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13 Bedford Falls Productions, Inc.), Edward Zwick,
Marshall Herskovitz and John Logan

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 AARON BENAY, an individual, *et al.*,

18 Plaintiffs,

19 v.

20 WARNER BROS.
21 ENTERTAINMENT, INC., a Delaware
corporation, *et al.*,

22 Defendants.
23
24

CASE NO. CV 05-8508 PSG (FMOx)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Declarations of Edward Zwick and
Jaime W. Marquart; Separate Statement
of Uncontroverted Material Facts and
Conclusions of Law; Notice of Lodging;
and Proposed Order filed herewith]

Date: February 11, 2008
Time: 1:30 p.m.
Ctrm.: 790

Date Filed: December 5, 2005
Trial Date: March 11, 2008

1 TO THE CLERK OF COURT AND TO ALL PARTIES AND THEIR
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT on February 11, 2008, at 1:30 p.m., or as
4 soon thereafter as counsel may be heard before the Honorable Philip S. Gutierrez, in
5 Courtroom 790 of the above-entitled Court, located at 255 East Temple Street, Los
6 Angeles, California 90012, Defendants Warner Bros. Entertainment, Inc., Radar
7 Pictures, Inc., The Bedford Falls Company (erroneously sued as Bedford Falls
8 Productions, Inc.), Edward Zwick, Marshall Herskovitz and John Logan
9 ("Defendants") will, and hereby do, move pursuant to Fed. R. Civ. P. 56 for an order
10 entering summary judgment in their favor and against plaintiffs Aaron Benay and
11 Matthew Benay on the First Amended Complaint and all causes of action set forth
12 therein.

13 Good cause exists to grant this motion. Plaintiffs' First Claim for Relief of
14 copyright infringement fails as a matter of law because the only elements common
15 to both screenplays are historical ones that are not copyrightable. But even if those
16 elements were copyrightable, there is no factual dispute that Defendants' screenplay
17 was independently created by them before Plaintiffs allegedly "pitched" their ideas
18 to an executive at Defendant Bedford Falls (a claim Defendants vehemently deny
19 but assume for purposes of this motion). This undisputed fact of independent
20 creation likewise defeats Plaintiffs' Second Claim for Relief for breach of implied
21 contract.

22 This motion is made following the conference of counsel pursuant to Local
23 Rule 7-3 which took place on November 20, 2007.

24 This motion is based upon this notice of motion; the attached Memorandum
25 of Points and Authorities; the concurrently submitted Declarations of Edward Zwick
26 and Jaime W. Marquart; the concurrently submitted Notice of Lodging; all pleadings
27 and other records on file in this action; and such further evidence and arguments as
28 may be presented at or before any hearing on the motion. A Separate Statement of

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 If two writers independently write screenplays involving a stock character
4 confronting the same historical events (here an American war veteran in 1870's
5 Japan) but otherwise create different plots, characters and dialogue, can one hold the
6 other liable for copyright infringement and idea theft? The law says no.

7 This case involves two works: Defendants' film "*The Last Samurai*" and
8 Plaintiffs' unpublished screenplay (the "Benay screenplay").¹ Both works are based
9 on an American war veteran's confrontation with historical events that occurred in
10 Japan in the 1870's: (1) the Japanese Emperor's introduction of Western military
11 technologies and strategies; (2) the rebellion of the samurai against the Emperor and
12 those Western military influences (the "Satsuma Rebellion"); and (3) the rise and
13 fall of a samurai named Saigo Takamori (who history knows as the "Last Samurai").
14 Historical events are not protected by copyright or any other legal theory.

15 Here, as documentary evidence unequivocally demonstrates, Defendants
16 Edward Zwick and John Logan conceived of a film based on these historical events
17 in April of 2000, weeks before they allegedly ever came into contact with the Benay
18 screenplay.² Specifically, before Plaintiffs allegedly "pitched" their screenplay to
19 Defendant Bedford Falls on May 9, 2000, Zwick and Logan already had conceived
20 of a drama in which an American war veteran comes to Japan during the 1870's,
21 confronts the modernization of the Japanese military establishment, and becomes

22
23 ¹ Defendants have submitted a copy of the 2-Disc Widescreen Edition DVD of
24 *The Last Samurai* and a copy of Plaintiffs' screenplay with this motion as Exhibit I
25 to the Declaration of Edward Zwick ("Zwick Dec.") and Exhibit B to the
26 Declaration of Jaime W. Marquart ("Marquart Dec."), respectively. Defendants
27 respectfully urge the Court to review each. It is critical to the determination of this
28 motion.

² Defendants vehemently deny any knowledge whatsoever of Plaintiffs'
screenplay before this case but will assume access for purposes of this motion.

1 involved with the Satsuma Rebellion and the Last Samurai, Saigo Takamori. This
2 undisputed evidence of independent creation is fatal to Plaintiffs' First Claim for
3 Relief (Copyright Infringement). Independent creation also defeats Plaintiffs'
4 Second Claim for Relief (Breach of Implied Contract). If those elements common
5 to the two projects were already in Defendants' possession before Defendants
6 supposedly received Plaintiffs' pitch then there is no consideration for any idea the
7 Plaintiffs supposedly gave to Defendant Bedford Falls.³

8 Plaintiffs' First Claim for Relief is also deficient because the works are not
9 substantially similar when it comes to their copyright-*protectible* elements. Again,
10 history is not copyrightable. Accordingly, Plaintiffs cannot survive a motion for
11 summary judgment by demonstrating that the same historical references and
12 dramatic events that would naturally flow from those references (known in
13 copyright law as "scènes à faire") appear in both works. For example, if an
14 American war veteran is in Japan in the 1870's, he can be either a veteran of (a) the
15 Civil War (as in the Benay screenplay) or (b) the Indian Campaigns (as in
16 Defendants' film). A choice of either option does not give rise to a viable claim
17 under any legal theory. The same goes for the next inevitable step: because of his
18 knowledge of modern warfare the veteran becomes involved with the Emperor's
19 efforts to create a modern army. And the next inevitable step: he comes into
20 conflict with the samurai (who were rebelling against these efforts) and thereby
21 confronts the Last Samurai, Saigo Takamori. These are historical events driven by
22 scènes à faire, not plot contrivances that are subject to copyright protection. And
23 once these non-copyrightable elements are set to the side, the Benay screenplay is
24 not at all similar to *The Last Samurai* in its characters, plot, themes, dialogue, mood,
25

26
27 ³ Defendant Bedford Falls is a production company owned by Defendants
28 Edward Zwick and Marshall Herskovitz.

1 setting, pace or sequence of events, and no copyright or idea theft claim can be
2 established as a matter of law.

3 Thus, summary judgment should be entered in Defendants' favor on all claims
4 in the First Amended Complaint.⁴

5 **Statement of Undisputed Facts**

6 **A. Defendants' Conception and Development of the Basic Elements of**
7 **The Last Samurai in Late 1999 and Early 2000.**

8 In 1999, Ed Zwick (an Academy Award winning producer, director and
9 writer, whose film credits include *Glory*, *Legends of the Fall*, *Courage Under Fire*,
10 *The Siege*, *Shakespeare in Love* and *Traffic*) and John Logan (an Academy Award
11 winning writer whose credits include *Gladiator*, *Any Given Sunday*, *The Aviator* and
12 *Sweeney Todd*) joined forces to write the screenplay that became the hit film *The*
13 *Last Samurai*. (Zwick Dec., ¶¶ 14-20.⁵) The two knocked around a number of
14 ideas, but one resonated with both. Since his undergraduate days at Harvard, Zwick
15 had been fascinated with Japanese culture and the samurai films of Akira Kurosawa.
16 Indeed, he had written a screenplay early in his career about an embittered America
17 military veteran who regains his sense of life through his clashes with, and then
18 assimilation into, an alien Eastern culture. (*Id.* ¶¶ 2-3 & Ex. A.)

19 Moreover, in 1997, Zwick was attached to direct a screenplay developed by
20 Defendant Radar Pictures⁶, then known as *West of the Rising Sun*, dealing with this
21 subject: "An American Civil War veteran journeys to Japan in 1871 during the
22

23 ⁴ The Court dismissed Plaintiffs' Third Claim for Relief for interference of
24 contract by Orders dated July 17 and 20, 2006. (Marquart Dec., Exs. C and D.)

25 ⁵ In his Declaration Defendant Zwick details the many influences that led to the
26 creation of *The Last Samurai* including the films of Akira Kurosawa, *Lawrence of*
Arabia, *Shogun*, *Dances With Wolves* and others. (Zwick Dec., ¶¶ 2, 13, 15-19.)

27 ⁶ Defendant Radar Pictures is an independent motion picture company based in
28 Los Angeles. It was a co-producer of *The Last Samurai*.

1 country's own civil war and he finds himself leading the first Samurai cattle drive.
2 His adventure helps him reaffirm the meaning of life and the will to live it well."
3 (Zwick Dec., ¶ 12 & Ex. B.) Radar Pictures and its predecessor had been creatively
4 developing the *West of the Rising Sun* project since 1992. (Id.)

5 In late 1999, Zwick conceived of his own approach to a Westerner
6 confronting Japanese culture – an "Eastern Western" that would combine elements
7 of the great Japanese samurai films with American culture as it existed in the 1870's,
8 the era depicted in the great Westerns of American film. At the same time, the film
9 would reflect Zwick and Logan's interest in the historical experiences of Western
10 military men such as Jules Brunet and Captain L. L. Janes, who ventured into Japan
11 at that time and were involved with the Westernization of the Japanese military.
12 (Zwick Dec., ¶ 15.)

13 Zwick described the elements of this "Eastern Western" that became *The Last*
14 *Samurai* in a fax to Logan on April 12, 2000 (Zwick Dec., Ex. K):

- 15 • *The End of Samurai Culture.* Zwick writes that the film will be "a story
16 about a transitional moment [that] colors everything with such beautiful
17 sadness and dignity: in this case the last breath of the Edo dynasty, the
18 end of the Shogunate, and the death agonies of Samurai culture." (Id.)
- 19 • *A Tortured Western Protagonist With a Violent Past.* Zwick writes that
20 the Western protagonist will be: "a man who has seen enough war,
21 enough bloodshed for several lifetimes – who is forced to accept that there
22 are still things worth fighting for. A man who has abjured his
23 extraordinary powers of destruction – who must own his truest, most
24 violent nature." (Id.)
- 25 • *The Eastern Character Whose Way of Life Is Ending.* The counterpart to
26 the Western protagonist will be a man, one of the samurai, whose way of
27 life is ending: "I see this man in close and necessary relationship to
28

1 another kind of warrior – a Samurai – whose way of life, indeed whose
2 whole purpose in life, no longer has a place in the world." (Id.)

- 3 • *The Western and Eastern Characters Ultimately Fight Together and Earn*
4 *Mutual Respect.* The Western protagonist will come to befriend his
5 Eastern counterpart: "I imagine that together they battle a common enemy
6 [and] come to some mutual respect." (Id.)

7 On April 18, 2000, Logan responded to Zwick with a faxed note reflecting his
8 having researched Japanese history, noting "in particular the internet item on the
9 Satsuma Rebellion" and asking Zwick to "track down some complete books on the
10 Satsuma Rebellion." (Zwick Dec., ¶ 23 & Ex. L.) Zwick replied later that same day
11 with additional historical facts about the end of the samurai. (Zwick Dec., ¶ 24 &
12 Ex. M.) Then, on April 19, Logan sent Zwick a short note on the history of the
13 samurai sword. (Zwick Dec., ¶ 25 & Ex. N.) Through these and other exchanges
14 before April 22, 2000, Zwick and Logan developed the following additional
15 elements of their screenplay:

- 16 • *The Samurai Resist Modern Weaponry, and, After Being Defeated, the*
17 *"Last of the Samurai" Commits Suicide.* On April 20, 2000, Logan wrote
18 that, after the samurai were forced to turn in their swords, Saigo Takamori
19 "found it too much to bear and led an army of followers in the Satsuma
20 Rebellion." (Zwick Dec., ¶ 27 & Ex. P.) He adds: "They fought as
21 bravely as the samurai of old, but they were no match for modern rifles
22 and cannon. Saigo Takamori ended his life in grand style by committing
23 hara-kiri. He was the *last of the samurai*" (Id. (emphasis added).)
- 24 • *The Western Protagonist Helps his Eastern Counterpart Commit Suicide.*
25 Also on April 20, Logan shared his idea for the climactic involvement of
26 the Western protagonist in the Saigo Takamori character's suicide: "He
27 asked his best friend (*our Western hero?*) to hold his sword. Then he
28 impaled himself like Mordred" (Id. (emphasis added).)

- 1 • *The Western Protagonist is an American Military Advisor.* On April 21,
2 Zwick and Logan exchanged historical pages which, among other things,
3 described the real-life account of an "advisor in Western naval and
4 military strategies, ... Captain Leroy Janes, a retired U.S. army general."
5 (Zwick Dec., ¶ 29 & Ex. R.) The entire account of Captain Leroy Lansing
6 Janes is set forth in *American Samurai: Captain L.L. Janes and Japan*, a
7 book written by F. G. Notehelfer and published in 1985, upon which
8 Zwick relied in developing *The Last Samurai*. (Zwick Dec., ¶¶ 15, 28 &
9 Ex. Q.)

10 **B. A Synopsis of *The Last Samurai***

11 In Defendants' film, the protagonist Nathan Algren (Tom Cruise) is a haunted
12 and dissolute veteran of the Indian Campaigns, in which the United States ruthlessly
13 destroyed a traditional culture. Algren's former commanding officer hires him to
14 accompany him to Japan on behalf of Omura, a Westernized Japanese businessman,
15 to train the Emperor's new peasant army using modern weapons. (Zwick Dec., Ex. I
16 at Chapters 3 & 6.)

17 Soon Algren is forced to take the fledgling army into battle against an army of
18 samurai led by Katsumoto, the Saigo Takamori (Last Samurai) character. (*Id.* at
19 Chapters 8-9.) Algren's troops are decimated and he is captured. Katsumoto takes
20 him to his village, where Algren begins to learn the way of the samurai. (*Id.* at
21 Chapter 11.) Algren also meets Taka, the beautiful widow of a samurai Algren had
22 killed. A deep relationship begins to develop between the two as Algren comes to
23 appreciate the beauty of traditional Japanese culture. Algren's soul is restored
24 during his captivity and he earns the respect and admiration of his captors,
25 especially when he helps them beat back a ninja attack. (*Id.* at Chapters 11-19.)

26 Algren is allowed to return to Tokyo, where Katsumoto is imprisoned.
27 Algren helps him escape. They learn that the imperial army, re-equipped and
28 trained, is marching out to do battle with the samurai. Algren joins the samurai in

1 their last stand. (*Id.* at Chapters 30-37.) Fighting valiantly, they are decimated and
2 Katsumoto commits ritual suicide with Algren's help. (*Id.* at Chapter 38.) Algren
3 returns to Tokyo to present Katsumoto's sword to the Emperor. There he convinces
4 the Emperor not to conclude an arms treaty with the United States. (*Id.* at
5 Chapter 39.) Algren then returns to Taka and the traditional Japanese way of life he
6 has come to love.

7 **C. Plaintiffs Use The Same Historical Events To Write A Screenplay**
8 **That Otherwise Differs Entirely From Defendants' Work.**

9 On May 9, 2000 -- *after* the April 2000 exchanges between Zwick and Logan
10 that created the essential historical setting, characters and plot of *The Last*
11 *Samurai* -- Plaintiffs allege their agent orally pitched Plaintiffs' ideas to a Bedford
12 Falls executive. (Marquart Dec. Ex. E ¶ 18 & Ex. F at Nos. 11-12.) On May 16,
13 2000, Plaintiffs allege their agent provided a written copy of the screenplay to
14 Bedford Falls and no other party. (Marquart Dec. Ex. E ¶ 19 & Ex. F at Nos. 11-
15 12.) Their screenplay uses certain historical references found in *The Last Samurai*,
16 but is otherwise entirely different in execution.

17 The Benay screenplay focuses its "American" storyline on a West Point
18 professor who is married to the daughter of an arrogant American arms
19 manufacturer. (Marquart Dec. Ex. B at 2, 28-30, 32, 84.) James Gamble, the hero
20 of the story, is a former officer in Ulysses S. Grant's civil war army who, amidst the
21 confusions of the Battle of the Wilderness, accidentally shot eight of his own men.
22 (*Id.* at 103-104.) Grant excused the mistake but assured Gamble that at some point
23 he would call on him to return the favor. (*Id.*) The screenplay begins with Gamble
24 happily engaging in a snowball fight with his students. (*Id.* at 4.) Then Gamble is
25 sent by Grant (a payoff for Grant's pardon of Gamble in the Battle of the
26 Wilderness incident) to Japan to assist the Emperor, who is attempting to modernize
27 his country and build a national army to suppress the samurai chieftains. (*Id.* at 9-
28 11.)

1 Plaintiffs' "Last Samurai" character (based, like Defendants', on the historical
2 figure Saigo Takamori) is ruthless and treacherous. (Id. at 17, 83, 93-94, 122.) He
3 deceives the Emperor into believing that Lord Eto is behind a wave of attacks on
4 foreigners. (Id. at 35, 52, 83, 93-94.) The Emperor commands Gamble to lead his
5 forces against Eto, which Gamble reluctantly does, ultimately delivering Eto's head
6 to the Emperor. (Id. at 35-50.)

7 Meanwhile, Gamble's wife and young son, and later his father-in-law, follow
8 him to Japan. (Id. at 53-54, 82.) Seeking revenge on behalf of Lord Eto, Saigo
9 Takamori attacks a Christian church and kills, among others, the Gambles' son
10 Trevor. (Id. at 58-61.)

11 Now seeking revenge himself, Gamble attacks Lord Eto's son Maebara and in
12 a disastrous battle in the rain, Gamble's heavily equipped troops are decimated by
13 Maebara's samurai. (Id. at 69-81.) In despair over his defeat and humiliated by his
14 wife (who calls him a failure), Gamble retreats to a Japanese opium den where he
15 has flashbacks to the time when he mistakenly shot his own men in the Battle of the
16 Wilderness. (Id. at 82, 85-87.)

17 Help for James Gamble appears in the form of Masako, a female samurai
18 warrior who abandons Saigo, rescues Gamble from the opium den, and leads him
19 and his wife to a Buddhist temple. (Id. at 89-93.) There, together with Masako's
20 brother, a warrior-monk, they plan an attack on Saigo at his base on the island of
21 Iwo Jima. (Id. at 94-100.) After a sea-battle near the island, Gamble and Masako
22 pursue Saigo through a secret tunnel to the volcanic peak of Mt. Suribachi. (Id.
23 at 109-122.) A duel ensues in which Masako sacrifices herself to save Gamble, who
24 cuts off Saigo's head and proclaims himself "the last samurai." (Id. at 122-123.)
25 The Benay screenplay concludes with a coda that returns to West Point, where the
26 Gambles have redecorated their house in Japanese style and named their new
27 daughter in honor of the female samurai who sacrificed herself for him. (Id. at 125-
28 126.)

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Argument

I. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF DEFENDANTS ON THE FIRST CLAIM FOR RELIEF BECAUSE (A) THEY INDEPENDENTLY CREATED *THE LAST SAMURAI* PRIOR TO ANY ALLEGED ACCESS AND (B) THE WORKS AT ISSUE ARE NOT SUBSTANTIALLY SIMILAR

A. Defendants Independently Conceived *The Last Samurai*.

In this case there can be no reasonable dispute that, before any Defendant allegedly ever saw or heard of the Benay screenplay, Zwick and Logan had independently conceived of the basic elements of *The Last Samurai* and that Defendants' screenplay is an independent creation from these elements. Independent creation necessarily defeats Plaintiffs' copyright claim. Shaw v. Lindheim, 809 F. Supp. 1393, 1402 (C.D. Cal. 1992) ("If the similarities between [two] works are the result of independent creation, rather than of copying, there is no copyright infringement."); see also 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.01[B], p. 13-10 (2007) ("[E]ven when two works are substantially similar with respect to protectible expression, if the defendant did not copy as a factual matter, but instead independently created the work at issue, then infringement liability must be denied.").⁷

The undisputed facts reflect that, in April of 2000, Zwick and Logan independently conceived *all* of the central elements of the film:

⁷ Stated differently, the Court should "filter out" from its infringement analysis any elements of *The Last Samurai* which the Defendants independently conceived prior to their alleged exposure to the Benay screenplay in May of 2000. See Benjamin v. Walt Disney Co., 2007 WL 1655783, at *4 (C.D. Cal. June 5, 2007) (Schiavelli, J.) ("Because Plaintiffs cannot establish access as a matter of law prior to May 1998, the Court must filter out all material created prior to the beginning of the SweetHome project at Disney.").

- 1 • The protagonist of their film would be an American war veteran.
2 (Zwick Dec., ¶¶ 12, 15, 22 & Exs. K, R.)
- 3 • The protagonist would be based on historical accounts of Westerners
4 who had advised the Emperor on military strategies in late 19th
5 Century Japan. (Zwick Dec., ¶¶ 15, 29 & Exs. Q, R.)
- 6 • The protagonist would be scarred by his war experiences but
7 nonetheless be "forced to accept that there are still things worth
8 fighting for." (Zwick Dec., ¶¶ 15, 22 & Ex. K.)
- 9 • It would concern "the death agonies of Samurai culture" (Zwick Dec.,
10 ¶ 22 & Ex. K), during the 1870's, the time of the Satsuma Rebellion.
11 (Zwick Dec., ¶¶ 23, 29 & Exs. L, R.)
- 12 • The Eastern counterpart would be based upon Saigo Takamori, the
13 leader of the Satsuma Rebellion, who is known as "the last of the
14 samurai" (Zwick Dec., ¶ 27 & Ex. P.)
- 15 • The protagonist would come to have a close relationship with his
16 Eastern counterpart. (Zwick Dec., ¶¶ 22, 27, Exs. K, P.)
- 17 • The protagonist and the Saigo character would befriend one another,
18 fight together, and earn mutual respect. (Zwick Dec., ¶¶ 22, 27 &
19 Exs. K, P.)
- 20 • The Saigo character and his followers would be decimated in a
21 climactic battle by the Japanese Emperor's modern weaponry, after
22 which Saigo commits ritual suicide. (Zwick Dec., ¶ 27 & Ex. P.)
- 23 • The protagonist would assist Saigo in committing suicide. (Id.)

24 (See also Zwick Dec. ¶ 31.)

25 Taken together, these are the core elements of *The Last Samurai*. All of the
26 alleged common elements between *The Last Samurai* and the Benay screenplay
27 either consist of these core elements or flow directly from them and their historical
28

1 context. Because Zwick and Logan conceived of them prior to any alleged exposure
2 to Plaintiffs' work, the copyright claim fails as a matter of law.

3 **B. Even Absent Independent Creation, the Works At Issue Are Not**
4 **Substantially Similar**

5 The Ninth Circuit has "frequently affirmed summary judgment in favor of
6 copyright defendants on the issue of substantial similarity." Funky Films, Inc. v.
7 Time Warner Entm't Co., 462 F.3d 1072, 1077 (9th Cir. 2006) (quoting Shaw v.
8 Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990)). On a motion for summary
9 judgment, the Court need only apply an extrinsic, objective test on the subject.⁸ In
10 applying the extrinsic test, the Court "compares, not the basic plot ideas for stories,
11 but the actual concrete elements that make up the total sequence of events and the
12 relationships between the major characters." Id. (quoting Berkic v. Crichton, 761
13 F.2d 1289, 1293 (9th Cir. 1985)). For example, "[g]eneral plot ideas are not
14 protected by copyright law; they remain forever the common property of artistic
15 mankind." Id. at 1081 (quoting Berkic, 761 F.2d at 1293). Likewise, scènes à faire,
16 which are scenes that flow naturally from generic plot-lines, cannot be protected.
17 See Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) ("One cannot copyright
18 the idea of an idealistic young professional choosing between financial and
19 emotional reward, or of love triangles among young professionals that eventually
20 become strained, or of political forces interfering with private action."); see also
21 Swirsky v. Carey, 376 F.3d 841, 850 (9th Cir. 2004) ("Under the scènes à faire
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23 ⁸ By contrast, the intrinsic test, which examines an ordinary person's subjective
24 impressions of the similarities between two works, is exclusively the province of the
25 jury and not amenable to resolution on summary judgment. See Shaw, 919 F.2d at
26 1360-61. However, a "plaintiff who cannot satisfy the extrinsic test necessarily
27 loses on summary judgment, because a jury may not find substantial similarity
28 without evidence on both the extrinsic and intrinsic tests." Kouf v. Walt Disney
Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 2004).

1 doctrine, when certain commonplace expressions are indispensable and naturally
 2 associated with the treatment of a given idea, those expressions are treated like ideas
 3 and therefore not protected by copyright."). In addition, pursuant to the merger
 4 doctrine, "courts will not protect a copyrighted work from infringement if the idea
 5 underlying the copyrighted work can be expressed in only one way, lest there be a
 6 monopoly on the underlying idea." Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068,
 7 1082 (9th Cir. 2000).

8 When engaging in this extrinsic analysis, the Court "must take care to inquire
 9 only whether 'the *protectible elements*, standing *alone*, are substantially similar.'" Cavalier v. Random House, 297 F.3d 815, 822 (9th Cir. 2002) (*quoting Williams v.*
 10 Crichton, 84 F.3d 581, 588 (2d Cir. 1996)) (emphasis in original).

12 **1. Any similar elements between the works derive from historic**
 13 **fact or generic plotlines and hence are not protectible.**

14 In this case, there are no substantially similar **protectible** elements. The
 15 works before the Court share the same historical backdrop of Japan in the 1870's:
 16 the Japanese Emperor's introduction of Western military technologies and strategies;
 17 the Satsuma Rebellion; and the rise and fall of "the last of the samurai," Saigo
 18 Takamori. (Zwick Dec., ¶¶ 15, 27, 29 & Exs. P, R; Marquart Dec., Exs. G, I & J.)
 19 Such historical facts cannot be protected by copyright. See, e.g., Narell v. Freeman,
 20 872 F.2d 907, 910-11 (9th Cir. 1989) ("Historical facts and theories may be copied,
 21 as long as the defendant does not 'bodily appropriate' the expression of the
 22 plaintiff."); see also 1 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 2.11, p.
 23 2-178.7 (2007) ("One cannot build a story around a historical incident and then
 24 claim exclusive right in the use of the incident.' [...] The courts have denied
 25 copyright protection ... to historical facts") (*quoting Echevarria v. Warner Bros.*
 26 Pictures, Inc., 12 F. Supp. 632, 638 (S.D. Cal. 1935)).

27 At the outset, it must be noted that the Ninth Circuit has warned that lists of
 28 similarities framed by a plaintiff are "inherently subjective and unreliable,"

1 particularly when the list "emphasizes random similarities scattered throughout the
 2 works." Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984). Yet here,
 3 each of Plaintiffs' listed similarities, none of which Plaintiffs claim "is in and of
 4 itself substantial" (see Marquart Dec., Ex. F (Responses to Interrogatories) at
 5 No. 13), flow naturally from historical and/or generic (and unprotectable) elements:

- 6 • *The Protagonist in Each Work is a Former Civil War Officer.* Given that
 7 both works involve a Westerner confronting the Emperor's modernization
 8 of the Japanese army and the samurai reaction, it is hardly surprising that
 9 the hero in each work has a military background; otherwise, the hero
 10 would be unable to participate in the action with any real competence or
 11 expertise. Of course, the protagonist in *The Last Samurai*, Nathan Algren,
 12 is a veteran not only of the Civil War but also of the Indian Campaigns,
 13 and his participation in the eradication of Native American culture shapes
 14 his choice to fight alongside the Last Samurai. By contrast, James
 15 Gamble, the protagonist in Plaintiffs' screenplay, fought only in the Civil
 16 War, and he never joins the samurai cause.
- 17 • *The Protagonist in Each Work is Hard-Drinking, Embittered, Guilt-*
 18 *Ridden, and Suffers War Flashbacks.* With any war veteran often comes
 19 some degree of weariness or loss, and the war veteran experiencing
 20 flashbacks is a staple of cinema (for example, in *Rambo*). In any event, in
 21 April 2000, Zwick already had conceived of his protagonist as being "a
 22 man who has seen enough war, enough bloodshed for several lifetimes
 23" (Zwick Dec., ¶ 22 & Ex. K.) All of these characteristics of
 24 Defendants' protagonist flow naturally from any description of a war
 25 veteran who has been witness to great violence.
- 26 • *The Protagonist is a "Fish-Out-of-Water."* Of course, *any* American
 27 traveling to the closed society of 1870's Japan would have been a "fish-
 28 out-of-water." The clash of cultures flows from the setting. Thus, on

1 April 12, Zwick wondered: "What do they teach each other (besides
2 flower-arranging, koans, and the tea ceremony)?" (Zwick Dec., ¶ 22 &
3 Ex. K.)

- 4 • *The Protagonist is a Strong Leader, an Excellent Swordsman and Known*
5 *to Employ Trickery in Warfare.* It is hardly surprising that an American
6 war veteran from the 1870's would be skilled as a swordsman or in
7 military tactics, or be able to lead men in battle. In fact, as noted in
8 historical accounts exchanged between Zwick and Logan on April 21,
9 2000, Captain Leroy Janes, a retired U.S. army general, was a real
10 historical figure who acted as Japan's "advisor in Western naval and
11 military strategy." (Zwick Dec., ¶ 29 & Ex. R.)
- 12 • *The Protagonist is Recruited by the Emperor to Train the Imperial Army,*
13 *Composed of Peasants, in Modern War Strategies.* As noted above, by
14 April 2000 Zwick and Logan already had conceived of their protagonist as
15 being a war veteran, and had in fact conducted research regarding an
16 American military advisor who had come to Japan to advise it on Western
17 military strategy. (Zwick Dec., ¶¶ 22, 29 & Exs. K, R.) From these
18 historically-based ideas, it naturally follows that the protagonist would be
19 involved in some way with the Emperor's modernization efforts using a
20 peasant army.
- 21 • *The Protagonist Leads the Imperial Army Against the Samurai.* If the
22 protagonist is a military advisor to the modernizing Japanese Emperor in
23 the 1870's, this would -- as a matter of historical fact -- put him in direct
24 conflict with the samurai, who were rebelling against these efforts. Thus,
25 again, the historical accounts exchanged between Logan and Zwick on
26 April 21 state, "[Saigo's] samurai followers were defeated by imperial
27 troops, drawn from the peasantry and equipped with modern arms."
28 (Zwick Dec., ¶ 29 & Ex. R.)

- 1 • *The Works Have Identical Titles.* Although Plaintiffs point out that the
2 works have identical titles ("The Last Samurai"), that title was handed
3 down by history, not conceived by either Plaintiffs or Defendants. There
4 is simply no dispute that Saigo Takamori has been known through history
5 as the "Last Samurai." (Zwick Dec., ¶¶ 15, 27 & Ex. P; Marquart Dec.,
6 Ex. G.) And, even putting aside that historical fact, no party may claim a
7 copyright in the title of a work. See Chase-Riboud v. DreamWorks, Inc.,
8 987 F. Supp. 1222, 1231 (C.D. Cal. 1997) ("[T]itles may not claim
9 statutory copyright.") (*quoting Dr. Seuss Enterprises, L.P. v. Penguin*
10 *Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997)); see also 1 M.
11 Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 2.16, pp. 2-185 to 2-186
12 (2007) ("It is nevertheless clear ... that titles may not claim statutory
13 copyright.").
- 14 • *The Settings are Identical.* All of Plaintiffs' claimed identical settings –
15 the Imperial Palace, the Imperial training field, multiple battles in foggy
16 forests, the samurai retreat – are **required** in any story about a Western
17 military advisor to the Emperor who trains an army to confront the
18 samurai. The doctrines of scènes à faire and merger bar Plaintiffs from
19 claiming a monopoly on this kind of expression.
- 20 • *The Sequencing is Identical.* The only identity of sequence alleged by
21 Plaintiffs flows naturally from the historical record: Western military
22 advisor arrives in Japan, suffers initial setbacks, and participates in a
23 climactic battle. That is merely a repetition of the basic three-act structure
24 required of any such tale; the timing of events is so obvious as to
25 practically be required.
- 26 • *Each Work Has a War Profiteer.* While each work has a minor character
27 who is a gun manufacturer, there is simply no similarity between these two
28 characters. Plaintiffs' character is the meddling father-in-law of their

1 protagonist, whereas Defendants' character fires the protagonist in the
2 opening scene and is never seen again. Moreover, the war profiteer is a
3 staple of cinema and fiction dealing with military subjects, such as in *Gone*
4 *With the Wind* and *Catch-22*.

- 5 • *Each Work Begins with a Description of a Civil War Battle*. This assertion
6 is false (both works do not begin this way), but it goes without saying that
7 almost every character has a back story that he or she reveals. In a
8 romance, the main characters disclose their past lovers; in a story about
9 war, the main characters tell war stories. These are basic plot devices that
10 cannot be protected. See, e.g., Denker v. Uhry, 820 F. Supp. 722, 730
11 (S.D.N.Y. 1992) ("Plaintiff points out that each of the works opens with an
12 'accident' befalling the main character. ... [A]t most plaintiff has alleged
13 that [defendant] used a somewhat similar plot device to that employed in
14 [his work], which does not constitute copyright infringement.").
- 15 • *Each Work Ends With the Protagonist Having An Audience with the*
16 *Emperor, Recounting How Someone Died Courageously in Battle*. This
17 similarity flows naturally from the concept of a military advisor to the
18 Emperor succeeding in battle. Thus, at best, the Plaintiffs have identified a
19 scène à faire. The concept of the main character having an audience with
20 his commander after a great battle is a stock plot idea that cannot be
21 protected. See Cavalier, 297 F.3d at 823 ("Familiar stock scenes and
22 themes that are staples of literature are not protected."); id. at 824 ("[B]asic
23 plot ideas . . . are not protected by copyright law."). Indeed, the main
24 character in a story nearly always has to report to his commander or to the
25 head of state after the climactic battle has occurred (as, for example, when
26 Luke Skywalker and Han Solo were commended by Princess Leia in the
27 original *Star Wars*). And, of course, the Emperor's posthumous honoring
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1 of Saigo Takamori is an historical fact. (Zwick Dec., ¶ 29 & Ex. R;
2 Marquart Dec., Exs. G, I & J.)

3 To summarize, all of these "similarities," to the extent they even exist, are not
4 original plot contrivances that are subject to copyright protection. Copyright
5 provides protection in direct proportion to originality, and none of these concepts
6 are original -- instead, they are history-based or generic. Consequently, Defendants
7 are entitled to summary judgment on Plaintiffs' First Claim for Relief.

8 **2. The works are clearly dissimilar once the non-protectible**
9 **elements are set to the side.**

10 That Defendants are entitled to summary judgment is corroborated by the fact
11 that, once the historical and generic elements of both screenplays are stripped away,
12 the remaining aspects are clearly *dissimilar*. Although both works begin with the
13 same historical premise, they involve entirely different expressions. "The extrinsic
14 test focuses on 'articulable similarities between the plot, themes, dialogue, mood,
15 setting, pace, characters, and sequence of events' in the two works." Funky Films,
16 462 F.3d at 1077 (*quoting Kouf*, 16 F.3d at 1045 (citations omitted)). Under any
17 reasonable analysis each of these factors confirms that summary judgment in favor
18 of Defendants is appropriate.

19 **(a) Characters**

20 *The Protagonists.* Plaintiffs' Gamble and Defendants' Algren are two
21 versions of the commonplace figure of the psychically or physically wounded
22 veteran, but the circumstances of their back stories significantly differ. Whereas
23 Gamble accidentally killed his own men in the Battle of the Wilderness, Algren was
24 compelled to participate in a brutal attack in the Indian Campaigns. Gamble's back
25 story is used to establish the debt he owes President Grant and thus to explain why
26 he feels obliged to leave his comfortable life at West Point. Later, when the
27 memory of the Battle of the Wilderness returns in a Japanese opium den, it is used
28 to reinforce Gamble's sense of failure after his son's murder, and his loss of half his

1 army while seeking revenge on the samurai. By contrast, Algren's back story is
2 used to explain his instability and isolation, and later provides a foundation for his
3 ability to appreciate the samurai way of life (which parallels the Native American
4 way).

5 The protagonists also differ in background, circumstances, and experiences.
6 Gamble is a decorated veteran, a happy-go-lucky West Point professor and a family
7 man, whereas Algren is haunted and dissolute. One of the opening scenes of
8 Plaintiffs' work depicts Gamble light-heartedly teasing military cadets as his class
9 ends, and then engaging in a snowball fight with them as he departs the building.
10 None of these character traits appear in Defendants' Algren -- who is depicted as an
11 abject failure and a loner drunk with a death wish. (Zwick Dec., Ex. I at Chapter 2.)
12 The emotional trajectory of Plaintiffs' Gamble leads from the security of West Point
13 to defeat and despair – at his nadir he takes refuge in an opium den – after which he
14 regains his sense of honor and worth by killing the villain Saigo. Algren's emotional
15 trajectory, by contrast, starts at a low point but leads to the healing of his psychic
16 wounds in the context of captivity, the regaining of his sense of honor fighting
17 alongside the samurai, and finally a return to the samurai village. (Zwick Dec., Ex. I
18 at Chapters 11-18 & 30-40.) Ultimately, Defendants' Algren comes to admire
19 everything that the samurai stood for, and therefore sides with them against the
20 newly westernized imperial army, using samurai tactics. But Plaintiffs' Gamble
21 consistently views the samurai as vicious and corrupt (in fact, they kill his son), and
22 he defeats them using Western technology and tactics. In short, the protagonists'
23 motivations and emotional journeys could not be more opposite.

24 *The Last Samurai Character.* Plaintiffs' Saigo is a treacherous warlord who
25 betrays his allies and friends; his villainy appears to be motivated by an ambition to
26 become emperor. By contrast, Defendants' Katsumoto is a thoughtful and spiritual
27 man – he is shown chanting in a Buddhist temple – respected by his friends and
28 enemies alike. (Zwick Dec., Ex. I at Chapters 12 & 30.) Although he is a fearsome

1 warrior, he is also well aware that his traditional way of life is coming to an end.
 2 Still, he wishes to preserve his dignity and honor. Although both chieftains are
 3 modeled on the historical Saigo Takamori, the parties' respective expressions of that
 4 individual are polar opposites.

5 *The Emperor Character.* Plaintiffs' Emperor is presented as an enlightened
 6 young ruler whose commitment to modernize Japan is shown, among other ways, by
 7 having him receive his advisors, including Saigo, at a Western-style table set with
 8 crystal and china, and announcing to them: "Gentlemen, welcome to the nineteenth
 9 century." (Marquart Dec., Ex. B at 18.) By contrast, Defendants' Emperor is a
 10 hesitant and tentative young man who is under the influence of an oligarch
 11 committed to modernization. At the film's conclusion, the Emperor comes into his
 12 own realization that Japan cannot forget its history and identity. (Zwick Dec., Ex. I
 13 at Chapter 39.)

14 *Other Characters.* Plaintiffs' Lord Eto is based on a historical figure, and has
 15 no parallel in Defendants' film, which portrays no independent samurai chieftains
 16 other than Katsumoto. Nor is there any parallel to the Plaintiffs' character Masako,
 17 the female samurai warrior, who assists Gamble in his revenge attack on Lord Saigo
 18 following the murder of Gamble's son. Other characters without analogue in *The*
 19 *Last Samurai* include: Gamble's wife, his son, and his domineering father-in-law;
 20 the Christian peasants Ken and Jun whose parents were killed by Eto and Saigo; and
 21 Gatier, the Frenchman killed by Saigo. Likewise, the Benay screenplay includes no
 22 parallel to Defendants' Colonel Bagley, who ordered the barbaric attack on a village
 23 during the Indian Campaigns; and no parallel to any of the characters from the
 24 samurai village, including the beautiful Taka, the movie's subdued love interest.

25 **(b) Plot**

26 The plot of each work is similar only insofar as both involve the premise of an
 27 American soldier in Japan during the period of the Satsuma Rebellion. Plaintiffs'
 28 screenplay develops this premise into a story of revenge in which the American

1 protagonist moves from domestic security, to despair, and finally to revenge and
 2 triumph when he defeats his evil antagonist. Defendants' film develops this premise
 3 in an entirely different way, turning it into a captivity narrative reminiscent in some
 4 respects to *Dances With Wolves* (Zwick Dec., Ex. I at Chapters 11-18); the
 5 American protagonist in Defendants' story moves from isolation and self-destructive
 6 cynicism to acceptance in a traditional community whose values he can embrace and
 7 to which he is willing to devote his life. Plaintiffs' plot represents the leader of the
 8 samurai rebellion as a treacherous villain who is justly defeated by a heroic
 9 protagonist; Defendants' plot, on the other hand, represents the samurai leader as a
 10 figure of doomed nobility who leads the protagonist to enlightenment. Furthermore,
 11 Defendants' film possesses nothing of the intrigue subplot concerning Saigo, Eto,
 12 and Maebara that is prominent in the Benay screenplay. Accordingly, contrary to
 13 Plaintiffs' position, the *expressions* of the respective plot ideas could hardly be more
 14 different. See, e.g., Litchfield, 736 F.2d at 1357 ("Any similarities in plot exist only
 15 at the general level for which plaintiff[s] cannot claim copyright protection."); see
 16 also Berkic, 761 F.2d at 1293 ("To some extent, both works take their general story
 17 from the adventures of a young professional who courageously investigates, and
 18 finally exposes, the criminal organization. But this degree of similarity between the
 19 basic plots of two works cannot sustain a plaintiff's claim that the works are
 20 'substantially similar.'").

21 (c) **Themes**

22 When basic stock themes are set aside, the two works are not even of the
 23 same *type*. The Benay screenplay is an action-based revenge story – Saigo is a
 24 classic villain who kills the Western protagonist's son. In the climax, Gamble fights
 25 an epic battle with Saigo to avenge his son's death. In *The Last Samurai*, Algren
 26 develops a deep and enduring friendship and respect for the Saigo-based character
 27 and his dying culture, ultimately joining him in battle in the climactic moments of
 28 the film. (Zwick Dec., Ex. I at Chapters 30-38.) In short, one movie is a

1 swashbuckling revenge movie, and the other is a redemptive buddy movie. See also
2 Anderson v. Paramount Pictures Corp., 617 F. Supp. 1, 2 (C.D. Cal. 1985) (finding
3 no substantial similarity where moods of two works were dissimilar: one was a
4 "social comedy" and the other a "romantic melodrama").

5 **(d) Setting**

6 Setting is employed in fundamentally different ways in the two works.
7 Plaintiffs' screenplay uses setting for variety and exoticism as do, for example, many
8 James Bond movies. Thus, the Plaintiffs employ sea fights as well as land fights,
9 and exotic locales such as the opium den and the temple of the warrior monks.
10 Defendants' work, on the other hand, employs setting structurally and thematically.
11 Thus, a major contrast is established between the urban and village settings as
12 representations of the opposed value systems of the modern and traditional worlds.
13 The story moves from urban Japan to the village for the captivity sequence, then
14 back to the city, and after the climactic battle, back to the village. No such pattern
15 appears in the Benay screenplay.

16 **(e) Mood**

17 There is a clear difference in tone between the works in question. Plaintiffs'
18 screenplay is predominantly triumphal or exultant. This quality is apparent, for
19 example, in the Iwo Jima finale in which Gamble, having slain Saigo, takes out the
20 American flag he has been carrying, explains to a young Japanese soldier that the
21 flag is a symbol of freedom, and then raises the stars and stripes on the Iwo Jima
22 mountain peak in a foreshadowing of the U.S. victory in World War II.
23 Defendants' *The Last Samurai*, on the other hand, is predominantly nostalgic and
24 reflective. This quality is evident in, for example, the dreamy concluding sequence
25 in which Algren returns to the Japanese village and effectively turns his back on
26 America. The generally melancholy tone of the movie is related to the fact that this
27 work celebrates a way of life that even its proponents realize is doomed.

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(f) Pace

The Benay screenplay is a fast-paced adventure and intrigue story. While Defendants' film also employs fast-paced action sequences, it also includes the more leisurely sequence in which Algren, a captive and guest in the samurai village, comes to appreciate the traditional Japanese way of life. (Zwick Dec., Ex. I at Chapters 11-18.) That both works, like countless Hollywood movies, happen to employ fast-paced action sequences is not a substantial similarity.

(g) Sequence of Events

The sequence of events in each work is similar only at the highest level of abstraction; when describing two works on similar subjects it is possible to leave out so much particularity of character and event that little is left but commonplaces and scènes à faire. In the present case, a description of the general sequence of events at a high level of abstraction leaves out such obvious and crucial differences between the works as:

- The Benay screenplay is a story of deception and intrigue in which a hero triumphs over a treacherous villain. Defendants' story, on the other hand, is a captivity narrative in which the hero undergoes a transformation and a radical change of life. (Zwick Dec., Ex. I at Chapters 11-18.)
- In the Benay screenplay, despite the hero's warning, the initial battle ends with the imperial army's victory and with Gamble presenting Lord Eto's head to the Emperor. Despite his protests that the recruits are raw and insufficiently trained, Gamble's tactical brilliance allows him to defeat his enemy. In the Defendants' work, on the other hand, the initial battle ends with the rout of the raw imperial army and Algren's capture. (Zwick Dec., Ex. I at Chapters 8-9.)
- In the Benay screenplay, the "picture of Japan" that Gamble acquires is an understanding of the brutality and deceit of the samurai. Gamble's

1 very different story ends where it began, in New York. The signs of
2 change are Japanese house furnishings and a daughter named Masako.
3 In the Defendants' work, by contrast, Algren acquires a deep
4 appreciation for the traditional values of the samurai and ultimately
5 elects to remain in Japan among them.

6 In short, "[t]he stories do not share any detailed sequence of events." Cavalier, 297
7 F.3d at 824.

8 (h) **Dialogue**

9 There are notable differences in the approach to dialogue in the two works.
10 With the exception of a few brief words or phrases, the Benay screenplay is written
11 in English; Defendants' film, by contrast, includes substantial exchanges in
12 Japanese. Defendants' film also uses voice-over passages to suggest that Algren is
13 keeping a journal of his experiences in Japan, one that continues his journal of the
14 Indian Campaigns. (*E.g.*, Zwick Dec., Ex. I at Chapter 4.) Nothing like this appears
15 in the Benay screenplay.

16 There are no passages in *The Last Samurai* that are in any substantial way
17 similar to passages in the Benay Screenplay. Nor have the Plaintiffs even attempted
18 to identify any dialogue "similarities." *See, e.g., Kouf*, 16 F.3d at 1046 (affirming
19 summary judgment where "dialogues [were] similar in random words, at best");
20 Olson v. Nat'l Broadcasting Co., 855 F.2d 1446, 1450 (9th Cir. 1988) (affirming
21 summary judgment where plaintiff did not demonstrate "extended similarity of
22 dialogue"); Idema v. DreamWorks, Inc., 162 F. Supp. 2d 1129, 1185 n.67 (C.D. Cal.
23 2001) ("Plaintiffs again confuse the 'idea' conveyed by a particular piece of dialogue
24 with the protectable 'expression' thereof.").

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1 **II. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF**
 2 **ALL DEFENDANTS AND AGAINST PLAINTIFFS ON THEIR**
 3 **CLAIM FOR BREACH OF IMPLIED CONTRACT**

4 Plaintiffs' Second Claim for Relief alleges that Defendants breached an
 5 implied-in-fact contract that "obligated" them to pay for the alleged use of the
 6 Benay screenplay. "To establish an implied-in-fact contract, the plaintiff must
 7 show: that he or she prepared the work; that he or she disclosed the work to an
 8 offeree for sale; that under all circumstances attending disclosure it can be
 9 concluded that the offeree voluntarily accepted the disclosure knowing the
 10 conditions on which it was tendered (i.e., the offeree must have the opportunity to
 11 reject the attempted disclosure if the conditions were unacceptable); and the
 12 reasonable value of the work." Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102,
 13 1114, 198 Cal. Rptr. 296 (1984) (citing, *inter alia*, Desny v. Wilder, 46 Cal.2d 715,
 14 744, 299 P.2d 257 (1956)).

15 On their Second Claim for Relief, the Plaintiffs may recover, if at all, only for
 16 the alleged theft of their ideas, not for the alleged copying of their screenplay, which
 17 would be preempted by the Copyright Act. See, e.g., Grosso v. Miramax Film
 18 Corp., 383 F.3d 965, 967-68 (9th Cir. 2004). Yet, the Plaintiffs cannot prove that
 19 the Defendants used their ideas when developing *The Last Samurai*. See Klekas,
 20 150 Cal. App. 3d at 1115 ("Although plaintiff may have submitted his literary effort
 21 to one of the named defendants, there is nothing in the record to establish the use of
 22 that work in the writing or making of 'The Deer Hunter.'"). As discussed in
 23 Section I.A., above, there is no admissible evidence to rebut the fact that Zwick and
 24 Logan independently created the essential elements for what became *The Last*
 25 *Samurai* well before any alleged access to the Benay screenplay. Thus, any
 26 inference of Defendants' use based on the fact that the two works share a similar
 27 premise is dispelled *as a matter of law*. See Hollywood Screentest of Am., Inc. v.
 28 NBC Universal, Inc., 151 Cal. App. 4th 631, 646, 60 Cal. Rptr. 3d 279 (2007).

