

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12	JARRETT ALEXANDER,)	CV 17-3123-RSWL-KSx
13)	
14	Plaintiff,)	ORDER re: Defendants'
15	v.)	Motion to Dismiss
16)	Plaintiff's Complaint in
17)	its Entirety with
18)	Prejudice [52]
19	METRO-GOLDWYN-MAYER STUDIOS)	
20	INC.; WARNER BROTHERS)	
21	ENTERTAINMENT, INC.; NEW)	
22	LINE CINEMA CORPORATION;)	
23	CHARTOFF-WINKLER)	
24	PRODUCTIONS, INC.;)	
25	SYLVESTER STALLONE; RYAN)	
26	COOGLER; AARON COVINGTON,)	
27	Defendants.)	

Currently before the Court is Defendants Metro-Goldwyn-Mayer Studios Inc. ("MGM"), Warner Brothers Entertainment, Inc. ("Warner Brothers"), New Line Cinema Corporation ("New Line"), Chartoff-Winkler Productions Inc. ("CWP"), Sylvester Stallone ("Stallone"), Ryan Coogler ("Coogler"), and Aaron Covington's ("Covington") (collectively, "Defendants")

1 Motion to Dismiss Plaintiff Jarrett Alexander's
2 ("Plaintiff") Complaint in its Entirety with Prejudice
3 [52] ("Motion" or "Motion to Dismiss"). Having
4 reviewed all papers submitted pertaining to this
5 Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the
6 Court **GRANTS** Defendants' Motion to Dismiss **WITHOUT**
7 **LEAVE TO AMEND** [52].

8 I. BACKGROUND

9 A. Factual Background

10 This is an Action common to this district, where a
11 plaintiff claims that defendants, typically
12 entertainment industry corporations or executives,
13 stole his idea for a popular television show or motion
14 picture.

15 Plaintiff is a New Jersey citizen and a largely
16 unknown television and movie actor. Compl. ¶¶ 6, 17,
17 ECF No. 1-1. MGM, Warner Brothers, New Line, and CWP
18 are Delaware corporations, a Delaware LLC, and a
19 California corporation, respectively.¹ Decl. of Sandy
20 Murray ("Murray Decl.") ¶ 3, ECF No. 1-3; Smith Decl. ¶
21 3; Compl. ¶ 10. All have their principal place of
22 business throughout the greater Los Angeles area.
23 Compl. ¶¶ 7-10. Defendants Stallone, Coogler, and
24 Covington are California citizens. Id. at ¶¶ 11-13.

25 *Rocky* is an internationally-known movie released in
26

27 ¹ New Line was incorrectly named New Line Cinema Corporation
28 in the Complaint [1]. New Line was converted to an LLC on
December 31, 2009. Decl. of Wayne M. Smith ("Smith Decl.") ¶ 1,
ECF No. 1-4.

1 1976. Id. at ¶ 20. Stallone starred as the titular
2 character, Rocky Balboa, a professional boxer. Apollo
3 Creed is another character featured in four of the
4 *Rocky* franchise sequels. Id. at ¶¶ 23-24.

5 In 2008, Plaintiff, a lifelong fan of the *Rocky*
6 franchise, allegedly came up with an idea to create a
7 story about the fighting career of Apollo Creed's son.
8 Id. at ¶ 2. The story would emphasize the theme of
9 building one's own legacy. Id. at ¶¶ 2, 18, 25. He
10 drafted a screenplay, initially titled "Creed: Rocky
11 Legacy," later titled "Creed" (the "Screenplay"). Id.
12 at ¶ 26. The Screenplay follows Apollo Creed's son as
13 he establishes himself in the boxing community, copes
14 with his father's death, and builds his own legacy with
15 Rocky Balboa's advice and mentorship. Id. at ¶ 27.²

16 Plaintiff also made a "pitch reel," a short
17 promotional film about the Screenplay and its "legacy"
18 theme (the "Pitch Reel"). Id. at ¶ 33. The Pitch Reel
19 starts with a reporter interviewing Apollo Creed's son
20 and asking him whether he will uphold his father's
21 legacy. Id. at ¶ 35. Plaintiff posted the Pitch Reel
22 on Vimeo, a social networking platform for sharing
23 video content. Id. at ¶ 41. In 2012, he created a
24 website, www.creedmovie.com (the "Website"), which was

25
26 ² In 2010, Plaintiff registered the Screenplay, titled
27 "Creed: Rocky Legacy" with the Writer's Guild of America ("WGA"),
28 registration number VPFA4D8DCEF2. Id. at ¶ 28. Thereafter, he
registered the Screenplay, this time entitled "Creed," with the
United States Copyright Office, registration number PA0001861140.
Id. at ¶ 30.

1 later transferred to a different domain,
2 www.jarrettalexander.com, after the original domain
3 lapsed in June 2014. Id. at ¶ 39. The Website
4 contained the Pitch Reel and described how Plaintiff
5 developed the Screenplay. Id. at ¶ 40. The
6 Screenplay, Pitch Reel, and Website are collectively
7 referred to as the "Creed Idea."

8 Between 2010 and 2013, Plaintiff attempted to
9 generate interest in the Creed Idea. In 2010, he
10 circulated the Screenplay to individuals in the movie
11 industry. Id. at ¶ 36. He alleges that Coogler knows
12 and interacts with some of these individuals; for
13 example, Coogler and one of the Screenplay recipients
14 both attended the American Black Film Festival in
15 Miami, Florida in July 2011. Id. at ¶ 38.

16 Because Plaintiff lacked the financial means or
17 connections to make a movie on his own, he also took to
18 social media to pitch the Creed Idea to movie industry
19 insiders. Id. at ¶ 51. In April 2012, Plaintiff and
20 several friends started promoting the Creed Idea on
21 Twitter, a social media platform where individuals can
22 post or "tweet" short, public messages that can be
23 directed at specific users. Id. at ¶ 42. They tweeted
24 links to the Website and the Pitch Reel to several
25 individuals in the movie and professional fighting
26 industries. Id. at ¶ 43.

27 For instance, they tweeted at actor and ex-
28 professional wrestler, Dwayne "The Rock" Johnson,

1 Stallone, and Carl Weathers (the actor who played
2 Apollo Creed in the *Rocky* movies), attaching a link to
3 the Website. Id. at ¶¶ 44-47. Stallone, MGM, and New
4 Line all allegedly "follow" Dwayne Johnson's twitter
5 account and Plaintiff alleges that Stallone and Dwayne
6 Johnson are friends. Id. at ¶ 45. Plaintiff's friend
7 also tweeted Stallone directly: "@TheSlyStallone next
8 rocky installment4u? 2min trailer. Wants to meet u
9 creedmovie.com." Id. at ¶ 46. Between April 2012 and
10 July 2013, Plaintiff and his friends allegedly sent
11 more than 25 tweets that hyperlinked to the Website and
12 encouraged Stallone to work with Plaintiff on the Creed
13 Idea. Plaintiff alleges that Defendants reviewed the
14 Screenplay, Website, and Pitch Reel. Id. at ¶ 50.

15 On July 24, 2013, MGM and Stallone announced their
16 plans to develop *Creed*, a motion picture about Apollo
17 Creed's son. Id. at ¶ 56. They recruited Coogler to
18 write the screenplay. Id. Plaintiff alleges that
19 Defendants' movie, *Creed*, is premised exactly on the
20 Creed Idea he created. Id. at ¶ 69. Specifically,
21 Defendants' *Creed* follows Apollo Creed's son as he
22 strives to create his own legacy under the tutelage of
23 the now-retired fighter, Rocky Balboa. Id. at ¶ 70.
24 And the official *Creed* trailer features the following
25 phrase: "Your Legacy is More Than a Name." Id. at ¶
26 72. Alleging that Defendants stole his idea, Plaintiff
27 filed the instant Action.

28 ///

1 **B. Procedural Background**

2 Plaintiff filed the Complaint on February 26, 2016
3 in New Jersey state court, asserting claims for (1)
4 misappropriation of an idea; (2) breach of implied
5 contract; and (3) unjust enrichment [1-1]. Defendants
6 removed the action to the United States District Court
7 for the District of New Jersey ("New Jersey Court") on
8 April 14, 2016.

9 On April 22, 2016, Defendants filed a Motion to
10 Dismiss Plaintiff's Complaint with Prejudice [6] and a
11 Motion to Transfer Action to the United States District
12 Court for the Central District of California [7]. On
13 December 20, 2016, the New Jersey Court granted
14 Defendants' Motion to Transfer, denied the Motion to
15 Dismiss as moot, and transferred the Action to this
16 Court [31].

17 On May 19, 2017, Defendants filed the instant
18 Motion to Dismiss pursuant to Federal Rules of Civil
19 Procedure 12(b)(6) ("FRCP" or "Rule") [52]. Plaintiff
20 filed his Opposition on June 20, 2017 [81], and
21 Defendants' Reply timely followed on July 3, 2017 [83].

22 **II. DISCUSSION**

23 **A. Legal Standard**

24 Federal Rules of Civil Procedure 12(b)(6) allow a
25 party to move for dismissal of one or more claims if
26 the pleading fails to state a claim upon which relief
27 can be granted. Fed. R. Civ. P. 12(b)(6). A complaint
28 must "contain sufficient factual matter, accepted as

1 true, to state a claim to relief that is plausible on
2 its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
3 (internal quotation marks omitted). Dismissal can be
4 based on a "lack of a cognizable legal theory or the
5 absence of sufficient facts alleged under a cognizable
6 legal theory." Balistreri v. Pacifica Police Dep't,
7 901 F.2d 696, 699 (9th Cir. 1990).

8 In ruling on a 12(b)(6) motion, a court may
9 generally consider only allegations contained in the
10 pleadings, exhibits attached to the complaint, and
11 matters properly subject to judicial notice. Swartz v.
12 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court
13 must presume all factual allegations of the complaint
14 to be true and draw all reasonable inferences in favor
15 of the non-moving party. Klarfeld v. United States,
16 944 F.2d 583, 585 (9th Cir. 1991). The question
17 presented by a motion to dismiss is not whether the
18 plaintiff will ultimately prevail, but whether the
19 plaintiff has alleged sufficient factual grounds to
20 support a plausible claim to relief, thereby entitling
21 the plaintiff to offer evidence in support of its
22 claim. Iqbal, 556 U.S. at 678; Swierkiewicz v. Sorema
23 N.A., 534 U.S. 506, 511 (2002). While a complaint need
24 not contain detailed factual allegations, a plaintiff
25 must provide more than "labels and conclusions" or "a
26 formulaic recitation of a cause of action's elements."
27 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)
28 (internal citation omitted).

1 **B. Analysis**

2 1. Defendants' Request for Judicial Notice is
3 **GRANTED in Part and DENIED in Part**

4 A court "may judicially notice a fact that is not
5 subject to reasonable dispute because it: (1) is
6 generally known . . .; or (2) can be accurately and
7 readily determined from sources whose accuracy cannot
8 reasonably be questioned." Fed. R. Evid. 201(b). A
9 court "must" take judicial notice "if a party requests
10 it and the court is supplied with the necessary
11 information." Fed. R. Evid. 201(c)(2).

12 Defendants seek judicial notice of the following
13 attached to the Kim Declaration: (1) the Complaint
14 filed in New Jersey state court; (2) a DVD copy of
15 Defendants' movie *Creed*; (3) a DVD copy of Plaintiff's
16 Pitch Reel; (4) screenshots of Dwayne Johnson and
17 Stallone's Twitter accounts; (5) a transcript of the
18 December 20, 2016 Oral Opinion of the New Jersey
19 Court's Magistrate Judge, Judge Michael A. Hammer,
20 granting Defendants' Motion to Transfer; and (6)
21 September 24, 2015 and December 18, 2015 orders in Reed
22 v. National Football League, No. Civ. 15-1796 DMG
23 (AGRx), a Central District case granting defendants'
24 motions to dismiss. Defs.' Req. for Judicial Ntc. ¶¶
25 1-7, ECF No. 54; Decl. of Elaine Kim ("Kim Decl.") Exs.
26 A-G, ECF Nos. 55, 55-1.

27 The Court **GRANTS in Part** Defendants' Request for
28 Judicial Notice as to the first five items requested

1 [54]. The Court takes judicial notice of the Complaint
2 and Judge Hammer's Oral Opinion, as a court may take
3 judicial notice of previous filings in the same
4 litigation between the same parties. See Shuttlesworth
5 v. City of Birmingham, 394 U.S. 147, 157 (1969). The
6 Court also takes judicial notice of the *Creed* DVD, the
7 DVD containing the Pitch Reel, and the Twitter account
8 screenshots, as their contents are referred to
9 throughout the Complaint, and they can be accurately
10 and readily determined from sources whose accuracy
11 cannot reasonably be questioned. Fed. R. Evid.
12 201(c)(2); Thomas v. Walt Disney Co., No. C-07-4392 CW,
13 2008 WL 425647, at *5 n.1 (N.D. Cal. Feb. 14, 2008).

14 The Court **DENIES in Part** Defendants' Request for
15 Judicial Notice as to the orders in Reed v. National
16 Football League. While the Court can consider them as
17 persuasive authority, "to the extent [Defendants] seek
18 to cite that case in support of their arguments,
19 judicial notice is also unnecessary: the Court can, and
20 will consider the reasoning of that ruling for whatever
21 persuasive value it may have." Diversified Capital
22 Inv., Inc. v. Sprint Commc'ns, Inc., No.
23 15-cv-03796-HSG, 2016 WL 2988864, at *5 (N.D. Cal. May
24 24, 2016).

25 2. Plaintiff's Request for Judicial Notice is
26 **GRANTED**

27 Plaintiff seeks judicial notice of screenshots of
28 the Website, www.jarrettalexander.com, formerly known

1 as www.creedmovie.com. Pl.'s Req. for Judicial Ntc.
2 Ex. A, ECF No. 82. The Court **GRANTS** Plaintiff's
3 Request for Judicial Notice [82] because its contents
4 are referred to throughout the Complaint, and it can be
5 accurately and readily determined from sources whose
6 accuracy cannot reasonably be questioned. Fed. R.
7 Evid. 201(c)(2); Thomas, 2008 WL 425647, at *5 n.1.

8 3. Defendants' Motion is Procedurally Permitted

9 Plaintiff argues that the New Jersey Court's denial
10 of Defendants' previous Rule 12(b)(6) Motion to Dismiss
11 [6] bars the instant Rule 12(b)(6) Motion pursuant to
12 Rule 12(g). Pl.'s Opp'n to Defs.' Mot. to Dismiss
13 ("Opp'n") 9:16-17. Under Rule 12(g), "a party that
14 makes a motion under [Rule 12] must not make another
15 motion under this rule raising a defense or objection
16 that was available to the party but omitted from its
17 earlier motion."

18 Defendants can renew their Rule 12(b)(6) Motion.
19 Arguments not raised in a previous motion to dismiss
20 are impermissible under Rule 12(g). Sowinski v. Wells
21 Fargo Bank, N.A., No. 11-6431-SC, 2013 WL 2436229, at
22 *3 (N.D. Cal. June 4, 2013). But the renewed Motion to
23 Dismiss repeats the same three arguments made in the
24 previous Motion to Dismiss: (1) Plaintiff did not keep
25 the Creed Idea confidential and widely disseminated it;
26 (2) the Copyright Act preempts his misappropriation of
27 idea and unjust enrichment claims; and (3) the breach
28 of implied contract claim lacks essential terms of

1 price, duration, and lacks privity of contract.
2 Compare Defs.' First Mot. to Dismiss at 10, 14, 19, 23,
3 with Defs.' Second Mot. to Dismiss ("Mot.") at 4:12-19.
4 Although the change in applicable substantive law from
5 New Jersey law to California law may slightly alter the
6 elements and tests applicable to the claims, it appears
7 that Defendants' main, underlying contentions remain
8 the same.

9 Defendants can also renew their Motion because the
10 New Jersey Court transferred venue pursuant to 28
11 U.S.C. § 1404(a) and denied as moot Defendants'
12 previous Motion to Dismiss. The New Jersey Court did
13 not expressly decide any of the arguments raised in
14 either Motion to Dismiss. See Kim Decl. Ex. E; see,
15 e.g., NDX Advisors, Inc. v. Advisory Fin. Consultants,
16 Inc., No. C 11-3234 SBA, 2012 WL 6520689, at *2 (N.D.
17 Cal. Dec. 13, 2012).

18 4. California Law Applies

19 Before reaching the merits of the Motion to
20 Dismiss, the Court must decide whether California or
21 New Jersey state law apply to Plaintiff's claims.

22 "Typically, a federal court sitting in diversity
23 applies the conflict-of-law rules of the state in which
24 it sits. However, after a transfer under 28 U.S.C. §
25 1404, the choice-of-law rules of the transferor court
26 apply." Sarver v. Chartier, 813 F.3d 891, 897 (9th
27 Cir. 2016)(internal quotation marks and citation
28 omitted). Here, New Jersey's choice-of-law rules apply

1 to determine whether the Court should apply California
2 substantive law or New Jersey substantive law.

3 New Jersey uses the "governmental interest" test in
4 a choice-of-law analysis. Erny v. Estate of Merola,
5 171 N.J. 86, 99 (2002). "The determinative law is that
6 of the state with the *greatest interest* in governing
7 the particular issue." Velasquez v. Franz, 123 N.J.
8 498, 527 (1991)(citation omitted)(emphasis in
9 original). The first prong asks "whether there is an
10 actual conflict between the laws of the states
11 involved." Erny, 171 N.J. at 100. The second prong
12 asks the relative interest each state has in applying
13 its law. Id.

14 First, New Jersey and California law regarding
15 misappropriation of idea conflict because California
16 apparently does not recognize a misappropriation of
17 idea claim, see Desny v. Wilder, 46 Cal. 2d 715 (1956),
18 but New Jersey law does. Duffy v. Charles Schwab &
19 Co., Inc., 123 F. Supp. 2d 802, 807-08 (D.N.J.
20 2000)(citing Flemming v. Ronson Corp., 107 N.J. Super
21 311, 317 (1969)).

22 Assuming an inherent conflict between California
23 and New Jersey law, California has a greater interest
24 in adjudicating this Action. For the second prong of
25 the governmental-interest test, New Jersey courts are
26 guided by these factors from Restatement (Second) of
27 Conflict of Laws § 145 (1971): "(1) the place where the
28 injury occurred; (2) the place where the conduct

1 causing the injury occurred; (3) the domicile,
2 residence, nationality, place of incorporation, and
3 place of business of the parties; and (4) the place
4 where the relationship, if any, between the parties is
5 centered."³

6 These factors counsel in favor of applying
7 California law. As Judge Hammer noted in the New
8 Jersey Court's Order Transferring Venue, Defendants'
9 awareness of the Creed Idea and how they
10 misappropriated it are key issues in this Action. Kim
11 Decl. Ex. E, at 11:9-12.⁴ With those issues in mind,
12 California emerges as the state with a greater
13 interest. The first factor favors New Jersey, as
14 Plaintiff's injury took place there. But this is only
15 because Plaintiff is domiciled in New Jersey. Sarver,
16 813 F.3d at 898 (New Jersey was not necessarily the
17

18 ³ New Jersey courts will also consider these factors from
19 the Restatement: "(1) the interests of interstate comity; (2) the
20 interests of the parties; (3) the interests underlying the field
21 of tort law; (4) the interests of judicial administration; and
22 (5) the competing interests of the states." Restatement (Second)
23 of conflict of Laws § 6 (1971). To potentially deter California-
based entertainment corporations from misappropriating
individuals' ideas, the Court concludes that these factors favor
applying California substantive law.

24 ⁴ Concluding that New Jersey has a stronger governmental
25 interest—and thus that New Jersey law applies—would be
26 inconsistent with the "law of the case;" that is, the New Jersey
27 Court's venue analysis. Judge Hammer cogently reasoned why the
28 Central District is an appropriate venue, and this analysis
guides the Court in the "governmental interest" choice-of-law
test. Thus, Plaintiff's efforts to argue that Judge Hammer's
venue reasoning is inapplicable to the choice-of-law analysis are
unavailing. Opp'n 11:4-16.

1 location of plaintiff's injuries just because he lived
2 there when defendants used his life story for a movie).
3 Plaintiff supposedly created the Creed Idea in New
4 Jersey and developed it with his friend and consultant,
5 Mr. Malone, another New Jersey resident. Opp'n 11:16-
6 21. Beyond Plaintiff's domicile and the domicile of an
7 ancillary non-party mentioned for the first time in the
8 Opposition, Plaintiff makes no effort to show how any
9 of the Restatement factors render New Jersey the state
10 with a greater interest in the Action.

11 The second and third factors weigh in favor of
12 California. Not only do Defendants have their
13 principal places of business in California or are
14 domiciled here, but also the conduct causing the
15 alleged misappropriation of idea claim occurred here.
16 Restatement § 145, cmt. e (1971)(in cases of unfair
17 competition or business or financial interests, "the
18 place of business is the more important contact");
19 Sarver, 813 F.3d at 896. Coogler apparently pitched
20 *Creed* to his agent and to Stallone's agent in
21 California, and started developing the movie with MGM
22 in California. Compl. ¶¶ 60-66.

23 The fourth factor is neutral. It is unclear where
24 the locus of the parties' relationship is because the
25 alleged contractual relationships arose from Twitter
26 interactions and the mailing of the Screenplay to
27 industry individuals. Even so, it is not as though the
28 parties had meetings in New Jersey or that Defendants

1 proceeded to exclusively market *Creed* there. Stewart
2 v. World Wrestling Fed'n Entm't, Inc., No. 03 CV 2468
3 RLC, 2005 WL 66890, at *1 (S.D.N.Y. Jan. 11, 2005)(the
4 parties' relationship was centered in New York, because
5 "[m]any of the meetings between the two parties took
6 place in defendant's New York offices, defendant
7 allegedly sold plaintiff's lingerie concept in its New
8 York restaurant and defendant allegedly conducted
9 fashion shows in New York utilizing plaintiff's
10 ideas.") Accordingly, the Court applies California
11 substantive law to the Action.

12 5. Motion to Dismiss

13 The Court now determines whether it should dismiss
14 Plaintiff's claims for misappropriation of idea, breach
15 of implied contract, and unjust enrichment.

16 a. *Misappropriation of Idea*

17 To state a claim for California's common-law
18 misappropriation tort, Plaintiff must plead that he
19 "has made a substantial investment of time, effort and
20 money in creating the thing misappropriated such that
21 the court can characterize the 'thing' as a kind of
22 property right; (2) the defendant has appropriated the
23 'thing' at little or no cost, such that the court can
24 characterize defendant's actions as 'reaping where it
25 has not sown;' and (3) the defendant has injured
26 plaintiff by the misappropriation." Hollywood
27 Screeentest of Am., Inc. v. NBC Univ., Inc., 151 Cal.
28 App. 4th 631, 650 (Ct. App. 2007)(citation omitted).

1 A cursory glance at the Complaint reveals some of
2 these elements. First, Plaintiff alleges that he
3 invested time and effort writing the Screenplay and
4 registering it with the Copyright Office and the WGA,
5 that he expended thousands of dollars on the Pitch
6 Reel, and that he built up the Website. Compl. ¶¶ 26-
7 28, 30, 33, 39-40. Second, Plaintiff's allegations
8 suggest—albeit in a roundabout, circumstantial way—that
9 Defendants misappropriated the Creed Idea. He strings
10 together the following allegations: he sent the
11 Screenplay to individuals in the movie industry with
12 whom Coogler has allegedly interacted; he tweeted
13 Stallone a link to the Website; and he tweeted the same
14 link to other individuals in the movie industry and
15 professional fighting industry that “follow” Stallone
16 on Twitter. Id. at ¶¶ 36-37, 42-47. Thus, Plaintiff
17 avers, Defendants saw the Screenplay, Pitch Reel, and
18 Website and misappropriated the Creed Idea. Third, the
19 Complaint pleads the bare minimum regarding Plaintiff's
20 injuries and damages: “Defendants’ wrongful
21 misappropriation . . . has caused [Plaintiff]
22 substantial harm, including, but not limited to, [his]
23 right to relevant portions of the substantial profits.”
24 Id. at ¶ 91.

25 In spite of the minimally satisfactory allegations,
26 Plaintiff cannot get the first element—that the Creed
27 Idea is a property right—off the ground, as “[u]nder
28 California law . . . misappropriation . . . claims are

1 actionable only to vindicate legally protected property
2 interests, and an idea is not recognized as a property
3 right." Whitfield v. Lear, 751 F.2d 90, 92 (2d Cir.
4 1984)(citing Weitzenkorn v. Lesser, 40 Cal. 2d 778, 789
5 (1953)). Put simply, "[a]n idea is usually not
6 regarded as property." Cal. Civ. Prac. Bus. Litig. §
7 68:2, (April 2017 update); see also Melchior v. New
8 Line Prods., Inc., 106 Cal. App. 4th 779, 793 (Ct. App.
9 2003)(no cause of action where plaintiff alleged
10 conversion of original idea for proposed television
11 series because "[t]he tort of conversion does not apply
12 to ideas").

13 In the seminal case, Desny, 46 Cal. 2d at 732, the
14 California Supreme Court expressed its wariness towards
15 misappropriation of idea claims. In Desny, the
16 plaintiff submitted a movie proposal to Paramount
17 Pictures based on the true story of a boy who had been
18 trapped in a cave. Id. at 726. Paramount then made a
19 movie based on the same events. Id. In its discussion
20 of the "law pertaining to ideas," the court stated that
21 "an idea is usually not regarded as property" and "the
22 fact that a product of the mind has cost its producer
23 money and labor, and has a value for which others are
24 willing to pay, *is not sufficient to ensure to it this*
25 *legal attribute of property.*" Id. at 731 (emphasis
26 added). As much as Plaintiff alleges that he expended
27 money and labor on the Creed Idea, he cannot sidestep
28 the fact that the misappropriation of idea claim—in the

1 context of a plaintiff sending the defendant a movie
2 idea or disseminating a movie idea—is typically
3 unworkable under California law.⁵ Keane v. Fox
4 Television Stations, Inc., 297 F. Supp. 2d 921, 938
5 (S.D. Tex. 2004), aff'd 129 F. App'x 874 (5th Cir.
6 2005)(noting that misappropriation of an idea is not
7 explicitly recognized under Texas law).

8 Although Keane applied Texas law to a
9 misappropriation of idea claim, it guides the Court's
10 analysis here because the court in Keane recognized
11 that misappropriation of an idea, unlike
12 misappropriation of a product or trade secret, was
13 unavailable under Texas law. 297 F. Supp. 2d at 938.
14 Assuming for purposes of the motion to dismiss that
15 misappropriation of idea was available, the court
16 decided whether defendants misappropriated plaintiff's
17 idea for a television talent show, "American Idol."
18 Id. at 926. The plaintiff sent a descriptive sales
19 packet to various financial investors and production
20 companies. Because the allegations showed that he did
21 not "convey a protected idea in confidence," instead

22 _____
23 ⁵ Because Plaintiff avers that New Jersey law applies, he
24 does not address Desny and instead sets his sights on New Jersey
25 misappropriation of idea claims. Perhaps most telling is that
26 Plaintiff opts not to argue even in the alternative the
27 misappropriation of idea claim's success under California law,
28 and does not provide a California case denying a motion to
dismiss a factually similar misappropriation of idea claim. But
even the success of a misappropriation of idea claim under New
Jersey law is suspect, as the requisite "confidentiality of the
idea" element collapses in light of Plaintiff's widespread
Internet dissemination of the Creed Idea.

1 "gratuitously publish[ing]" his sales packet,
2 plaintiff, like the Desny plaintiff, could not claim
3 misappropriation of ideas "as free as the air." Id. at
4 941, 943; Desny, 46 Cal. 2d at 731. Here, even if the
5 Court recognized Plaintiff's misappropriation of idea
6 claim, it would lack the requisite confidentiality
7 because, like the Keane plaintiff, Plaintiff
8 disseminated and made the Creed Idea widely available.

9 Recognizing that misappropriation of an idea is a
10 slippery concept, California law allows contract
11 recovery—either breach of express contract or implied
12 contract—for plaintiffs claiming that their idea was
13 stolen. See, e.g., Whitfield, 751 F.2d at 92 (although
14 misappropriation of an idea was unavailable as a stand-
15 alone claim, plaintiff could "recover[] for the
16 appropriation of an idea . . . on a contractual
17 theory"); Quirk v. Sony Pics. Entm't Inc., No. C11-3773
18 RS, 2012 WL 12920192, at *n.3 (N.D. Cal. July 5,
19 2012)("A viable implied contract claim, however, would
20 potentially render defendants liable for use of basic
21 ideas that are not protected under copyright, even if
22 nothing in the movie constitutes misappropriation of
23 expression"); cf. Interserve, Inc. v. Fusion Garage
24 PTE. LTD, No. C 09-5812 RS (PVT), 2010 WL 3339520, at
25 *8 (N.D. Cal. Aug. 24, 2010)(dismissing
26 misappropriation of "business" idea claim without leave
27 to amend as the tort claim sounded more in contract).

28 Thus, the Court **GRANTS** Defendants' Motion to

1 Dismiss as to the misappropriation of idea claim and
2 determines if Plaintiff's breach of implied contract
3 claim fares any better.⁶

4 b. *Breach of Implied Contract*

5 "California law recognizes that an implied-in-fact
6 contract arises when the writer submits material to a
7 producer with the understanding that the writer expects
8 to be paid if the producer uses his concept." Counts
9 v. Meriwether, 2:14-cv-00396-SVW-CW, 2015 WL 12656945,
10 at *2 (C.D. Cal. June 12, 2015)(citing Desny, 46 Cal.
11 2d at 715). As the Ninth Circuit has recognized, the
12 so-called Desny claim protects individuals "who wish to
13 find an outlet for creative concepts and ideas."
14

15 ⁶ While the misappropriation of idea claim is already
16 questionable under California law and should be dismissed on
17 subpar allegations alone, the fact that the Copyright Act may
18 preempt this claims counsels in favor of granting this Motion.
19 "A plaintiff's state-law cause of action is preempted under 17
20 U.S.C. § 301(a) if: (1) the work involved falls within the
21 general subject matter of the Copyright Act as specified by
22 sections 102 and 103; and (2) the rights that the plaintiff
23 asserts under state law are equivalent to those protected by the
24 Act in section 106 in works of authorship that are fixed in a
25 tangible medium of expression." Firoozye v. Earthlink Network,
26 153 F. Supp. 2d 1115, 1123-24 (N.D. Cal. 2001).

27 Even though the Copyright Act does not protect ideas, the
28 Creed Idea was fixed in these tangible mediums and thus is within
the Copyright Act's subject matter. Mot. 17:16-18; Montz v.
Pilgrim Films & TV, Inc., 649 F.3d 975, 979 (9th Cir. 2011).
Plaintiff alleges that Defendants "used the Creed Idea in
writing, developing, producing, selling, and distributing their
Creed movie without [Plaintiff's] express or implied permission
or authorization." Compl. ¶ 89. From his allegations, Plaintiff
does not clearly seek protection for rights different from the
Copyright Act's exclusive rights to reproduce, perform, or
distribute a work. Celebrity Chefs Tour, LLC v. Macy's, Inc., 16
F. Supp. 3d 1141, 1156-57 (S.D. Cal. 2014).

1 Montz, 649 F.3d at 981.

2 "To establish a Desny claim for breach of
3 implied-in-fact contract, the plaintiff must show that
4 the plaintiff prepared the work, disclosed the work to
5 the offeree for sale, and did so under circumstances
6 from which it could be concluded that the offeree
7 voluntarily accepted the disclosure knowing the
8 conditions on which it was tendered and the reasonable
9 value of the work." Grosso v. Miramax Film Corp., 383
10 F.3d 965, 967 (9th Cir. 2004)(citing Faris v. Enberg,
11 97 Cal. App. 3d 309 (Ct. App. 1979)).

12 Plaintiff alleges that he prepared the Creed Idea
13 between 2008 and 2011, creating the Screenplay, Pitch
14 Reel, and Creed Website. Compl. ¶¶ 25-41. He
15 disclosed the Creed Idea at least to Stallone, by
16 tweeting him a link to the Website, and by distributing
17 the Screenplay to individuals who apparently know and
18 work with Coogler. Plaintiff claims that the remaining
19 Defendants "reviewed" the Creed Idea, but alleges no
20 facts to support this allegation.⁷

21 But Plaintiff has no allegations that the Creed
22 Idea was offered for sale. "The law will not imply a
23 promise to pay for an idea from the mere facts that the
24

25 ⁷ That Plaintiff also disseminated the Creed Idea to Carl
26 Weathers, the actor who played Apollo Creed in *Rocky* and to
27 Dwayne Johnson, a fighting industry professional, is of no moment
28 to the breach of implied contract claim, as these individuals are
not parties to the case or, apparently, the contract. Id. at ¶¶
44, 47.

1 idea has been conveyed, is valuable, and has been used
2 for profit . . . [plaintiff] must fail unless . . . he
3 can establish a contract to pay." Desny, 46 Cal. 2d at
4 739; see also Wilder v. CBS Corp., No. 2:12-cv-8961-SV
5 W-RZ, 2016 WL 693070, at *3 (C.D. Cal. Feb. 13, 2016)
6 (plaintiff told defendants during a pitch meeting that
7 she wanted payment for her proposed talk-show idea).
8 Indeed, the allegations portray that Plaintiff offered
9 the Creed Idea gratuitously—asking Stallone, through
10 his Twitter account, "@TheSlyStallone next rocky
11 installment4u? 2min trailer. Wants to meet u
12 creedmovie.com." Compl. ¶ 46.

13 Plaintiff argues that he understood, based on
14 industry custom, that he would be compensated for the
15 Creed Idea. Id. at ¶ 88. He adds that industry custom
16 dictates that writers will submit ideas to producers
17 and industry insiders with the expectation of
18 compensation, and that Defendants implicitly understood
19 this norm was in play here. Id. at ¶¶ 52, 84-85.
20 While industry custom may inform the implied contract
21 calculus, "reasonable expectation of payment . . .
22 [should] be inferred from the facts and circumstances."
23 Minnear v. Tors, 266 Cal. App. 2d 495, 502 (Ct. App.
24 1968).

25 The facts and circumstances do not show Plaintiff
26 was to receive compensation. Plaintiff's allegations
27 make two tenuous inferences: (1) that he expected
28 payment for tweeting his Creed Idea to Stallone's

1 Twitter account (Stallone has over 1.7 million
2 followers), to which no response was received; (2) or
3 that he expected compensation after plastering his
4 Creed Idea all over the Internet. Kim Decl. Ex. E, at
5 26. Indeed, Plaintiff invites the Court to premise a
6 claim for breach of implied contract on a "tweet" that
7 was never responded to. Jordan-Benel v. Univ. City
8 Studios, Inc., CV 14-5577-MWF(MRWx), 2015 WL 9694896,
9 at *3 (C.D. Cal. Feb. 13, 2015)("[T]here needs to be
10 more than a unilateral offer and [Plaintiff] only
11 offers arguments as to his intent, not [Defendants']
12 understanding or conduct"). While requiring an in-
13 person meeting for a misappropriation of idea claim in
14 the world of movie and television pitching may be
15 unrealistic in light of communication and social media
16 advancements, Plaintiff's theory of implied contract by
17 tweet and by mass-mailing of his Screenplay might turn
18 mere idea submission into a free-for-all.

19 Plaintiff's breach of implied contract claim also
20 fails to show that "[D]efendants voluntarily accepted
21 the disclosure knowing the conditions on which it was
22 tendered and the reasonable value of the work."
23 Grosso, 383 F.3d at 967. Defendants argue that the
24 Complaint is devoid of this requisite privity between
25 the parties, and the Court agrees. Mot. 19:18-19.
26 Nowhere in his Complaint does Plaintiff indicate the
27 conditions on which he sent Defendants the Screenplay
28 or link to the Website. Id. Instead, Plaintiff

1 alleges that he "intended to generate interest in [the
2 Creed Idea] so that it would be produced into a motion
3 picture with the expectation that [Plaintiff] would be
4 compensated for use of the [concept]," and he expected
5 that Defendants would just compensate him down the
6 road. Compl. ¶ 51. Plaintiff does not allege any
7 exchange or dialogue with Defendants. It strains
8 reason that Defendants "accepted" Plaintiff's offer to
9 enter a contract or understood the conditions under
10 which he tendered the Creed Idea from a unilateral
11 tweet and from Plaintiff disseminating his Creed Idea
12 on the Internet. Desny, 46 Cal. 2d at 738-39 (contract
13 liability cannot attach where defendant has not had an
14 opportunity to reject an idea before its disclosure).
15 Even in cases where the plaintiff alleged a more
16 concrete exchange between the parties, courts have been
17 wary to let an implied contract claim proceed at the
18 motion to dismiss stage. Reed v. Nat'l Football
19 League, CV 15-01796 DMG (AGRx), 2015 WL 13333481, at
20 *3-4 (C.D. Cal. Sept. 24, 2015)(granting motion to
21 dismiss even where plaintiff sent defendants a
22 voicemail with his proposed idea for a television
23 series, defendants' representative told him to forward
24 his proposal to another executive, and the NFL informed
25 plaintiff it would not accept his unsolicited
26 proposal).

27 Above all else, the concern outlined in Desny comes
28 to fruition here: "[t]he idea man who blurts out his

1 idea without having first made his bargain has no one
2 but himself to blame for the loss of his bargaining
3 power. The law will not in any event, from demands
4 stated subsequent to the unconditioned disclosure of an
5 abstract idea, imply a promise to pay for the idea, for
6 its use, or for its previous disclosure." 46 Cal. 2d
7 at 739. The Court thus **GRANTS** Defendants' Motion to
8 Dismiss as to the breach of implied contract claim.

9 c. *Unjust Enrichment*

10 In cases where a plaintiff alleges a defendant
11 producer stole his movie or television idea, "[t]here
12 is no cause of action in California for unjust
13 enrichment[,] [and] [t]he phrase unjust enrichment does
14 not describe a theory of recovery, but . . . [rather]
15 the result of a failure to make restitution."

16 Melchior, 106 Cal. App. 4th at 793 (internal
17 alterations, quotation marks, and citation omitted).
18 However, quasi-contract may "prevent unjust enrichment
19 where recovery 'is based upon a benefit accepted or
20 derived for which the law implies an obligation to
21 pay.'" Jonathan Browning, Inc. v. Venetian Resort,
22 LLC, No. C 07-3983 JSW, 2007 WL 4532214, at *8 (N.D.
23 Cal. Dec. 19, 2007)(citation omitted).

24 Per California law, the elements of unjust
25 enrichment are: (1) receipt of a benefit; and (2)
26 unjust retention of the benefit at the expense of
27 another. In re ConAgra Foods, Inc., 908 F. Supp. 2d
28 1090, 1113 (C.D. Cal. 2012). Plaintiff alleges that

1 Defendants received a "substantial benefit" from using
2 the Creed Idea and that equity requires them to
3 compensate him. Compl. ¶¶ 101-102.

4 The unjust enrichment claim has the same flaws as
5 the breach of implied contract claim. Plaintiff cannot
6 allege how Defendants benefitted from the Creed Idea,
7 as it is uncertain whether and how Defendants accepted
8 the Creed Idea and converted it to their own benefit
9 after Plaintiff sent a unilateral tweet, created the
10 Website, and indiscriminately mailed copies of the
11 Screenplay to random industry individuals. Moreover,
12 it is unclear why they must compensate him, as
13 Plaintiff has not demonstrated factual circumstances
14 binding the parties or making it equitable to
15 compensate Plaintiff for gratuitously disseminating the
16 Creed Idea. Jonathan Browning, 2007 WL 4532214, at *8
17 (dismissing unjust enrichment claim as duplicative of a
18 quasi-contract or breach of implied contract claim);
19 Hollywood Screentest, 151 Cal. App. 4th at 649-50
20 (breach of implied contract failed because plaintiff
21 could not show defendants actually used his ideas;
22 thus, the "related cause" of unjust enrichment also
23 failed).⁸ The Court thus **GRANTS** Defendants' Motion to
24

25 ⁸ The unjust enrichment claim also merits dismissal, as it
26 is preempted by the Copyright Act. The unjust enrichment claim
27 is "grounded" in Defendants' alleged incorporation of Plaintiff's
28 Creed Idea into their movie. Anderson v. Stallone, No. 87-0592
WDKGX, 1989 WL 206431, at *4 (C.D. Cal. Apr. 25, 1989).
Moreover, "there is no 'extra element' such as fraud or palming
off to save the . . . unjust enrichment claims from preemption."

1 Dismiss as to the unjust enrichment claim.

2 d. *Leave to Amend*

3 Federal Rules of Civil Procedure 15(a) provide that
4 a party may amend their complaint once "as a matter of
5 course" before a responsive pleading is served. Fed.
6 R. Civ. P. 15(a). After that, the "party may amend the
7 party's pleading only by leave of court or by written
8 consent of the adverse party and leave shall be freely
9 given when justice so requires." Id. "Rule 15's
10 policy of favoring amendments to pleadings should be
11 applied with 'extreme liberality.'" United States v.
12 Webb, 655 F.2d 977, 979 (9th Cir. 1981)(internal
13 quotations and citation omitted). But if in a motion
14 to dismiss any amendment to the pleadings would be
15 futile, leave to amend should not be granted. Bush v.
16 Liberty Life Assurance Co. of Boston, 77 F. Supp. 3d
17 900, 906-07 (N.D. Cal. 2015).

18 The Court has strong misgivings that Plaintiff can
19 overcome the evident lack of facts or circumstances
20 indicating that Defendants received and misappropriated
21 the Creed Idea or overcome the fact that the parties
22 apparently never had any bilateral exchange through
23 which an implied contract could be inferred. Plaintiff

24 _____
25 Id. at *5 (citation omitted). Finally, "where the unjust
26 enrichment arises from defendants' unauthorized use of a
27 copyrighted work, such an extra element does not qualitatively
28 change the rights at issue, the rights the plaintiff holds in the
copyrighted work, and does not avoid preemption." Zito v.
Steeplechase Films, Inc., 267 F. Supp. 2d 1022, 1027 (N.D. Cal.
2003).

1 has only demonstrated that he sent one Defendant,
2 Stallone, a link to the Website and widely distributed
3 the Screenplay. From this, he asks the Court to infer
4 that Defendants misappropriated his idea and that the
5 parties had an implied-in-fact contract. Plaintiff
6 seems to argue that industry custom allows for a viable
7 breach of implied contract claim where any individual
8 creates an idea, publicizes it, and then expects
9 compensation from anyone offering even a remotely
10 similar idea. This stretches "industry custom" to its
11 breaking point. Reed, 2016 WL 13344625, at *3 (denying
12 leave to amend breach of implied contract claim where
13 plaintiff only alleged that he sent defendants several
14 emails pitching his television program idea).

15 Affording Plaintiff the chance to amend his
16 Complaint is likely to raise even more baseless
17 allegations, is unlikely to cure the current
18 deficiencies, and is even more unlikely to render
19 Plaintiff's Complaint "plausible on its face." ZL
20 Techs., Inc. v. Gardner, Inc., No. CV 09-02393 JF (RS),
21 2009 WL 3706821, at *13 (N.D. Cal. Nov. 4, 2009).
22 Plaintiff lacks concrete allegations that show any
23 conversations he had with Defendants regarding
24 compensation and the conditions under which he shared
25 the Creed Idea. The Court will not allow a breach of
26 implied contract claim to proceed on (1) tweets to a
27 popular celebrity social media account which were never
28 responded to; and (2) the fact that Defendants are

1 generally in the same industry as unnamed individuals
2 to whom he sent the Screenplay.

3 It would be conjectural for the Court to predicate
4 granting leave to amend on the possibility that
5 Plaintiff may have facts showing some kind of concrete
6 contract with Defendants where they agreed to use the
7 Creed Idea and set forth clear terms for compensation
8 and the conditions on which it would be used. In
9 Montz, the Ninth Circuit upheld the district court's
10 decision to deny leave to amend the breach of implied
11 contract claim because the only cure would be
12 allegations that plaintiff authorized defendants to use
13 his work in exchange for payment, but plaintiff
14 insisted that defendants only used his ideas without
15 his express consent. But leave to amend would be
16 inappropriate "where the allegation of other facts
17 consistent with the challenged pleading could not
18 possibly cure the deficiency." 649 F.3d at n.3
19 (internal quotation marks and citation omitted). It is
20 doubtful that Plaintiff could allege facts
21 substantiating that Defendants would compensate
22 Plaintiff, beyond his one-sided belief that they would
23 based on "industry custom." Here, guessing at
24 hypothetical facts that would plausibly cure the
25 claim's defects is strained, as "Plaintiff has not
26 suggested that [he] can allege additional facts which
27 support [his] claim for relief." U.S. Care, Inc. v.
28 Pioneer Life Ins. Co. of Ill., 244 F. Supp. 2d 1057

1 (C.D. Cal. 2002). As such, the Court **DENIES LEAVE TO**
2 **AMEND** the breach of implied contract claim.

3 The Court also **DENIES LEAVE TO AMEND** the
4 misappropriation of idea and unjust enrichment claims.
5 California law does not recognize misappropriation of
6 idea and breach of implied contract is a more
7 appropriate vehicle for this type of claim. Moreover,
8 it is not clear why Plaintiff does not raise a
9 copyright infringement claim, as he copyrighted the
10 Screenplay. Plaintiff insists that he is not claiming
11 Defendants copied his Screenplay or his Pitch Reel.
12 Opp'n 20:5-6. While the Court will not speculate as to
13 the strength of a hypothetical copyright infringement
14 claim, the decision not to bring the claim in light of
15 the copyrighted Screenplay gives the Court pause as to
16 whether Defendants' *Creed* truly misappropriates the
17 Creed Idea. And "the Court can discern no way in which
18 additional factual allegations could cure the
19 deficiencies" in the unjust enrichment claim, *id.* at
20 *n.7, as it is likely preempted by the Copyright Act.

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III. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motion to Dismiss [52] **WITHOUT LEAVE TO AMEND**. The Clerk shall close the case.

IT IS SO ORDERED.

DATED: August 14, 2017

s/ RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge

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