

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-56087

DAVID ZINDEL, as Trustee for the David Zindel Trust and the Lizabeth
Zindel Trust,

Plaintiff – Appellant,

v.

FOX SEARCHLIGHT PICTURES, INC., a Delaware corporation, et al.,

Defendants – Appellees.

PLAINTIFF-APPELLANT DAVID ZINDEL’S OPENING BRIEF

Appeal the Judgment of the United States District Court for the Central
District of California,
Case No. 2:18-CV-01435-PA-KS
(Honorable Percy Anderson)

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under the U.S. Copyright Act, 17 U.S.C. §§ 101 *et seq.*, as well as 28 U.S.C. §§ 1331, 1332 and 1338(a), (b). This timely appeal arises from a Fed. R. Civ. P. 12(b)(6) order dated July 23, 2018. Excerpts of Record (“ER”) at 1-18; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Plaintiff, David Zindel, the son and literary trustee of Pulitzer-Prize-winning author Paul Zindel, has filed suit alleging that the Academy-Award-winning film *The Shape of Water* (ER-189 (physical exhibit) (the “Film”)) and its novelization (ER-223 (physical exhibit) (the “Book”)) infringe the copyright to his father’s play *Let Me Hear You Whisper* (ER-155 (the “Play”)). Despite numerous similarities between the works –widely noted by the public when the Film was released – the district court dismissed the complaint, finding a lack of substantial similarity. The court’s decision gives rise to the following questions:

1. Whether the district court erred in applying this Court’s extrinsic test by “filter[ing] out” elements that the court considered unprotected, without first analyzing whether the Play’s selection and arrangement of protected and unprotected elements are substantially similar to those of the Film/Book.
2. Whether the district court applied an erroneously expansive definition

of *scènes à faire* to exclude the Play's original expressive elements from its substantial-similarity analysis, contrary to this Court's definition of *scènes à faire*, which is limited to stock elements that do not include original expression.

3. Whether the district court erred by giving weight to new elements added by Defendants to their Film and Book, contrary to the rule that the substantial-similarity inquiry focuses entirely on the works' similar elements.

4. Whether, in characterizing the works' literary elements, the district court improperly substituted its subjective judgment for that of the fact-finder, contrary to the rule that dismissal of a copyright-infringement claim at the pleading stage is proper only if no reasonable juror could find substantial similarity between the works.

STATEMENT OF THE CASE

The Play has been widely broadcast, read, staged, and taught since its first performance on national television in 1969. As trustee, Plaintiff brought this copyright infringement action in response to remarkable similarities that Defendants' Film and Book bear to the Play.¹ Indeed, the Film's release prompted

¹ The Film's producers, distributors, and/or financiers are Defendants-Appellees Fox Searchlight Pictures, Inc., Twentieth Century Fox Film Corporation, TSG Entertainment Finance LLC, Guillermo Del Toro, and Daniel Kraus (the "Film Defendants"). Defendant MacMillan Publishing Group, LLC ("MacMillan") published the Book.

a spontaneous outpouring of criticism from ordinary filmgoers who immediately recognized the Play's special elements in Defendants' work.

The Play, and Defendants' Film/Book, tell the idiosyncratic story of a lonesome, unmarried janitorial cleaning woman, working the graveyard shift in a large East Coast urban laboratory facility which experiments on mammals for covert military purposes. There, she becomes fascinated by a fantastic intelligent aquatic male creature, held captive in a glass tank (a *talking* dolphin in the Play, an aquatic humanoid in the Film/Book). To the sounds of romantic vintage music (playing on a phonograph), she forms a deep, loving bond with the creature, realizing he can communicate – but chooses to do so only with her. The heroine discovers he is being exploited for military use, and that higher-ups at the facility plan to vivisect him within days. Spurred to rescue him, the heroine forms a haphazard plan to sneak him out of the facility in her laundry hamper and free him at the dock on a river leading to the Atlantic. Through vivid fantasy sequences and shared elements of character, setting, dialogue, and plot, the works convey the message that only empathy and communication can bridge the divide between us, and with this, people, whatever their station in life, are capable of extraordinary things.

In dismissing Plaintiff's claims out-of-hand on a 12(b)(6) motion, the district court disregarded or misapplied core copyright principles governing the application

of this Court’s “extrinsic test” for substantial similarity:

- (a) The court must consider whether the “selection and arrangement” of literary elements may be substantially similar irrespective of whether each element, standing alone, is copyright protected, *see Metcalf v. Bochoco*, 294 F.3d 1069, 1074 (9th Cir. 2002);
- (b) Similar elements cannot be disregarded as unprotected *scènes à faire* unless they meet the narrow exclusion for “stock” elements “indispensable” to a given subject, *see Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000);
- (c) The court cannot consider elements that defendants added or changed in their work, but must focus exclusively on the works’ shared elements, *see Shaw v. Lindheim*, 919 F.2d 1353, 1357-58 (9th Cir. 1990); and
- (d) The court must not impose its subjective judgment in evaluating the works, and may dismiss only if no reasonable juror could find substantial similarity, *see L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 851 (9th Cir. 2012).

By disregarding vast sequences of the Play and subjectively resolving all disputes of literary interpretation against Plaintiff, the district court committed serious error, continuing a recent alarming trend of district courts abrogating this

Circuit's precedent, disregarding the benefits of expert opinion, and usurping the jury's role. Reversal is necessary to reaffirm this Court's fundamental copyright principles and allow Plaintiff a fair opportunity to present expert testimony on the myriad inter-related ways in which his father's celebrated Play was appropriated in Defendants' Film and Book.

STATEMENT OF FACTS

A. The Play²

The Play, a 1969 young-adult science fiction-fantasy, has been nationally read and seen for decades, including in: (i) 1969 and 1990 national television productions that have been repeatedly re-broadcast, (ii) three print editions, and (iii) ten anthologies. ER-317-319 ¶¶ 20-24. It has been widely taught in schools and staged in live productions. *Id.* ¶ 24. The Play tells a peculiar and memorable story, unfolding in two Acts:

1. Act One

The Play is set in the 1960s (during the height of the Cold War) in a large multi-floor scientific facility in New York City, near docks on the Hudson River. The Play opens with Dr. Crocus, a dedicated scientist, and his assistant experimenting on a Dolphin, confined to a long glass tank, and prodded via

² As is undisputed, the Play's two versions (unabridged and slightly abridged) are not materially different (ER-8), except that the cast in the unabridged version is all-female. ER-158.

electrodes for an emotional response (“pain,” “pleasure,” “anger,” “fear”). Play at 5 (ER-159). Helen, a janitorial cleaning woman who works the night shift, arrives. Self-sufficient, methodical and quiet, she is greeted by Moray, a “briskly efficient supervisor” who is condescending, censorious and self-righteous with Helen. Moray tells her the facility has a “natatorium” where the Dolphin can swim. Meeting Danielle, a chatty co-worker, Helen tersely indicates she is single, but would like to be married. Danielle: “You don’t like to talk do you?” *Id.* at 9 (ER-163).

Once Helen is alone, a phonograph in the lab plays a romantic song from a *1940s film musical*: “Let me call you sweetheart, I’m in love with you, Let me hear you whisper, That you love me too.” *Id.* Curious, Helen opens a curtain revealing the Dolphin. “He is looking right back at her.” “She [later] glances out of the corner of her eye . . . and notices the Dolphin is [still] looking at her. She pretends to look away and sings Let Me Call You Sweetheart . . . but her eyes return to” him, “still looking at her.” Helen coyly “play[s] peek-a-boo with the Dolphin” who miraculously responds: “Youuuuuuuuuuu,” showing distinct recognition of her. *Id.* at 10 (ER-164). The scene ends with the same four lines of the love song. *Id.* at 12 (ER-166).

The next night, Helen arrives, looks around to ensure she is unnoticed, and wheels her equipment into the lab, while the Dolphin intently looks at her.

Thinking of the Dolphin and smiling, “she starts humming the love song and scrubs [the floor] to the rhythm of it.” *Id.* at 13 (ER-167). Noticing how “sad” he seems, she “looks directly in the Dolphin’s face” and touches his head. “He squirms and likes it.” *Id.* at 14 (ER-168). Helen can’t resist fully stroking the Dolphin. “This time he reacts even more enthusiastically. She is half-afraid and half-happy[,]” while he emits gleeful noises. *Id.* Moray enters, telling Helen, “[dolphins] have an intelligence equal to our[s] . . . if we teach them our language . . . we’ll be able to communicate.” As to the experiments, Moray lectures Helen on the sacrifices in the name of “progress” which “you have to accept on faith.” After she leaves, the Dolphin *speaks*: “Whisper . . . Whisper to me.” Danielle barges in with a laundry cart: at “the docks . . . [y]ou can see the moon on the [nearby] river.” *Id.* at 15-16 (ER-169-70).

When Helen and the Dolphin are finally alone, the romantic record plays again. The Dolphin stares at Helen “intensely.” She offers him food from her lunch bag, but “[t]he Dolphin moves and startles her.” *Id.* at 16 (ER-170). Helen reaches into the tank: “I wouldn’t hurt you. You know that.” *Id.* at 17 (ER-171). They begin to form a close tender bond. Moray enters, and dialogue establishes that Helen lives alone and is “used to . . . being alone.” Helen is shocked to learn the Dolphin will soon be killed, as studying it alive has not yielded results. Moray is concerned that Helen has “apparently grown fond of the mammal.” Once alone, the

Dolphin stares at Helen in desperation. *Id.* at 18 (ER-172).

2. Act Two

With the clock ticking down to the Dolphin's death, a distraught Helen defends him to Moray: "Maybe he's mute . . . Some human beings are mute . . . we don't kill them." *Id.* at 19-20 (ER-173-74). She rushes to the Dolphin in the lab, lit by "moonlight," and begs him to save himself by cooperating. He repeats: "Boooooooooook." *Id.* at 20 (ER-174). Helen frantically enlists Danielle's help, who reluctantly agrees ("I'll try . . . Can't spend time looking for what ain't any of my business"). *Id.* at 21 (ER-175). Helen pleads to Moray, who speaks of her pet cat who died; Helen asks if it was "decapitated." *Id.* Moray interjects that "lady fingers" will be served with coffee, noting the "macabre" name. *Id.* at 22 (ER-176). Moray tells Helen that the facility performs vivisection, and when Helen asks "What good is vivisection?" Moray describes how understanding dolphins will benefit man. *Id.* Helen's vivid underwater fantasy ensues depicting (via film projection) idyllic coexistence between humans and dolphins. *Id.* The Dolphin excitedly interrupts, repeating "Boooooooooook" and "Hate." Helen rifles through files provided by Danielle and discovers that the Dolphin is studied for military use. *Id.* at 24-25 (ER-178-79). Helen has a second fantasy, about the sinister use of dolphins and nuclear annihilation. This is why the remarkable Dolphin refuses to cooperate. *Id.* at 25-26 (ER-179-80).

To save the Dolphin, Helen embarks on a plan to wheel him out of the facility in her laundry cart and free him at the docks on “the river . . . to the sea!” *Id.* at 27 (ER-181). Moray cannot find Helen but sees that her coat is still in her locker. Arriving at the lab, she yanks the curtain, revealing “Helen with her arms around the front part of the Dolphin,” lifting him. Moray: “what do you think you’re hugging?” *Id.* at 27-28 (ER-181-82). Later, as Crocus readies a hypodermic syringe and his assistant sticks electrodes in the Dolphin, he emits pathetic distress signals. Helen, “[b]ursting into tears,” runs to the elevator to flee. But we hear the romantic record again: “Let me call you sweetheart, I’m in love with you”. Helen, who until now has been seemingly compliant, marches back as Crocus is poised to inject the Dolphin, and lets loose: “Who the hell do you think you are? . . . [to Dolphin] You gotta talk back against what’s wrong . . . At least you gotta try.” As Helen leaves, the Dolphin exclaims “Loooooooooveeeeeee,” declaring his feelings for her. Stunned, the scientists abort the killing and direct Moray to get Helen. Moray protests: “That woman was hugging the mammal.” Helen has a visual exchange of recognition with the Dolphin before departing, as the elevator doors close and the Play ends. *Id.* 30-31 (ER-184-85).

B. Defendants’ Film and Book

Defendants released the Film in December 2017, touting it as an original sci-fi/fantasy work and garnering critical praise and industry awards. ER-341-42 ¶¶

51-52. However, there was a spontaneous outpouring from the public pointing out the Film’s striking similarity to the Play, as ordinary audience members commented, *e.g.*, “There are way too many similarities” between the Film and Play, “remake of [the Play],” “movie version of [the Play],” “a LOT like this [P]lay,” “way to [*sic*] similar to the [P]lay,” “pretty much lifted from [Play],” “The Shape of Plagiarism?”, “similarities are too close . . . [Film] exactly like [Play],” “[Film’s] premise, plot, and central character are ripped off from [Play],” etc. ER-342-45 ¶ 53.

In March 2018, MacMillan published the Book, written by the Film’s writer-director Guillermo del Toro and co-producer Daniel Kraus (“Kraus”), a writer of young-adult fiction who had publicly praised Zindel’s work. ER-328-35 ¶¶ 37-41. The Book features substantially the same elements as the Film.

The Film/Book largely track the Play’s story and character arcs in their **first two Acts**. The Film/Book then add a **third Act**, featuring additional events after the heroine escapes with the creature.

1. Act One

The Film/Book open with an underwater fantasy scene in a submerged apartment. Film (ER-189) at 00:00-2:55 Book (ER-223) at 4-5. This is a dream of the protagonist, Elisa, who wakes up alone and goes through a precise, solitary routine. Film (ER-189) at 2:55-5:10; Book (ER-223) at 5-6. Elisa has “keloid

scars” on her neck. Book at 6. She visits her friend/neighbor Giles, a closeted gay artist, to whom Elisa signs because she is *mute*. Film (ER-189) at 5:10-6:16; Book (ER-223) at 13. Elisa boards a bus late at night; she is “[a]lmost entirely alone and looks out the window with great longing.” Film (ER-189) at 7:53-8:05; Book (ER-223) at 18; ER-98 (physical exhibit) (“Screenplay”) at 6.³

Elisa works the night shift as a janitorial cleaning lady at a large scientific facility in 1960s Baltimore. Film (ER-189) at 8:25-9:50; Book (ER-223) at 18-22. She is friends with Zelda, a chatty co-worker. They learn the facility has received an amphibious Creature captured by Strickland, an efficient, imperious government figure who carries an electric cattle prod. Film (ER-189) at 10:10-12:00, 20:40-21:15; Book (ER-223) at 22-33, 47-55. He is condescending and self-righteous to Elisa/Zelda. Film (ER-189) at 16:45-17:54; 26:20-29:15; Book (ER-223) at 60-62. Hoffstetler, a conscientious scientist, studies the Creature. Later, Strickland staggers from the lab with a bloody hand, and Elisa finds his two severed fingers

³ The district court refused to take judicial notice of the Film’s Screenplay. ER-5. This was error, as the Screenplay referenced in the Complaint (ER-321-24) is the written embodiment of the Film, of which the court did take judicial notice, and expresses the intended “context” for the Film’s extrinsic elements. *Kniewel v. ESPN*, 393, F.3d 1068, 1076 (9th Cir. 2005) (“surrounding” webpages incorporated by reference in complaint provided “context” for statements at issue). Moreover, contrary to the Order, Defendants published the Screenplay by distributing it for Oscar consideration (and to the WGA’s 20,000 members). ER-95-101.

which she puts into a lunch bag. Film (ER-189) at 18:40-20:25. Elisa, alone in the lab, looks inside a glass tank. The Creature reveals himself, staring at her, but when others enter, he retreats. The next night, Elisa, ensuring she is unnoticed, pushes her equipment into the lab, where the Creature is in a natatorium. As Elisa peels an egg from her lunch bag, the Creature's head emerges – they stare at each other, and she gives him the egg. A phone call between Strickland and General Hoyt reveals that the military have a special interest in the Creature. *Id.* at 29:20; Book (ER-223) at 88-92, 148-151.

2. Act Two

The next evening Elisa plays a romantic song from a *1940s musical film* on a phonograph in the lab. The Creature reacts favorably, and the two stare at each other. Elisa revisits the Creature, plays a new record and, smiling, mops to the rhythm while the Creature watches. Elisa puts her hand to the tank and the Creature puts his against hers. Film (ER-189) at 34:34-35:19; Book (ER-223) at 99-101, 112-113. Hoffstetler, unnoticed, watches with amazement. Film (ER-189) at 35:00. It is soon revealed that Hoffstetler is also a Soviet spy. *Id.* at 35:17-38:18; Book (ER-223) at 118.

When Elisa next enters the lab, the Creature is chained and whimpering. While Elisa hides, Strickland enters and shocks the Creature to prompt a response (“You hurting? . . . maybe you’re angry?” (Film (ER-189) at 40:22), but the

Creature does not divulge anything. *Id.*; Book (ER-223) at 141-145. Hoyt enters, revealing his objective (“Soviets want it” and they put “missiles in Cuba”). Strickland responds, “we have to vivisect this thing. Take it apart. Learn how it works.” Film (ER-189) at 43:10. Over Hoffstetler’s objections, Hoyt decides: “Crack the damn thing open.” *Id.* at 44:50; Book (ER-223) at 153, 206. Elisa begs Giles to help free the Creature. He refuses, but then agrees. Hoffstetler, ordered by his Soviet boss to kill the Creature, readies a hypodermic syringe (to inject it). Film (ER-189) at 45:02-59:00; Book (ER-223) at 163-64, 200-01. Elisa/Giles embark on a plan to free the Creature. As tension mounts, Hoffstetler helps Elisa unshackle the Creature; she lifts him into her rolling laundry cart. Zelda, reluctantly, also comes to Elisa’s aid. Strickland checks the lab – the Creature is missing, as Elisa/Giles drive off with him. Film (ER-189) at 1:02:30, 1:06:29-1:07:11; Book (ER-223) at 202-220.

3. Act Three

Elisa hides the Creature in her bathtub, and plans to release him at the dock on a river canal that opens to the Atlantic. Film (ER-189) at 1:07:40-1:11:10; Book (ER-223) at 223-24, 252. When Giles discovers the Creature has decapitated his cat, the startled Creature slashes Giles’ arm, but later apologetically places his hand on Giles’ wound and bald head. Later, Giles’ wounds have healed and hair is re-growing. Film (ER-189) at 1:16:12-1:32:43; Book (ER-223) at 257-58, 294.

Elisa and the Creature consummate their relationship with sex. Film (ER-189) at 1:23:50; Book (ER-223) at 259-60. Elisa fantasizes a song-and-dance number performed with the Creature, like the vintage musical songs played in the lab, singing “You’ll never know just how much I love you, you’ll never know how much I care.” Film (ER-189) at 1:38:05-1:40:59.

Strickland grows increasingly unhinged. While he interrogates Elisa about the Creature’s disappearance, Elisa who until now has been seemingly compliant, lets loose at him (singing). Film (ER-189) at 1:15:08-1:15:55. He then uncovers Elisa’s plot by torturing Hoffstetler and threatening Zelda in front of her husband, who gives up Elisa. *Id.* at 1:45:18-1:49:40; Book (ER-223) at 287-291. As Elisa takes the Creature to the docks, Strickland shoots her and the Creature, who heals himself and kills Strickland. As Zelda arrives with the police, the Creature takes Elisa and jumps into the water. Underwater, the Creature kisses her, bringing her back to life. When he touches her neck scars, they open as gills allowing her to breathe, and they embrace. Film (ER-189) at 1:34:48-1:57:54; Book (ER-223) at 307-314.

C. Extrinsic Analysis of Substantial Similarity Between the Play and the Film/Book

All Defendants filed motions to dismiss asserting lack of substantial similarity between the works. In response, Plaintiff detailed the works’

substantially similar extrinsic elements (ER-80-92, 122-133), tracking the elements traditionally considered under this Circuit’s “extrinsic test”:

1. Plot/Sequence

The first two Acts of the Play/Film/Book feature similar plot points in nearly the same sequence. In Act One: (i) the heroine, an unmarried janitorial cleaning woman (Helen/Elisa), arrives to work the graveyard shift at a large scientific facility in a big city; (ii) she works alongside a garrulous, funny co-worker, under close supervision of an unctuous, condescending supervisor; (iii) in the first dramatic revelation, Helen/Elisa comes face-to-face with a highly-intelligent aquatic creature, confined to a long glass case in a laboratory, and the two lock eyes, an early sign of preternatural closeness; (iv) Helen/Elisa knows the scientists are studying the creature, but does not yet know its covert military purpose; (v) over the next few days, Helen/Elisa becomes increasingly drawn to the creature and emboldened to sneak into the lab to interact with him, though she knows it is prohibited and she may be caught; (vi) it is revealed that the creature can communicate in human language (spoken in the Play, signed in the Film), but does so only with Helen/Elisa; (vii) in one visit, Helen/Elisa feeds him food from her lunch bag; (viii) in another, she playfully cleans the floor to a 1940s musical number, while alternately smiling to herself, shooting the creature playful glances and moving to the music; (ix) romantic Hollywood music from the 1940s

repeatedly plays on the phonograph during Helen/Elisa's visits; (x) she tenderly touches the creature while they are alone; and (xi) having bonded with the creature, she is shocked to learn that higher-ups have decided to gruesomely vivisect him in just a few days, believing they can learn more by dissecting him while he dies.

In Act Two: (xii) the creature's impending death serves as a suspenseful "ticking clock" as Helen/Elisa is increasingly frantic to save him; (xiii) Helen/Elisa pleads for his life; (xiv) when she revisits the lab, he sadly stares at her imploringly; (xv) she resolves to attempt a haphazard escape – to sneak him out, and free him at nearby docks on a river that feeds into the Atlantic; (xvi) suspense mounts as Helen/Elisa's superior notices that something is awry; (xvii) Helen/Elisa is discovered trying to free the creature; and ultimately (xviii) saves his life.

In addition, there are the following similarities that are far too idiosyncratic to be coincidental: (xix) the phonograph playing romantic songs from 1940s musicals in a scientific laboratory; (xx) the decapitated cat (discussed in the Play) is depicted in the Film/Book; (xxi) the scientist readying a hypodermic needle to kill the creature; (xxii) the macabre reference to severed fingers (lady fingers in the Play; actual fingers in the Film/Book); and (xxiii) the use of a rolling laundry cart as the escape mechanism.

2. Characters

Helen/Elisa is: (i) an unmarried janitorial cleaning woman who lives alone; (ii) works the graveyard shift at an urban lab facility, where she is condescended to as the lowest-ranking employee; (iii) outwardly quiet (in Elisa's case, mute) but reveals a playful vivacious side and sharp wit; (iv) shown wearing a headscarf/overcoat, a humble appearance; (v) conscientious and finds comfort in orderly daily routines; (vi) isolated and yearns for a romantic partner; (vii) prone to vivid fantasies; (viii) empathetic and drawn to the creature, to whom she feels a deep, personal connection; (ix) the only one able to communicate with him; (x) sensitive; (xi) a non-conformist; (xii) fond of vintage music; (xiii) flirtatious, when alone with him; (xiv) though seemingly compliant, rebellious and has a temper; (xv) willing to stand up to her "superiors"; (xvi) obstinate; and ultimately, (xvii) courageous.

Likewise, the creatures in the Play/Film/Book: (i) are amphibious male creatures that do not exist in the real world (*i.e.*, an English-speaking dolphin); (ii) make haunting dolphin-like sounds⁴; (iii) move similarly in the water⁵; (iv) despite

⁴ The Film's supervising sound editor "used those dolphin-like noises as initial inspiration" for the creature's vocalizations. ER-339 ¶ 46.

⁵ The Film's visual effects supervisor relied on dolphin footage for the creature's movement. *Id.*

differences in appearance, have similar physical and physiological traits⁶; (v) possess a moral intelligence superior to humans'; (vi) can communicate with humans in their language; but (vii) are averse to interacting with humans who study them for destructive (military) purposes; (viii) are emotional; (ix) are said to "hate[]" mankind (Play at 25 (ER-179); Screenplay (ER-98) at 64); (x) see past superficial status and appearances to (xi) unexpectedly recognize Helen/Elisa as a kindred soul; (xii) staring intently into her eyes, can see and appreciate her for who she really is; and (xiii) are capable of feeling real love for her.

The main characters' *emotional arcs* exhibit the same patterns. Helen/Elisa's arc follows her (i) initial isolation and yearning for something more in life; (ii) curiosity, overcoming her trepidation about interacting with the creature; (iii) private excitement from breaking the rules; (iv) interaction with the creature that inspires joy and the freedom to be herself; (iv) empathy and deep caring for him; (v) mounting desperation upon learning he will be killed; and (vi) finally, courageous rebellion as she finds the resolve to save him. The creature follows a parallel arc in each work, as he is: (i) initially uncooperative and inscrutable; (ii)

⁶ Both have dorsal fins (Film (ER-189) at 25:17); emit dolphin-like sounds (Play at 10 (ER-164); Film (ER-189) at 33:08); breathe air and require high water salinity (odd, given Film creature is from freshwater Amazon) (Play at 17 (ER-171); Film (ER-189) at 1:02:32); and are fed raw fish (Play at 16 (ER-170); Film (ER-189) at 35:09). The comparison to a dolphin is explicit in the Book (ER-223) at 11-12, 92, 126, 143, 258.

unexpectedly curious upon meeting Helen/Elisa; (iii) increasingly engaged, enthusiastic, joyful, and expressive when interacting with Helen/Elisa; but then (iv) bewildered, desperate, and plaintive as his situation turns dire; and finally (v) uplifted by his pure love for Helen/Elisa.

Traits of other characters and elements from the Play are re-assigned to the Film/Book's characters. For instance, Helen's co-worker, Danielle, is a garrulous, funny co-worker who cleans – a foil for the more reserved Helen, and, though worried about breaking the rules, helps Helen. The Film gives Elisa a garrulous, funny co-worker (Zelda) who also serves as comic foil, and reluctantly breaks the rules to help Elisa. Danielle complains about her ex-husband, as Zelda complains about her husband. Play at 9 (ER-163), Film (ER-189) at 9:01. Like the Play's Dr. Crocus, the Film's Hoffstetler is a dedicated scientist. Hoffstetler also serves to neatly articulate Helen's emotions and themes from the Play, declaring the creature can “communicate,” is intelligent, and feels emotions, and that “this intricate beautiful thing [must not be] destroyed.” Film (ER-189) at 37:30, 43:45, 1:00:54. Further, key traits of the Play's Moray (anxious, brown-nosing, pontificating, condescending supervisor/antagonist) are re-assigned to two Film/Book characters: Fleming (anxious, brown-nosing supervisor) and Strickland (condescending, pontificating antagonist).

3. Themes

The works' dominant themes are: (i) the power of love over hate, divisiveness and violence; (ii) the triumph of empathy and communication over fear and authority; (iii) the supremacy of individuality over conformity; (iv) real advancement is impossible without an open mind; (v) one must look beyond appearance and status to a person's true character and spirit; (vi) our false view of "progress" neglects genuine progress of the human condition; and (vii) one must stand up against what is wrong, no matter one's station in life. Sub-themes are similar as well, including: (a) war is the product of fear, ignorance and a failure to communicate; (b) cruelty against innocent creatures in the name of science is wrong; (c) we tend to destroy what we don't understand; (d) music has an emotional power, facilitating communication; (e) people, though marginalized by society, can be remarkable. These shared themes reflect the net dramatic effect of other similar interrelated extrinsic elements like plot sequencing and character arcs.

4. Mood/Pacing

The mood of the works is: (i) mundane at first, with Helen/Elisa working the graveyard shift, but wistful as she yearns for something more; (ii) fantastical, due to Helen/Elisa's interactions with the supernatural creature and vivid fantasy sequences (including underwater); (iii) dreamy and tender, due to Helen/Elisa's relationship with the creature and their gazing at one another to romantic 1940s

musical numbers; (iv) sinister and suspenseful, due to the covert military study of the creature, the risk that Helen/Elisa will be caught interacting with him, and the “ticking clock” of his pending vivisection; (v) desperate, frantic and hopeless in the face of institutional authority; but finally, (vi) heroic and triumphant. Similarities in *pacing* are substantial: the works’ first two Acts unfold over approximately the same weeklong period with revelations and beats arising at similar intervals, such as Helen/Elisa’s first encounter with the creature and the lyrical rhythm of her forays into the lab. In both works the pacing is casual and leisurely as we get to know the characters, picks up once Helen/Elisa discovers that the creature is being studied for military purposes, then rapidly accelerates once she learns he will soon be killed, and does not let up until the end of Act Two when he is saved.

5. Dialogue

Similar dialogue drives the works’ plots:

- Play at 15 (ER-169) (Play’s antagonist, Moray, admonishes: “You will do your best not to become fond of the subject animals”), Film (ER-189) at 1:01:03 (Film’s antagonist, Strickland, admonishes not to “fall in love with [] playthings,” “this isn’t a petting zoo”);
- Play at 8 (ER-162) (Moray, in response to Helen’s curiosity: “[D]on’t worry about anything except the floor . . . [do] not to touch either the equipment or animals”); Film (ER-189) at 28:15 (Strickland to Elisa: “[L]emme say this

upfront. You clean that lab. You get out.”); Book (ER-223) at 38, 39

(supervisor Fleming admonishes that cleaners like Elisa “are not supposed to be here” when creature is brought in, “[t]hey’re janitorial”);

- Play at 22 (ER-176) (Moray: creature will undergo “vivisection”); Film (ER-189) at 43:28 (Strickland: “we have to vivisect this thing.”);
- Play at 24 (ER-178) (“saw through the skull”); Film (ER-189) at 44:50 (“[c]rack the damn thing open”); Book (ER-223) at 153, 206 (same).

Other similar dialogue develops the lead characters:

- Play at 17 (ER-171) (Moray, Play’s antagonist, needlessly emphasizes Helen’s lonesomeness: “You live alone, don’t you, Helen”; “But you have friends, of course”; “Nothing . . . ?”); Book (ER-223) at 186 (Strickland, Book’s antagonist, doing the same to Elisa: “[W]ho do you have? Your file says you don’t have nobody”);
- Play at 15 (ER-169) (creature “may have an intelligence equal to our own”); Film (ER-189) at 37:38, 1:00:54 (“I have reason to believe it is intelligent,” “This creature is intelligent”);
- Play at 15, 17 (ER-169, 171) (“we’ll be able to communicate” with the creature; “Helen knows you talk. You do talk to Helen, don’t you?”); Film (ER-189) at 37:30, 1:00:54 (“I think [creature] may be able to communicate . . . with us,” “creature is [] capable of language”); Book (ER-

223) at 128 (“[creature] can communicate. I’ve seen it.”);

- Play at 30 (ER-184) (Helen, re: creature: “you know just from looking at it . . . that it knows what pain feels like”); Book (ER-223) at 128 (Hoffstetler, re: creature: “It doesn’t only feel pain, it *understands* pain”);
- Play at 25 (ER-179) (to creature: “I guess you don’t like us” humans, “you do hate us”); Book (ER-223) at 236 (to creature: “I can’t imagine your thoughts were especially flattering to the human race”);

Still other similar dialogue conveys the works’ similar themes:

- Play at 20 (ER-174) (Helen: “Some human beings are mute, you know. Just because they can’t talk we don’t kill them”); Film (ER-189) at 47:00 (Elisa (who is mute): “I move my mouth, like him, and I make no sound, like him. What does that make me?”); Book (ER-223) at 164 (Elisa, insisting the creature deserves to live: “What am I, then? Am I a freak, too?”);
- Play at 30 (ER-184) (Helen re: saving the creature: “You gotta be very stupid people to need an animal to talk before you know just from looking at it that it’s saying something”); Book (ER-223) at 181 (Hoffstetler re: saving the creature: “[my degrees are meant] to parade me about as *intelligent*. But what is intelligence? . . . [I] believe that I am stupid, stupid, stupid”);
- Play at 30 (ER-184) (Helen: “You gotta talk back against what’s wrong or you can’t ever stop it. At least you gotta try”); Film (ER-189) at 47:33

(Elisa: “I can either save him now or let him die,” Giles: “But it’s not even human,” Elisa: “If we don’t do something . . . Neither are we.”); Book (ER-223) at 164 (Elisa, pleading with Giles to help rescue the creature: “I either save him now or let him die”).

6. Setting

The central setting of the first two Acts is also substantially similar: (i) the middle of the night at (ii) a large, multi-level urban facility devoted to scientific research, which includes (iii) a scientific laboratory for studying the creature, with a long glass water tank holding him; (iv) a larger pool where he can swim; (v) corridor(s) which lead(s) to an elevator that transports characters on and off the floor where the creature is housed, and (vi) a locker room. Both facilities are located in East Coast cities (Manhattan/Baltimore) and, critically, near docks on rivers that flow to the Atlantic. Outwardly, neither presents itself as for military use; its military purpose is revealed only later. Both are sterile, impersonal environments in contrast to the works’ emotional tone.

D. The Court’s July 23, 2018 Order

The district court granted Defendants’ 12(b)(6) motions in an order (the “Order”), concluding that the “similarities in the two works’ expressive choices, [are] the fact that the main character is a janitorial worker, that the test subject is of interest for military purposes, and that the escape plan involves the use of a laundry

cart” and that “the similarities generally end there.” ER-10.

STANDARD OF REVIEW

The Order, which decided the issue of substantial similarity as a matter of law, is reviewed *de novo*. *Ets-Hokin*, 225 F.3d at 1073.

SUMMARY OF ARGUMENT

The district court committed four categories of legal error, each requiring reversal:

(i) The court first “filter[ed] out” all Play elements that in its view were “unprotectable,” “generic,” and/or “*scènes-à-faire*” (ER-8, 10-13, 17). In so doing, the court erred by skipping over the mandatory step of first determining whether the works’ selection and arrangement of literary elements is substantially similar (regardless of whether the elements are protected standing alone), as such similarity is sufficient for copyright infringement. Under this Court’s precedent, that required inquiry reveals that Plaintiff has plausibly alleged and demonstrated that the Film/Book’s combination of elements is substantially similar to the Play’s, precluding dismissal as a matter of law.

(ii) The court further erred by mislabeling and broadly disregarding as “unprotectable” *scènes à faire* all Play elements that in its view “flow[] naturally” from any “premise,” thereby ignoring the similarity of entire storylines, and their similar constituent elements. ER-13. In so doing, the court misapplied this Court’s

traditionally narrower definition of *scènes à faire* as applicable only to “stock,” “indispensable,” or “standard” elements, devoid of original expression.

(iii) In evaluating substantial similarity, the court further erred by pervasively assigning weight to elements that Defendants added to their Film/Book, contrary to this Court’s rule that substantial-similarity analysis focuses exclusively on the elements similar to Plaintiff’s work.

(iv) The court also erred by adopting highly subjective interpretations of the works’ literary elements and dismissing Plaintiff’s infringement claims, contrary to the rule that a court may not do so unless it is clear that no reasonable juror could find substantial similarity. By refusing to allow the factfinder to decide subtle, inter-dependent issues of literary interpretation, with the benefit of expert opinion, the court deprived Plaintiff of the due process that the “no reasonable juror” standard necessarily safeguards.

The Film is very well acted and directed, and garnered well-deserved Academy Awards. However, that is legally irrelevant to objective analysis under the extrinsic test. This case presents an ideal opportunity to reaffirm this Circuit’s standards that require district courts to exercise disciplined caution before finding no infringement as a matter of law. Through its many interlocking legal errors, the district court denied Plaintiff the procedural safeguards at the pleadings stage that such standards are meant to preserve. Indeed, the Order reflects a troubling recent

trend among lower courts which subjectively abrogate bedrock due process requirements in copyright cases in the name of the “extrinsic test.”

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISREGARDING THIS CIRCUIT’S “SELECTION AND ARRANGEMENT” TEST.

“In most cases, direct evidence of copying is not available”; accordingly, copyright infringement is established inferentially where (1) “the infringer had access to the work” and (2) “the two works are substantially similar.” *Shaw*, 919 F.2d at 1356. The substantial-similarity prong, in turn, is established by “a two-part test”: (1) the “extrinsic test,” which “considers whether two works share a similarity of ideas and expression based on external, objective criteria,” and (2) the “intrinsic test,” which “asks whether an ordinary, reasonable observer would find a substantial similarity of expression of the shared idea.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (internal quotation marks omitted).

A. The Extrinsic Test for Substantial Similarity.

Under the extrinsic test, the court “looks to find specific, articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.” *Swirsky v. Carey*, 376 F.3d 841, 849 n.15 (9th Cir. 2004). Importantly, “the intrinsic test is reserved exclusively for the trier of fact.” *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018). Thus, the court may rule

against Plaintiff under the extrinsic test only if “no reasonable juror could find” that the works are substantially similar. *Swirsky*, 376 F.3d at 844.

**B. The Extrinsic Test Requires Analysis of Whether the Works’
Selection and Arrangement of Elements Is Substantially Similar.**

The extrinsic standard includes a necessary analytic step known as the “selection and arrangement” test, under which this Circuit has long held that “a combination of [even] unprotectable elements may qualify for copyright protection,” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). As recognized in *Metcalf*, 294 F.3d 1069, “[t]he particular sequence in which an author strings a significant number of unprotectable elements can” well satisfy the extrinsic test. *Id.* at 1073-74. Thus, where shared elements are “not protectable,” the district court cannot dismiss the action if “[plaintiff]’s original selection, coordination, and arrangement of such elements is protectable”. *Aeropostale*, 676 F.3d at 850. *See Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (same); *Sid & Marty Krofft Telev’n Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977) (same).

Under this test, courts cannot preemptively “filter out” elements deemed “unprotectable,” without first considering whether a plaintiff’s original selection and arrangement of all elements supports substantial similarity. This step is mandatory in any case where plaintiff, as here, asserts a combination of similar

elements as a protectable whole. *See* 4 David Nimmer, *Nimmer on Copyright* (“*Nimmer*”), § 13.03 n.25 (2009), *citing Krofft*, 562 F.2d 1157.

C. The District Court Failed To Properly Consider the Similar Combination of Elements It Broadly “Filtered Out”.

The “filter” test “must not obscure the general proposition” that “selection and arrangement of unprotected components” may constitute protected expression. *Nimmer* § 13.03 n.342. “[T]o disregard” elements as unprotected when performing the extrinsic test “is to ignore the fact that substantial similarity can be found in a combination of elements, even if those elements are individually unprotected.”⁷ *Swirsky*, 376 F.3d at 841. That is precisely the error the district court committed here. Plaintiff documented, and the subject works reflect, dozens of extrinsic elements that, *in combination*, establish substantial similarity to survive a 12(b)(6) motion. Yet the Order preemptively reduces those shared specific elements to extremely broad, supposedly “unprotectable” categories, then “filter[s] out” all elements related to those categories. This is expressly prohibited by this Court’s precedent. *See, e.g., Metcalf*, 294 F.3d at 1073-74; *Krofft*, 562 F.2d at 1169.

The district court cited *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th

⁷ The Second Circuit likewise applies the selection and arrangement test. *E.g., Tufenkian Imp./Exp. Vent., Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003); *see also Betty, Inc. v. PepsiCo, Inc.*, 283 F. Supp. 3d 154, 169 (S.D.N.Y. 2017).

Cir. 2018)) for the “filtration” process, but *Rentmeester* expressly supported the “selection and arrangement” test. *Id.* at 1119 (“What *is* protected by copyright is the [author’s] selection and arrangement of the [work’s] otherwise unprotected elements.”) (emphasis in original). Even *Cavalier v. Random House, Inc.*, 297 F.3d 815, 827 (9th Cir. 2002), widely cited for “filtration,” faithfully performed the selection and arrangement test, and reversed summary judgement as to a substantially similar combination of independently unprotectable elements.

In particular, the district court expressly disregarded interwoven elements related to broad categories: (a) Helen’s growing relationship with the creature, (b) Helen’s motivation to save him at all costs, and (c) Helen’s escape plan. ER-10-11. The court failed to address the many carefully-selected expressive elements in each category, which the Play/Film/Book arrange in substantially the same sequence, such as: (i) Helen working the graveyard shift, coming face-to-face with the creature trapped in a glass tank; (ii) their fascination with each other, staring in each other’s eyes; (ii) her repeated secret forays into the lab, emboldened to be with him; (iii) the alienation and sense of longing that draws them together; (iv) Helen scrubbing the floor, moving to the sound of romantic Hollywood 1940s music, playfully glancing at him, and cautiously feeding him from her lunch; (v) Helen’s discovery that he can communicate but chooses to do so only with her; (vi) that higher-ups intend to vivisect him (an unusual scientific term/procedure)

within days; (vii) the cavalier attitude of her superiors, contrasting with Helen's anguish and humanity; (viii) her frantic pleas that the creature deserves to live; (ix) Helen's plan to sneak him out in her rolling laundry hamper to free him on the dock of a river leading to the Atlantic; and (x) the powerful image of Helen embracing him.

In collapsing such details into overbroad categories and ignoring them, the court manifestly did not consider whether their protected selection and arrangement satisfied the extrinsic test. This Circuit rejected such disregard for copyright protection in, *e.g.*, *Metcalfe*, 294 F.3d 1069. There, the works featured similar plot/character elements – though not nearly in the number or detail as here. *Id.* at 1073-74. The Court acknowledged that *all* of “the similarities proffered by the [plaintiffs] are not protectable,” yet *reversed* summary judgment, rejecting defendant's argument that “generic” similarities could not be considered under the “extrinsic test.” As the Court held, “the presence of so many generic similarities and common patterns” are “articulable similarities” precluding even summary judgment. *Id.* at 1074-75.

The district court apparently dismissed the Play's expressive elements as “ideas”. ER-8, 10. But the well-understood exclusion of *ideas* from copyright protection does not support the Order. Irrespective of the fact that the Play's idiosyncratic elements cannot be dismissed as mere “ideas,” the Play features a

“combination of many different [expressive] elements,” and that combination is itself protected. *Krofft*, 562 F.2d at 1169 (“expression inherent in the [work] differs markedly from” a “simple idea”). Where, as here, “concrete” elements are articulated with original expression, they “extend[] beyond [a] basic idea,” “[e]ven if none,” standing alone, “is remarkably unusual” – a standard readily met here. *Shaw*, 919 F.3d at 1362-63. Thus, “even if Defendant[s] could succeed in characterizing each [Play] element as too general, copyright also protects” their arrangement – the analytical step skipped by the district court. *Fleener v. Trinity Broadcasting Network*, 203 F. Supp. 2d 1142, 1149-50 (C.D. Cal. 2001) (denying summary judgment).⁸

Finally, the court’s fleeting mention of selection-and-arrangement abrogates the standard by limiting it to ““a particular sequence ... [of] a significant number of elements strung together””. ER-17, *quoting DuckHole Inc. v. NBC Universal Media LLC*, 2013 WL 5797279, at *7 (C.D. Cal. Sept. 6, 2013) (unpublished). While the works clearly share similar sequencing of numerous elements, shown above, this is a facially incorrect statement of the standard. “Even in the absence of

⁸ See also *Robinson v. New Line Cinema Corp.*, 211 F.3d 1265, at *2 (4th Cir. 2000) (unpublished) (“concrete elements such as plot,” “overriding theme,” and specified character traits are not “so attenuated or general” that they can be disregarded under extrinsic test); *Lawrence Crane Ent., Inc. v. Abrams*, 2013 WL 12123997, at *6 (C.D. Cal. Jan. 28, 2013) (12(b)(6) motion denied on same grounds).

a similar sequence of events, . . . a combination of many different elements of similarity may be sufficient to constitute infringement,” regardless of their protectability. *Nimmer* § 13.03 n.25, *citing Krofft*, 562 F. 2d 1157. That was the holding in *Metcalf*, 294 F.3d at 1074: “[t]he cumulative weight of [unprotected] similarities,” in combination “allows [plaintiffs] to survive summary judgment,”” *quoting Shaw*, 919 F.2d at 1363. Likewise, *Shaw* did not impose any formalistic requirement of a copied “sequence”; rather, “the fact that both [works] contain all of these similar events gives rise to a triable question of substantial similarity”. 919 F.2d at 1363. The court’s failure to properly consider “selection and arrangement” requires reversal.⁹

II. THE DISTRICT COURT IMPROPERLY DISREGARDED THE PLAY’S PROTECTED ELEMENTS AS *SCÈNES À FAIRE*.

A. The Court Applied an Overbroad Definition of *Scènes à Faire* To Exclude Vast Sections of the Play from Consideration.

The Order also erred by inflating the concept of *scènes à faire* to swallow up myriad expressive elements in the Play. The court mislabeled as *scènes à faire*

⁹ To the extent the court rested its rejection of the selection/arrangement test on its view that “the Play and Film do not share many similarities,” ER-17, that is the product of legal errors, namely its (a) preemptive filtering-out of the heart of the Play, discussed above; and (b) overall disregard of the works’ pervasive similarities, discussed below.

every aspect of the Play that, in its view, “flows naturally” from any “premise,” without further analysis. ER-11. That approach is unsupported in copyright law. Since its inception, *scènes à faire* has maintained a specific, limited meaning: only expressions that “are as a practical matter indispensable, or at least standard, in the treatment of a given” subject or genre. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Nimmer* § 13.03 at [B][4] (*scènes à faire* are “scenes which ‘must’ be done”); *Ets-Hokin*, 225 F.3d at 1082 (same).

This narrow definition encompasses only the most generalized stock scenes or characters that lack original expression. *Berkic v. Chrichton*, 761 F.2d 1289, 1294 (9th Cir. 1985) (“romantic frolics on the beach,” conflicts between “young people” and “bureaucracies”); *Smart Inventions, Inc. v. Allied Commc’ns Corp.*, 94 F. Supp. 2d 1060, 1069 (C.D. Cal. 2000) (comparing prices in advertising); *Nimmer* § 1303 at [B][4] (slum featuring “drunks, prostitutes, vermin and derelict cars”). It is not meant to exclude entire story lines – and all elements thereof – from extrinsic analysis.

From a passing reference in *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624-25 (9th Cir. 2010) to *scènes à faire* as “flow[ing] necessarily or naturally from a basic plot premise,” the Order improperly expanded the standard to cover

anything, no matter how detailed or expressive, that in its view “flows naturally from” any “premise” (ignoring “necessarily”). ER-11-12. That unbounded interpretation warps the traditional formulation that “courts will not protect . . . expression embodied in the work [that] necessarily flows from a commonplace idea”. *Ets-Hokin*, 225 F.3d at 1082 (reversing summary judgment). *See Swirsky*, 376 F.3d at 850 (doctrine applies “when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea”). That is the narrow standard referenced in *Benay*, in line with this Court’s precedent. 607 F.3d at 624 (“[f]amiliar stock scenes and themes”).¹⁰

Yet the district court categorized entire plotlines as *scènes à faire* contrary to the doctrine’s well-settled meaning, and disregarded their constituent elements. ER-10-12. The court failed to perform the required analysis whether each is a “stock” element that “necessarily flows from a commonplace idea,” without original expression. *Ets-Hokin*, 225 F.3d at 1082. Proper analysis reveals that such elements readily transcend *scènes à faire* because they embody original expression. *See elements cited*, Statement of Facts, Part C, *supra*. These elements shared by the Film/Book include, *e.g.*: Helen/Elisa’s lowly social status as an

¹⁰ Unlike the Order, *Benay* largely based its decision on the fact that the works’ shared elements were historical events/characters in the public domain, not *scènes à faire*. *Id.* at 625.

unmarried janitor, working graveyard shift, resulting in her alienation from condescending superiors and attraction to the creature, to whom she has special access in the wee hours; Helen/Elisa's emerging bond with the creature, whom she is warned not to interact with, based on a series of carefully-crafted encounters amidst a romantic love song from a 1940s musical; the revelation that he is studied for military use; Helen/Elisa's discovery that he will soon be vivisected; macabre dialogue contrasting with her humanity; references to severed fingers and the decapitated cat; Helen/Elisa's awareness that he "hate[s]" mankind and will communicate only with her; and her motivation/resolve (without the resources) to save him, and plan to free him at an urban dock on a river that feeds to the Atlantic.

The Order thus "battles against the law and facts in attempting to reclassify" virtually "every [] concrete aspect of [the Play] as a standard element". *Fleener*, 203 F. Supp. 2d at 1150 (emphasis in original). *See Shaw*, 919 F.3d at 1363 (warning against "overexuberance" in finding *scènes à faire*); *Universal City Studios v. Film Ventures Int'l, Inc.*, 543 F. Supp. 1134, 1141 (C.D. Cal. 1982) ("reject[ing] overly expansive view of that which falls within the unprotected sphere of general ideas and scenes a faire"); *MGM, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1299 (C.D. Cal. 1995) ("attempt to characterize all of the alleged similarities . . . as scenes-a-faire [is] unavailing"). This repeated legal error

alone requires reversal.

**B. The District Court Erred By Finding the Play’s Elements
“Generic” Without Expert Evidence.**

The court erroneously disregarded nearly all of the Play’s expressive elements before any expert discovery as to *scènes à faire*, contravening this Court’s holding in *Swirsky*. There, though the defendant proffered expert testimony that elements of plaintiff’s song were *scènes à faire*, it failed to account for many aesthetic choices that distinguished such elements from “common-place” clichés. 376 F.3d at 850. This Court reversed, holding: “It is inappropriate to grant summary judgment on the basis of *scenes a faire* without independent evidence, unless the allegation of *scenes a faire* is uncontested.” *Id.* Here, of course, the allegation that entire categories of the Play’s elements are generic/*scènes à faire* was hotly contested.

Swirsky’s holding is consistent with this Court’s observation that “[t]he extrinsic test often requires . . . expert testimony.” *Three Boys Music*, 212 F.3d at 485; accord *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). In *Shaw*, reversal of summary judgment was largely based on “expert[] analysis” that “reveal[ed] substantial similarities”. 919 F.2d at 1357-58. Accord *Williams*, 895 F.3d at 1119 n.6, 1126 (affirming denial of summary judgment where expert testimony differed as to whether works’ elements were

“unprotectable”); *Green v. MGM Studios, Inc.*, 2008 WL 11338272, at *3 (C.D. Cal. Nov. 24, 2008) (expert evidence that extrinsic elements were substantially similar “create[d] a genuine issue of fact”).

Indeed, the need for expert analysis is particularly acute where, as here, a court must compare a stage play to a full-blown film and book, and consider the interplay and impact of their literary and aesthetic elements – an inherently “subtle and complex” inquiry. *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 (9th Cir. 1987). The district court erred by deciding such questions without expert evidence.

III. THE COURT GAVE IMPROPER WEIGHT TO THE FILM’S/BOOK’S DIFFERENCES, AS OPPOSED TO SIMILARITIES.

A. “Additional and Varied” Elements Cannot Outweigh Substantial Similarity.

The district court also committed reversible error by allowing differences between the Film/Book and Play to detract from dozens of similarities, as this approach violates a longstanding rule:

“It is entirely immaterial that, in many respects, plaintiff’s and defendant’s works are dissimilar . . . If substantial similarity is found, the defendant will not be immunized from liability by reason of the addition in his work of different characters or additional and varied incidents, nor generally by reason of his work proving more attractive or saleable than the plaintiff’s.”

Nimmer § 13.03 at 13:67-68, *citing, inter alia*, *Walt Disney Prods. v. Air Pirates*,

581 F.2d 751, 756 (9th Cir. 1978)). As Judge Hand famously put it, an infringer may not “excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). See *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 945 (10th Cir. 2002) (infringement “may not be excused merely because it is [allegedly] insubstantial with respect to the infringing work”). “Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.” *Baxter*, 812 F.2d at 425. A contrary approach “ignores the fundamental notion that no bright line rule exists as to what quantum of similarity” constitutes “substantial similarity.” *Id.* For example, the extrinsic analysis in *Shaw* “reveal[ed] significant similarities and differences,” yet differences did not justify summary judgment. 919 F.2d at 1357-58. Instead, the presence of significant shared elements means “reasonable minds might differ as to [] substantial similarity,” despite “dissimilarities”. *Id.*

B. The District Court Erred in Focusing On Elements That Defendants Added to the Film/Book.

The Order pervasively runs afoul of this “fundamental” principle that the focus is on shared, not different elements. *Baxter*, 812 F.2d at 425. With each extrinsic category, the court gave less weight to the works’ similarities, and greater weight to elements Defendants added. Though the first two Acts of the Film/Book

closely parallel the two-Act Play, the court repeatedly relied on additional elements in the Film/Book's Third Act, once Elisa escapes with the creature. ER-10-11. The Order similarly emphasizes the subplots involving Russian spies and Elisa's neighbor added to the Film/Book. ER-10-12.

Such lopsided emphasis of differences, which takes up all or part of 19 paragraphs in the Order (ER-8-17), obscured the extent to which the works' core story, told in their first two Acts, is objectively similar. *See* Statement of Facts, Part C.1. The district court's approach produces absurd results. If a future copycat film retold the Film's essential story, could it escape infringement by introducing new amphibian characters and documenting Elisa's and the creature's happy underwater life after their escape?

This is a paradigmatic case where, “despite the[] dissimilarities” between the works, “the respective plots do parallel each other,” precluding even summary judgment. *Shaw*, 919 F.2d at 1357-58. Even where it is undisputed that defendants adapted the underlying work in “different plots,” in ways that “differ markedly” from the original, the extrinsic test asks only whether “defendants took more than is allowed”. *Air Pirates*, 581 F.2d at 753-54, 757. The “extrinsic test does not inquire as to whether there are *any* differences between [] works,” but only whether sufficient similarities make infringement plausible. *Marchel Design, Inc. v. Best Master Ent., Inc.*, 2008 WL 4723113, at *3 (C.D. Cal. Oct. 23, 2008).

Accord Atari, Inc., 672 F.2d at 619.¹¹

The works' core narrative in their first two Acts amply meets this standard, in ways the district court failed to credit. For example, as to the works' characters, the court improperly discusses only their different traits (with the sole exception of Helen/Elisa's job as "a janitorial worker"). ER-10. The court did not acknowledge the many other features shared by Helen/Elisa, identified at Statement of Facts, Part C.2, *supra*, such as: their sense of isolation working third shift; humble appearance; lowly status and reserved demeanor at work, rendering them an easy target of condescension; yearning for a romantic partner; fondness for music; sensitivity/empathy, drawing them to the creature; latent rebellious streak; sharp wit; unique ability to communicate with the creature and relate to him as an equal; special ability to buoy his spirits; active imagination with vivid fantasies; and inner courage/resolve to save the creature. The Order similarly ignores that the works' creature is an aquatic male creature that does not exist in the real world; displays abundant similar traits, such as dolphin-like anatomy, movement, and noises, an emotional/moral intelligence superior to humans'; resents mankind except for Helen/Elisa whom he recognizes as a kindred spirit; can learn human language;

¹¹ See also, e.g., *Peter Letterese and Assocs., Inc. v. World Inst. of Scientology Ent.*, 533 F.3d 1287, 1315 (11th Cir. 2008); *Gal v. Viacom Int'l, Inc.*, 403 F. Supp. 2d 294, 306-07 (S.D.N.Y. 2005); *Smart Inventions*, 94 F. Supp. 2d at 1072.

stares intently at Helen/Elisa and can feel human-like love.

It is contrary to law for the district court to disregard these similar concrete traits in favor of the Film/Book's added traits. In *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015), the defendant asserted that certain character depictions did not infringe, because they featured "many differences" and "look[ed] substantially different from any particular depiction" of the plaintiff's character. *Id.* at 1025. This Court's response was blunt: "We reject this argument," because extrinsic analysis depends on shared "character traits and attributes," not differences. *Id.* See, e.g., *Danjaq, LLC v. Universal City Studios, LLC*, 2014 WL 7882071, at *3-4 (C.D. Cal. Oct. 2, 2014) (despite "many differences between [main] characters," similar traits precluded dismissal); *Spry Fox LLC v. LOL Apps Inc.*, 2012 WL 5290158, at *6 (W.D. Wash. Sept. 18, 2012) (denying 12(b)(6) motion despite "meaningful" differences).

Likewise, the Order erroneously emphasizes the Film/Book's different *secondary* characters. ER-15. But the addition or subtraction of characters "is not of major significance when considering both stories in their entirety". *Shaw*, 919 F.2d at 1357. Thus, an accused infringer cannot avoid liability by inserting different "features[] and mannerisms" among characters. *Krofft*, 562 F.2d at 1166-67. See *Danjaq*, 2014 WL 7882071, at *3-4 (C.D. Cal. Oct. 2, 2014) ("many differences between characters," including "supporting characters," did not justify

dismissal).¹²

The district court was also improperly influenced by the works’ different media, opining that the Film/Book’s settings are more expansive. ER-11-12. Such difference in scope does not support dismissal, particularly in the “not infrequent situation where the [] work is adapted for use in a medium different from that intended for the plaintiff’s” work. *Nimmer* §13.03 at [E][2]. *See Castle Rock Entm’t, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 140 (2d Cir. 1998) (“different genres” having “different concept and feel” does not negate infringement).

Whereas a play is a text that must be performed live on a single stage, evoking a larger world, a film and book are finished products that cross-cut (onscreen or on the page) among multiple settings and timelines. Such differences do not undermine substantial similarity:

“It is true . . . that the film and [play] differ in numerous respects. Such dissimilarities result, however, principally from the film’s enlarged means to express in a wider latitude incidents necessarily requiring a wider range of settings than a play restricted to the narrow confines of a theatrical stage is able to present.”

Twentieth-Century Fox Film Corp. v. Stonesifer, 140 F.2d 579, 583 (9th Cir. 1944), (affirming copyright infringement). Here, the court gave undue weight to such “enlarged means,” emphasizing settings added to the Film/Book while

¹² *Accord Betty*, 283 F. Supp. 3d at 169; *Gal*, 403 F. Supp. 2d at 307.

erroneously failing to credit the similarities between the works' key setting (*see* Statement of Facts, Part C.6, *supra*).

Importantly, the court's error in relying on differences does not arise from the common situation where purported similarities are not, in fact, similar, as in *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072 (9th Cir. 2006), cited in the Order. There, "[a]lthough [plaintiffs] attmpt[ed] to link up" the works' characters and elements, the works featured "few real similarities". *Id.* at 1078. Thus, "[b]eyond the basic premise of a family-run funeral home," extrinsic elements did not overlap. *Id.* at 1080, 1081.

The district court here did not undertake the analysis performed in *Funky Films*. Instead, it preemptively disregarded entire categories of the Play's similar elements as allegedly unprotectable (*see* Part I, *supra*), and improperly weighed remaining shared elements against different elements added by Defendants. This is wrong under Ninth Circuit law.

C. The Film/Book's Added Elements, on Which the District Court Erroneously Relied, Are Not Protectable Under the Court's *Scènes à Faire* Standard.

The district court's over-reliance on the works' differences was doubly inappropriate because the Film/Book's added elements are shot through with unprotected stock elements. The court used an overly expansive *scènes à faire*

definition to “filter out” the works’ similarities, yet when relying on the works’ differences, it cites elements from the Film/Book that are unprotected under its own standard. *Dillon v. NBCUniversal Media LLC*, 2013 WL 3581938 (C.D. Cal. June 18, 2013) noted the unfairness of this loaded approach, and rejected defendants’ reliance on the works’ differences, because such “elements are stock elements . . . that play no role in the substantial similarity analysis.” *Id.* at *6.

Here, the Film/Book’s added elements on which the Order relies include such obvious stereotypes/clichés as the (i) sadistic “villain” who displays “hostility” toward the creature; (ii) female lead’s gay-friend/neighbor/frustrated artist; (iii) female lead’s smart-talking, loyal work-friend; (iv) a gruff general overseeing military operations; (v) the Cold War; and (v) Soviet spies seeking U.S. military secrets. ER-10-12, 15. The Order thus reflects a transparent double-standard, where stock elements not in the Play are used to support dismissal, while the Play’s supposedly generic elements, no matter how expressive or originally arranged, also support dismissal. No copyright infringement action could survive such a slanted analysis.

IV. THE COURT FAILED TO ADHERE TO THE “NO REASONABLE JUROR” STANDARD AND INSTEAD RELIED ON ITS OWN SUBJECTIVE ASSESSMENT.

A. The Court May Not Decide the Factual Question of Substantial Similarity Unless “No Reasonable Juror” Could Find Otherwise.

Compounding the above errors, the district court violated the bedrock principle that an infringement claim cannot be dismissed unless “no reasonable juror could find substantial similarity”. *Swirsky*, 376 F.3d at 844. In copyright cases, this Court’s adherence to that rule has been unwavering. *Id.* This is the same stringent standard that restricts the authority of district courts to render judgment notwithstanding the verdict under FRCP 50. *Williams*, 895 F.3d at 1127 (“[i]t is not the courts’ place to substitute our [subjective] evaluations for those of the jurors”); *Kaseberg v. Conaco, LLC*, 260 F.3d 1229, 1235 (S.D. Cal. 2017).

This rule is necessary, “[s]ince substantial similarity is usually an extremely close question of fact”. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n.6 (9th Cir. 1983) (denying summary judgment because “reasonable minds could differ”). *See Baxter*, 812 F.2d at 424-25 (same); *Aeropostale*, 676 F.3d at 851 (“genuine dispute of material fact” as to works’ similarities). Due to the detailed nature of this factual inquiry, even on summary judgment all literary inferences must be construed “in a manner most favorable to the non-moving

party”. *Shaw*, 919 F.2d at 1355. *Accord Kouf v. Walt Disney Pictures & Telev’n*, 16 F.3d 1042, 1045 n.3 (9th Cir. 1994) (determining substantial similarity as a matter law is “not highly favored”); *Atkins v. Fischer*, 331 F.3d 988, 995 (D.C. Cir. 2003) (same). “A jury ultimately may conclude that the similarities between the protected elements in” the works “are not ‘substantial,’” but because “[s]ubstantial similarity” is a question of fact, [] summary judgment is only appropriate if no reasonable juror could differ in weighing the evidence.” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1216 (11th Cir. 2000).

A fortiori, on a 12(b)(6) motion, disputes as to substantial similarity and all literary inferences to be drawn from the works must be construed in plaintiff’s favor. The extrinsic test must be applied with the utmost caution as plaintiffs have no opportunity to present, *e.g.*, expert literary opinion and evidence of access. *See Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938) (denying 12(b)(6) motion; though court can compare works’ contents at pleading stage, “court will rarely impose its judicial knowledge” as to originality/similarity); *Copeland v. Bieber*, 789 F.3d 484, 486 (4th Cir. 2015) (denying 12(b)(6) motion under “no reasonable juror standard”).

Here, in construing the Complaint and works “in the light most favorable to” Plaintiff, no court can say “beyond doubt” that a jury could not find substantial

similarity. *Jacobsen*, 287 F.3d at 941-42 (denying 12(b)(6) motion).¹³

B. On a 12(b)(6) Motion, the “Inverse-Ratio” Rule Calls for a Lower Threshold for Substantial Similarity

This Court’s “inverse-ratio” rule required the district court to exercise special caution in deciding substantial similarity on a 12(b)(6) motion. Under this rule, “[w]here a high degree of [Defendants’] access” to Plaintiff’s work “is shown, we require a lower standard of proof of substantial similarity” to demonstrate infringement inferentially. *Swirsky*, 376 F.3d at 844. *Accord Three Boys Music*, 212 F.3d at 481; *Smith*, 84 F.3d at 1218; *Krofft*, 562 F.2d at 1172.

Here, Plaintiff pled Defendants’ high degree of access to the Play and Defendant Kraus’s admiration of Paul Zindel’s work. ER-317-19, 320-42, ¶¶ 20-25, 34-40. Because such allegations are accepted as true on a 12(b)(6) motion, a “commensurately lowered” standard of substantial similarity applies. *Swirsky*, 376 F.3d at 844-45. The district court side-stepped the inverse-ratio rule, stating that it

¹³ See *Unicolors, Inc. v. H&M Hennes & Mauritz LP*, 2016 WL 10646311, at *4 (C.D. Cal. Aug. 12, 2016) (denying 12(b)(6); “reasonable minds might answer differently the touchstone question” of substantial similarity); *Wilson v. The Walt Disney Company*, 2014 WL 4477391, at *1 (N.D. Cal. July 30, 2014) (despite “differences,” court cannot conclude that “no reasonable juror could find substantial similarity”) *Dillon*, 2013 WL 3581938, at *4 (“drawing all reasonable inferences in favor of Plaintiff there are enough similar elements . . . to state a claim of copyright infringement”).

““assists only in proving copying, not proving unlawful appropriation””. ER-7, *quoting Rentmeester*, 883 F.3d at 1124. But the *Rentmeester* Court found, in comparing two simple photographs, that the only thing copied was the idea of photographing a basketball player in mid-air attempting a dunk. As a result, no amount of deliberate copying of that idea could establish infringement, even under the inverse-ratio rule. 883 F.3d at 1121-22.

By contrast here, the district court subverted the substantial-similarity analysis by discounting virtually all of the Play’s interwoven *expressive* elements as unprotected (based on an overbroad *scènes à faire* definition) or insufficiently similar in the court’s own view, leading to the circular conclusion that this negates “unlawful appropriation.” ER-7. This Court has never condoned such a process; instead, where access is shown, the court must “commensurately lower[]” the requisite quantum of similarity, and evaluate whether a “reasonable juror could find” such similarity. *Swirsky*, 376 F.3d at 844-45; *see Dillon*, 2013 WL 3581938, at *7 (denying 12(b)(6); “Court cannot conclude [works] are not substantially similar on the pleadings . . . especially” under inverse-ratio rule “in light of the high degree of access alleged”). *Accord Aeropostale*, 676 F.3d at 851; *Shaw*, 919 F.3d at 1361. No court performing the requisite analysis could dismiss Plaintiff’s claims at the 12(b)(6) stage.

C. The District Court Repeatedly Erred by Ruling on Subjective Matters of Literary Interpretation.

Where, as in this case, the substantial-similarity inquiry compares a play to a film and book, the analysis is especially open to a range of interpretations, requiring close analysis of works' elements that often intertwine in "subtle and complex" ways. *Baxter*, 812 F.2d at 424. Whenever such expressive elements could yield conflicting reactions among jurors, the court must leave such questions to the jury. Instead, the judge here substituted his own subjective reactions for those of the jury. In effect, he became a jury of one.

Characters. According to the Order, Helen/Elisa's only shared trait is "that they are janitorial employees working the night shift" at a lab where "they decide to attempt to free a test subject," and Helen "is a relatively undeveloped character". ER-14. The breadth of this pronouncement is stunning. It is error to summarily conclude that no reasonable juror could recognize Helen/Elisa's objective similarities, such as their quietness, humble appearance, reserved nature at work, lowly status subjecting them to condescension, lonesomeness in yearning for a partner, sensitivity, empathy and feelings of deep attachment to an otherworldly and abused creature, hidden streaks of rebellion and playfulness, fondness for romantic vintage music, impulse to defy orders to be with the creature they care most about and, ultimately, righteous courage to save the creature's life

at all cost. Jurors might disregard these similarities, contrary to the Play's text, but no court may assume jurors would do so.

The district court also distinguishes Helen's relationship with the creature from Elisa's, by subjectively characterizing Helen as motivated by "disapprov[al] of animal testing" rather than by her close bond with the creature. ER-10.

Similarly, the Order claims that the Play's creature "does not form a personal connection with any character." ER-14. The text contradicts both those characterizations. *First*, Helen does not visit, talk to, praise, form a relationship with, try to free, or even contemplate freeing, any captive of the lab other than the creature. Helen's boss detects her special fondness for the creature and restricts Helen only from the creature's lab: "I'm placing it off limits for your own good. You're too emotionally involved." Play at 20 (ER-174). Helen's emotional involvement with the creature is repeatedly signaled through, *e.g.*, their moonlit meetings and gazing at each other, usually to the overtly romantic tune "Let Me Call You Sweetheart." Play at 16-17, 20 (ER-170-71, 174).

Second, the creature reciprocates Helen's attention and affection, repeatedly staring "intens[ely]" and emotionally into her eyes. Play at 16 (ER-170); *id.* at 18, 25-26 (ER-172, 179-80). The creature's final pronouncement of "Looooooooooooooveeeeeee" (accompanied by the romantic tune) is in direct response to Helen's impassioned plea for his life, and a culmination of their unique

relationship. *Id.* at 30 (ER-184). It is strained at best for the court to conclude that the creature’s reference to “Love” “appears to be a general love among living creatures”.¹⁴ ER-14. Indeed, if the Play is just about “animal testing” (ER-10) why the moonlight and why is the overtly romantic song heard every time Helen and the creature are alone?

The court also deduces that, because in the Film’s Third Act the creature causes Elisa’s “keloid” neck scars (Book (ER-223) at 6) to open underwater, Elisa is “not-entirely-human”. ER-14.¹⁵ More plausibly, Elisa is human and the creature has healed her (consistent with his magical powers displayed in the Third Act, Film (ER-189) at 1:20:36), so she can breathe underwater. *Id.* at 1:57:54. In any event, the court cannot decide, on a 12(b)(6) motion no less, that this added event retroactively erases Helen/Elisa’s shared traits in the first two Acts.

Plot/Sequence. The Order contains similar unfounded assumptions about the works’ plots. For example, it deflects the obvious similarity of the works’ idiosyncratic laundry-hamper escape by unduly emphasizing that in the Play the

¹⁴ The court purports to contrast Helen’s acts of “speak[ing]” to the creature and “tr[ying] to give it a piece of her sandwich” with Elisa’s befriending the creature and “bring[ing] it eggs”. ER-10. In straining to differentiate elements that are in fact quite similar, the court only highlights the need for a jury to resolve the question.

¹⁵ However, “keloid” scars are simply caused by cutting. Film (ER-189) at 28:00.

creature suggests the “Ham . . . purrr.” (ER-14). But it’s the hamper that matters, not which character the author chose to come up with it. And, once Helen deciphers this cryptic suggestion, she entirely takes the lead to free the creature, as in the Film/Book. Play at 27-28 (ER-181-82).¹⁶ Moreover, as explained in Part III *supra*, the court erroneously used subplots from the Film/Book’s Third Act to outweigh substantially similar plot/sequencing in the works’ first two Acts.

Setting. The Order also misinterprets the Play’s setting as more diminutive than that of the Film/Book (ER-12), disregarding the Play’s actual descriptions of a significant scientific facility. Although the Play’s large, urban facility expressly takes up many floors of a large building occupied by numerous employees, replete with a “natatorium” where the creature can swim, the district court only recognizes the Film/Book’s portrayal of a large facility. *Id.* Also contrary to the Order, the laboratory in both the Play and Film/Book is “found on a single floor” (*id.*), with a corridor leading to the lab and an elevator that shuttles characters on and off the floor. Moreover, the Play’s lab contains substantially similar features such as a glass tank housing the creature, sinister equipment and, idiosyncratically, a

¹⁶ It is also incorrect for the district court to conclude that, when Helen bonds with the creature by cleaning rhythmically to “Let Me Call You Sweetheart,” the creature is covered by a curtain. ER-17, *citing* Play at 13 (ER-167). In fact the Play describes Helen as cleaning and “sing[ing] Let Me Call You Sweetheart to herself” while “her eyes return to the dolphin”. Play at 10 (ER-164).

phonograph playing very similar music. *See* Statement of Facts, Part C.6, *supra*.

The court’s evident preference for the Film/Book apparently flows from the difference in media, by which the Film/Book have an “enlarged means to express” events, “requiring a wider range of settings than [the] play”. *Stonesifer*, 140 F.2d at 583. That difference in the literal depiction of settings does not undercut substantial similarity. *Id.*

It was also entirely subjective to conclude that the Film/Book is a “Cold War” story, but not the Play (ER-12), even though the Play: (i) is written and set in the 1960s, a few years after the Cuban Missile Crisis and erection of the Berlin Wall; (ii) portrays the facility’s objective to use the creature to “deliver atomic warheads,” “nuclear torpedoes,” and “nuclear warheads”; (iii) criticizes the militant jingoism of its time; and (iv) contrasts Helen’s solitariness with the enforced conformity that typified Cold-War culture. Play at 25-26 (ER-179-80).

Dialogue. The district court tries to distinguish the works’ obviously similar dialogue by arguing that in some instances it is delivered by or to different characters – but that does not address how closely the cited lines of dialogue track each other and build on the works’ shared themes. *See* Statement of Facts, Part C.5, *supra*. The Order purports to distinguish Helen’s dialogue, underscoring the creature’s humanity and pleading to save his life, with Elisa’s dialogue for the same purpose, because Helen spoke to her bosses (to persuade them not to vivisect

the creature) and Elisa spoke to her neighbor (to persuade him to help save the creature from vivisection). ER-16. The court also expressly discounted the motivation behind Helen's dialogue as limited to "condemning the facility's experiments," thus ignoring her "emotional[] involve[ment]" with the creature that the Play consummately develops. ER-16; Play at 20 (ER-174). Because reasonable jurors could readily disagree, the court's subjective analysis reflects serious error.

Themes. The themes that the Order presents as unique to the Play or the Film/Book apply equally to all the works. It is simply wrong to say that only the Film/Book include themes of "the power of friendship and love," the "power of music," "unexpected soulmates," and "society's intolerance toward outsiders" (ER-12), considering that: (i) the Play's central drama is the unlikely friendship between Helen and the creature; (ii) the Play's climax is the creature's proclamation of "Love" for Helen (Play at 30 (ER-184)); (iii) Helen and the creature bond over very similar romantic music that gives the Play its name; and (iv) their friendship and love is all the more poignant because they are classic outsiders – a lonesome, disrespected cleaning woman and a fantastical aquatic creature of superior intellect about to be sacrificed because he is misunderstood.

It was equally erroneous to conclude that only the Play includes themes of "triumph of empathy and communication over fear and authority," "supremacy of individuality over conformity," the importance of an "open mind," society's "false

view of ‘progress,’” and the importance of “stand[ing] up against what is wrong, no matter one’s station”. ER-12. Both works clearly exhibit these themes throughout, *e.g.*, (i) contrasting Helen/Elisa’s empathy and communication with the creature to the facility’s cold, brutal treatment of him; (ii) Helen/Elisa’s refusal to conform, open-mindedness in treating the creature as an equal, and rebelliousness, in sneaking into the lab and resolving to free him; (iii) the facility’s wrongful abuse of the creature in the name of scientific/military progress; and (iv) Helen/Elisa’s transformative act of standing up to authority despite their lowly status. *See* Statement of Facts, Parts C.1-3, *supra*.

Pacing. The Order essentially admits that the pacing of the works’ core story is parallel, increasing from steady character/relationship development in the first Act to accelerated suspense in the second Act. Yet the district court improperly distinguishes the Film/Book’s pacing by focusing on their added subplots and third Act. ER-13.

Mood. The Order reflects the same one-sided interpretation of the works’ moods. The court opines that the Play’s science-fiction component (featuring a dolphin who can speak English, read military papers and devise an escape plan) is “mild” but the Film/Book is “fantastical”. ER-13. This is no justification for dismissal, and in fact points to a lively dispute. Likewise, the court contradicts the Play’s text by improperly discounting its vivid *fantasy* sequences as “lacking [a]

dreamlike quality”. *Id.* In fact, the Play’s first underwater fantasy is described in dreamlike terms, where “[a]ll voices echo” and characters “appear phantasmagorically,” to the “[s]weet strains of Let Me Call You Sweetheart,” as dolphins live harmoniously with humans in a stylized montage. Play at 23 (ER-177). The Play’s second underwater fantasy is darker and eerie, “Helen’s voice becomes echoed,” “theatrical effects creep[] in,” and we see “a discordant vision” of dolphins. Play at 25-26 (ER-179-80).

The Order describes the Film/Book as contrasting “[p]eriods of joy and happiness” with “darker and suspenseful moments” (ER-13), but that description just as readily matches the Play. Helen’s and the creature’s interactions are expressly described as joyful, *e.g.*: (i) seeing the creature is “sad,” Helen makes faces to entertain him (Play at 13 (ER-167)); (ii) when she strokes him he “reacts even more enthusiastically” (*id.* at 14 (ER-168)); (iii) Helen is in very “good spirits” as she sings “Let Me Call You Sweetheart” and cleans (*id.* at 13 (ER-167)); and (iv) Helen and the creature laugh in each other’s company (*id.* at 13-14 (ER-167-68)). By contrast, the Second Act turns darker and more suspenseful as Helen learns the creature is being studied for military purposes and will soon be gruesomely vivisected (*id.* at 22-24 (ER-176-78)); she desperately seeks to free him, and he is saved just as the scientist’s “hypodermic needle is poised” to inject him (*id.* at 30). This contrast is also emphasized by Helen’s two vivid fantasies

discussed above. *Id.* at 23, 25-26 (ER-177, 179-80).

Courts must not “ma[k]e [such] subjective determination[s]” of similarity, which usurp the role of the “reasonable juror.” *Shaw*, 919 F.2d at 1357. Faced with complex “[d]eterminations of substantial similarity of expression,” the district court improperly failed to consider how reasonable minds might differ on myriad points of comparison. *Baxter*, 812 F.2d at 424. It also committed reversible error by resolving every literary dispute against Plaintiff, when on a 12(b)(6) motion such disputes must be resolved in Plaintiff’s favor.

V. REVERSAL IS NECESSARY TO REAFFIRM THE DUE PROCESS PROTECTIONS INHERENT IN THIS CIRCUIT’S COPYRIGHT INFRINGEMENT TESTS.

The district court’s approach reflects a dangerous recent trend that has emerged in the lower courts which have become increasingly unbridled in dismissing copyright infringement claims at the pleadings stage (*see, e.g., cases cited* ER-7-9), undermining this Circuit’s procedures designed to ensure that the quintessentially factual question of substantial similarity of expression is decided on a more developed record. In copyright-infringement cases these courts have hand-waved away such principles as the (i) “no reasonable juror” standard, (ii) “selection and arrangement” test, (iii) inverse-ratio rule, and (iv) the importance of expert opinion regarding what is often subtle and complex literary interpretation.

Although on a 12(b)(6) motion, a court may consider the works' contents (as incorporated by reference), it must still "view[] the evidence and draw[] inferences in the manner most favorable to [plaintiff]" as required even on summary judgment, with a complete record. *Shaw*, 919 F.2d at 1355. Rather than honoring these well-settled rules, grounded in due process, district courts often misuse the "extrinsic test" to render highly subjective literary judgments, without the benefit of expert opinion, on essentially issues of fact, hijacking the "intrinsic test" and usurping the role of the factfinder.

This Court has long exercised caution in applying the extrinsic test as a matter of law, even on summary judgment. *See Baxter*, 812 at 424-25 (if "reasonable minds could differ as to" substantial similarity, court cannot render judgment as a matter of law); *Aeropostale*, 676 F.3d at 851 (same); *Shaw*, 919 F.2d at 1355; *Kouf*, 16 F.3d at 1045 n.3; *Twentieth Century-Fox Film Corp.*, 715 F.2d at 1329 n.6. Appropriately, appellate courts show even greater vigilance on a 12(b)(6) motion. *See Dezendorf*, 99 F.2d at 851; *Copeland*, 789 F.3d at 486; *Jacobsen*, 287 F.3d at 941-42.

The district court here relied on two opinions where this Court allowed dismissal on the pleadings under the extrinsic test: *Rentmeester*, 883 F.3d 1111, involving the comparison of two still photographs with extremely few elements to evaluate; and *Christianson v. West Pub. Co.*, 149 F.2d 202 (9th Cir. 1945),

comparing two U.S. maps drawn from public-domain outlines of the States. ER-7. It is no coincidence that both cases entailed an exceedingly streamlined comparison of limited expressive elements, resulting in the rare instances where this Court condoned 12(b)(6) dismissal based on proper application of the extrinsic test.¹⁷

As explained in *Shaw*, in cases involving static, visually simple products, the court may more readily “make the required determination of similarity on a motion for summary judgment. A comparison of literary works, on the other hand, generally requires the reader or viewer to engage in [the] two-step process” of applying the extrinsic and intrinsic tests. *Shaw*, 919 F.2d at 1361. Even in *Rentmeester*, involving a quintessentially simple static image, the dissent warned: “Where no discovery has taken place, we should not say that, as a matter of law, [defendant’s work] could never be substantially similar to” the plaintiff’s, as the extrinsic test raises “an inherently factual question which is often reserved for the jury, and rarely for a court to decide at the motion to dismiss stage.” 883 F.3d at 1127.

¹⁷ Similarly, in *Wild v. NBC Universal*, 513 Fed. App’x. 640 (9th Cir. Feb. 28, 2013) (unpublished), the Court affirmed dismissal where alleged infringement was based on a very short list of images: “characters approaching a carnival, characters in the house of mirrors, and a view through a gun sight.” *Id.* at 641. Such a starkly limited visual comparison of so few elements is consistent with *Rentmeester*.

Lower courts have failed to emulate this Court's restraint, resulting in a string of mostly unpublished decisions dismissing colorable copyright infringement cases prior to any discovery, depriving plaintiffs at the pleading stage of due process. *See cases cited*, ER-7-9, 16-17. The district court's Order follows the same erroneous trend, displaying overzealous use of the extrinsic test to improperly resolve all factual disputes against a copyright plaintiff on a 12(b)(6) motion.

CONCLUSION

Juries are not chopped liver. The district court's Order must be reversed and the case remanded with instructions to deny Defendants' 12(b)(6) motions and set the case on the path for a jury trial.

Dated: December 10, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,984 words, as determined by Microsoft Word 2013, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

Dated: December 10, 2018

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STATEMENT OF RELATED CASES

Appellant is aware of no cases to disclose pursuant to Ninth Circuit Rule 28-2.6.

Dated: December 10, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system pursuant to Ninth Circuit Rule 30-1.3.

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