See also *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006), *overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)); *Benay*

¶ 37.) Even accepting as true these six alleged similarities for purposes of ruling on the instant Motion, Plaintiff fails to plausibly allege that MIXED Episode 1 and Mixed-ish are substantially similar as to plot, themes, dialogue, mood, setting, pace, characters, and sequence of events to state a claim for copyright infringement.⁶ See *Esplanade Prods., Inc. v. Walt Disney Co.*, 2017 WL 5635024, at *5 (C.D. Cal. July 11, 2017).

⁶ See Dkt. No. 58 (Order re: Defendant's Motion to Dismiss FAC) at 14 (finding Plaintiff failed to state a claim for copyright infringement based on the same six alleged similarities).

As for new allegations regarding similarities among the parties’ works, the SAC alleges the following is an “[a]dditional comparison not in the First Amended Complaint”:

v. Warner Bros. Ent., 607 F.3d 620, 625, 628-29 (9th Cir. 2010) (copyright claim failed as a matter of law despite identical titles), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Evans v. McCoy-Harris*, 2019 WL 1002512, at *3-4 (C.D. Cal. Jan. 4, 2019); *Esplanade Prods., Inc.*, 2017 WL 5635024, at *5.

*6 (SAC ¶ 52.) In addition, the SAC alleges “[t]he first and very obvious is the similarities in the title ‘MIXED’ ... [c]ompared with the title ‘Mixed-ish.’ ” (*Id.*) Even assuming these five alleged similarities regarding the one lead female character in Plaintiff’s work are true and are included in Plaintiff’s MIXED Episode 1, and even if the Court considered the similarity between the titles of the parties’ works,⁷ these new allegations, the titles of the parties’ works, and the six alleged similarities identified above which were previously included in the FAC, are insufficient to state a claim for copyright infringement because there are no allegations in the SAC regarding any similarity between dialogue, mood, setting, pace, or sequence of events of the works. *See Gregorini v. Apple Inc.*, 2022 WL 522307, at *1 (9th Cir. Feb. 22, 2022).⁸

Therefore, the SAC fails to plead sufficient non-conclusory facts regarding substantial similarity as to Plaintiff’s MIXED Episode 1 and Defendants’ MIXED-ISH to state a claim for copyright infringement.

2. Black-ish, Grown-ish, and Old-ish

The SAC also alleges Defendants’ “Mixed-ish” series “is a prequel to Black-ish.” (SAC ¶ 19 n.1.) The SAC further alleges “[w]hile serving as Executive Producer of ABC’s Black-ish, Defendant E. Brian Dobbins employed defendants Eskridge, McKay, and Nissel to convert the Plaintiff David Fisher’s YouTube Series “MIXED” into scripts for ABC Signature series Black-ish, Grown-ish, Mixed-ish and Old-ish.” (*Id.* ¶ 49.) It is unclear whether Plaintiff’s SAC is asserting a copyright infringement claim based on Black-ish, Grown-ish, and/or Old-ish. Plaintiff’s FAC did not assert a copyright infringement claim based on Black-ish, Grown-ish, and/or Old-ish. However, the Court’s order dismissing the FAC expressly limited leave to file the SAC “to allege

non-conclusory similarities between Plaintiff’s Episode 1 of Mixed and Defendants’ MIXED-ISH” for Plaintiff’s copyright infringement claim. (Dkt. No. 58 at 16.) Therefore, to the extent the SAC asserts a new copyright infringement claim based on Black-ish, Grown-ish, and/or Old-ish, Plaintiff failed to obtain leave of Court or written consent from Defendants prior to asserting this new copyright claim based on Black-ish, Grown-ish, and/or Old-ish as required under [Federal Rule of Civil Procedure 15\(a\)](#). *See Fed. R. Civ. Proc. 15(a)* (“A party may amend its pleading one as a matter of course,” and “[i]n all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.”); *see also Mendoza v. Lehigh Sw. Cement Co.*, 540 F. App’x 813 (9th Cir. 2013); *Doe v. California Institute of Tech.*, 2020 WL 8463631, at *6 (C.D. Cal. Feb. 4, 2020).

Even assuming it was procedurally proper for Plaintiff to include a new copyright claim based on these new works, the SAC fails to allege any similarities as to the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events” of Plaintiff’s MIXED Episode 1 and the “Grown-ish” and “Old-ish” series. Therefore, the SAC fails to state a claim for copyright infringement based on “Grown-ish” and “Old-ish.”

*7 With respect to Black-ish, the SAC alleges: “On September 23, 2015, Black-ish Season 2 premiered with episodes full of scenarios, themes and similarities from the Plaintiff’s intellectual property ‘MIXED’ and would continue for 8 Seasons with Defendants E Brian Dobbins, Kenya Barris, and Anthony Anderson listed as Executive Producers and Angela Nissel, Layne Eskridge, and Montrel McKay working with the writer’s rooms for the episodes.” (SAC ¶ 30.) The SAC also alleges the following two new allegations regarding alleged “[s]imilarities between Black-ish and MIXED”:

#	MIXED	BLACK-ISH Season 2
01	While in “MIXED” the main character Samantha buys bean pies from a nation of Islam member while on a date where she professed her love of Condelezza Rice as a fellow black republican who also went to an Ivy league school	Episode 5 is titled “Churched” and deals with the theme of the black church experience and conservatives views while directly mentioning referencing Republican Vice President Condelezza Rice
	In Mixed, Samantha's black family members also make fun	Episode 7 The main character goes back to her Ivy League School, while dealing with cold

of her for not feeling cold in
winter weather

weather jokes because she is
Bi-racial. Episode 8 deals with
the Nation of Islam and the
selling of bean pies.

(SAC ¶ 52.) The SAC fails to identify whether the alleged similarity above is included in Plaintiff's Episode 1 of MIXED as opposed to what was included in Episodes 2 through 5 of MIXED for which the Court previously dismissed without leave to amend for failure to satisfy the pre-registration filing requirements. Moreover, even assuming the two allegations identified above are included in Plaintiff's MIXED Episode 1, these are the sole allegations in the SAC regarding alleged similarities between Plaintiff's MIXED and Black-ish. *See Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1132 (C.D. Cal. 2007) (a plaintiff alleging copyright infringement cannot "evade dismissal simply by alleging infringement from common elements by citing only a handful of specific examples in the Complaint"). Thus, the SAC fails to allege sufficient facts regarding similarities between Plaintiff's MIXED Episode 1 and Black-ish as to the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in order to state a claim for copyright infringement based on Black-ish.

* * *

Since Plaintiff has filed three complaints, including the SAC with the assistance of counsel, but has failed to allege sufficient facts demonstrating the parties' works are substantially similar to state a claim for copyright infringement, the Court dismisses Plaintiff's copyright infringement claim without further leave to amend.

B. Breach of Implied Covenant of Good Faith and Breach of Implied Contract

The SAC asserts two new claims for breach of implied covenant of good faith and breach of implied contract. Defendants move to dismiss the two new causes of action on the ground Plaintiff failed to seek leave to assert these claims.

Federal Rule of Civil Procedure 15(a) provides "[a] party may amend its pleading one as a matter of course," and "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." *Fed. R. Civ. P. 15(a)*. Here, the Court's order dismissing the FAC stated:

[T]he Court dismisses the FAC with leave to amend to allege nonconclusory facts regarding substantial similarity between Plaintiff's Mixed Episode 1 and Defendants' works, which shall include "a clear and detailed description of the allegedly infringed works" comparing their "the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." *See Esplanade Prods., Inc. v. Walt Disney Co.*, 2017 WL 5635024, at *5 (C.D. Cal. July 11, 2017). To the extent Plaintiff files a second amended complaint which fails to plead non-conclusory facts regarding substantial similarity between Plaintiff's Episode 1 of Mixed and Defendants' MIXED-ISH, the Second Amended Complaint may be dismissed without further leave to amend.... The Court **GRANTS** Disney's motion to dismiss the FAC and Defendants Nissel, Dobbins, and Barris' Joinder as to Plaintiff's copyright infringement claim based on Mixed Episode 1 **with leave to amend** to allege non-conclusory facts regarding the similarities between the parties' works as to the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events To the extent Plaintiff chooses to file a second amended complaint to allege non-conclusory similarities between Plaintiff's Episode 1 of Mixed and Defendants' MIXED-ISH, Plaintiff shall file the amended complaint **no later than August 29, 2022**.

*8 (Dkt. No. 58 at 15-16.) Therefore, the Court's order granting Defendants' motion to dismiss the FAC expressly limited leave to amend to file the SAC to plead non-conclusory facts regarding similarity between Plaintiff's Episode 1 of Mixed and Defendants' MIXED-ISH for Plaintiff's copyright infringement claim based on Mixed Episode 1. Plaintiff neither obtained Defendants' written consent nor leave of court to assert new causes of action in the SAC. Accordingly, the Court dismisses Plaintiff's breach of implied covenant of good faith (second cause of action) and breach of implied contract (third cause of action). *See Fed. R. Civ. Proc. 15(a)*; *Mendoza v. Lehigh Sw. Cement Co.*, 540 F. App'x 813 (9th Cir. 2013); *California Institute of Tech.*, 2020 WL 8463631, at *6; *Ketab Corp. v. Mesriani & Assocs.*, 2015 WL 8022874, at *8 (C.D. Cal. Dec. 4, 2015).⁹

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Even if it was procedurally proper for Plaintiff to assert these new state law claims for breach of implied covenant of good faith and breach of implied contract in the

SAC without obtaining leave or Court or Defendants' written consent, the Court would decline to exercise supplemental jurisdiction over Plaintiff's new state claims for breach of implied covenant of good faith (second cause of action) and breach of implied contract (third cause of action) pursuant to 28 U.S.C. § 1367(c).

C. Dismissal As To All Defendants

The SAC added Layne Eskridge, Anthony Anderson, and Montrel Mckay as new defendants.¹⁰ No request for summons has been filed as to the SAC, and no proof of service of the SAC on newly named defendants Eskridge, Anderson, and Mckay has been filed by Plaintiff. Moving Defendants, however, seek dismissal as to all defendants, including those who have not yet been served.

¹⁰ Plaintiff did not obtain leave of Court nor written consent from Defendants to amend the complaint to identify any of the Doe Defendants.

Because the reasons for dismissal of the three causes of action asserted in the SAC apply to all the claims against all defendants (i.e., failure to state a claim for copyright infringement and failure to obtain leave of Court or Defendants' written consent to assert new state claims), the Court dismisses the entire action as to all defendants.

D. Certification That Plaintiff's Appeal Cannot Be Taken In Good Faith

While the title of Defendants' Motion refers to 28 U.S.C. § 1915(e)(2)(b), Defendants request in the memorandum of

points and authorities that the Court certify in writing that any appeal would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3), which provides: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

Plaintiff has failed to file an opposition to the instant Motion to dismiss the SAC despite being given multiple opportunities and additional time to file an opposition, and despite having the assistance of counsel. Moreover, as set forth above, Plaintiff fails to allege similarities between the parties' works despite being given multiple opportunities to do so. Therefore, the Court certifies that an appeal would not be taken in good faith.

V. CONCLUSION

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss the SAC without further leave to amend, dismisses the entire action as to all defendants, and certifies that an appeal would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3).

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 3034826