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

**SCOTT W. HALLOCK, WMTI
PRODUCTIONS, INC., WMTI
PRODUCTIONS NORTH, INC., and
THE NEXT SEASON COMPANY, INC.**

Case No.: CV 20-02726-CJC(MAAx)

Plaintiffs,

**ORDER GRANTING IN PART
DEFENDANTS’ MOTION TO
DISMISS [Dkt. 28] AND MOTION TO
STRIKE [Dkt. 29]**

v.

**KEVIN HEALEY, PROPAGATE
CONTENT, LLC, and DOES 1 through
100,**

Defendants.

I. INTRODUCTION

On February 12, 2020, Plaintiffs Scott W. Hallock, WMTI Productions, Inc., WMTI Productions North, Inc., and The Next Season Company, Inc. (“TNSCI”), filed

1 this copyright infringement action against Defendants Kevin Healey, Propagate Content,
2 LLC (“Propagate”), and unnamed Does. (*See* Dkt. 20 [First Amended Complaint,
3 hereinafter “FAC”].) Before the Court are Defendants’ motion to dismiss, (Dkt. 28
4 [hereinafter “MTD”]), and motion to strike, (Dkt. 29 [hereinafter “MTS”]). For the
5 following reasons, the motion to dismiss and motion to strike are **GRANTED IN**
6 **PART**.¹

8 **II. BACKGROUND**

9
10 The FAC alleges the following facts. For a time, Plaintiff Hallock and Defendant
11 Healey worked as creative partners and producers, creating a number of television series
12 including *Scare Tactics*, a scripted comedy horror hidden camera show. (FAC ¶ 18.)
13 *Scare Tactics* was broadcast in half-hour episodes, featuring four short stories which
14 introduced a temporary newcomer (“the Mark”) to a group of actors who would interact
15 with the Mark in a seemingly safe setting, and the pre-set addition of strange occurrences
16 to capture the Mark’s authentic reactions on hidden cameras. (*Id.* ¶ 19.) Hallock and
17 Healey worked together in various parts of the production process such as, supervising
18 the writers on the show, producing the individual stories, casting characters, filming the
19 episodes, and editing the footage. (*Id.* ¶¶ 20–23.)

20
21 In 2011, disputes arose between Hallock and Healey which resulted in Healey fully
22 divesting himself of *Scare Tactics*. (*Id.* ¶ 26.) These disputes were resolved in two
23 settlement agreements, one in 2012 (the “2012 Agreement”) and one in 2016 (Dkt. 1-1
24 Ex. 1 [hereinafter the “2016 Agreement”]).² Under the 2012 Agreement, Healey

25
26 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
27 for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for September 28, 2020 at 1:30 p.m. is hereby vacated and off calendar.

28 ² According to Plaintiff, the 2012 Agreement has a confidentiality provision and “will be filed under seal
if and when necessary.” (FAC at 5 n.3.) The 2016 Agreement is not confidential. (*Id.* at 5 n.4.)

1 transferred all of his “rights, title, and interest” in a company that owned a show called
2 *Freak Encounters*, also co-created and co-produced by Hallock and Healey. (FAC
3 ¶¶ 88–89.) In the 2016 Agreement, Healey agreed to “assign and transfer to HALLOCK
4 all of his direct and indirect rights and interest of any kind or nature whatsoever in and to
5 SCARE TACTICS.” (*Id.* ¶ 28; 2016 Agreement.) Healy also transferred to Hallock all
6 ownership in WMTI US, WMTI North, and TNSCI, which held title in and to various
7 *Scare Tactics* intellectual property. (*Id.*) However, Plaintiffs believe that Healy failed to
8 divest himself of, and retains, physical and tangible assets related to *Scare Tactics* in
9 violation of the 2016 Agreement. (*Id.* ¶¶ 30–31.)

10
11 Shortly after executing the 2016 Agreement, Healey joined Propagate as its vice
12 president. (*Id.* ¶ 34.) On May 11, 2016, Howard Owens, a senior executive with
13 Propagate, was advised that Hallock was the exclusive owner of the *Scare Tactics*
14 franchise, which included its worldwide format and media rights. (*Id.* ¶ 35; Dkt. 1-1
15 Ex. 2 [Facebook Message Between Hallock and Owens].) Despite this, Healey and
16 Propagate produced a new series for Netflix, named *Prank Encounters*, which allegedly
17 infringes on Plaintiffs’ copyrights in *Scare Tactics*. (FAC ¶¶ 38–39.)

18
19 Based on these allegations, Plaintiffs assert four claims against Defendants for
20 (1) copyright infringement, (2) breach of the implied covenant of good faith and fair
21 dealing, (3) interference with contract, and (4) breach of contractual duty to account and
22 pay proceeds. (*See Id.*)

23 24 **III. LEGAL STANDARD**

25
26 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
27 sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for
28 failure to state a claim is not whether the claimant will ultimately prevail, but whether the

1 claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco*
2 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with
3 Rule 8(a), which requires only a short and plain statement of the claim showing that the
4 pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6)
5 motion, the district court must accept all material allegations in the complaint as true and
6 construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*,
7 32 F.3d 1382, 1384 (9th Cir. 1994).

8
9 However, “the tenet that a court must accept as true all of the allegations contained
10 in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
11 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that while
12 a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
13 allegations, courts “are not bound to accept as true a legal conclusion couched as a factual
14 allegation” (citations and quotes omitted)). Dismissal of a complaint for failure to state a
15 claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief
16 that is plausible on its face.” *Twombly*, 550 U.S. at 570.

17
18 When ruling on a Rule 12(b)(6) motion, a court generally cannot consider material
19 outside of the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). A court
20 may, however, consider exhibits submitted with the complaint. *See id.* at 453–54. Also,
21 a court may consider documents which are not physically attached to the complaint but
22 “whose contents are alleged in [the] complaint and whose authenticity no party
23 questions.” *Id.* at 454.

24 25 **IV. DISCUSSION**

26
27 Defendants move to dismiss Plaintiffs’ claims for failure to state a claim upon
28 which relief may be granted. Defendants separately move to strike the state law claims

1 pursuant to California’s anti-SLAPP statute, Cal. Code Civ. P. § 425.16. The Court will
2 address these motions in turn.

3
4 **A. Motion to Dismiss**

5
6 Defendants move to dismiss Plaintiffs’ claims for copyright infringement, breach
7 of the implied covenant of good faith and fair dealing, interference with contract, and
8 breach of contractual duty to account and pay proceeds.

9
10 **1. Copyright Infringement**

11
12 Plaintiffs allege that *Prank Encounters* infringes their copyrights of eight *Scare*
13 *Tactics* episodes:

- 14
15
- 16 • Episode 101, “Camp Kill”,
 - 17 • Episode 117, “My Heart Belongs to Misery” aka “Dangerous Obsession”,
 - 18 • Episode 206, “The Mummy”,
 - 19 • Episode 301, “Satan’s Baby”,
 - 20 • Episode 305, “Phantom Power”,
 - 21 • Episode 401, “It’s My Party”,
 - 22 • Episode 405, “Road Kill”, and
 - 23 • Episode 509, “Send In the Clowns”.

24
25 (FAC ¶ 40.) Defendants’ works that allegedly infringe on Plaintiffs’ copyrights include
26 the following stories: “End of the Road”, “Face Fears”, “Urgent Scare”, “Camp
27 Scarecrow”, “Storage War of the Worlds”, “Fright at the Museum”, and “Split Party”.

28 (*Id.* ¶¶ 41–42.) Plaintiffs allege that Defendants’ stories copy the protectable expression

1 in Plaintiffs’ original stories by “using, without permission or license, the actual concrete
2 elements that make up the total sequence of events, the relationships among the major
3 characters, and the settings and mood.” (*Id.* ¶ 44.)
4

5 To state a claim for copyright infringement, Plaintiffs must allege “(1) ownership
6 of a valid copyright, and (2) copying constituent elements of the work that are original.”
7 *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). “Copying may
8 be established by showing that the infringer had access to plaintiff’s copyrighted work
9 and that the works at issue are substantially similar in their protected elements.” *Cavalier*
10 *v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). For the purposes of their
11 motion to dismiss, Defendants do not dispute ownership or access, only substantial
12 similarity. (*See* Dkt. 31 [Defendants’ Consolidated Memorandum in Support of MTD
13 and MTS, hereinafter “Mem.”] at 13.)
14

15 “The Ninth Circuit has noted that ‘[t]here is ample authority for holding that when
16 the copyrighted work and the alleged infringement are both before the court, capable of
17 examination and comparison, non-infringement can be determined on a motion to
18 dismiss.’” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal. 2007)
19 (quoting *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945)). To assess
20 substantial similarity at the motion to dismiss stage, the Court must apply the objective
21 “extrinsic test.” *Funky Films, Inc. v. Time Warner Ent. Co., L.P.*, 462 F.3d 1072, 1077
22 (9th Cir. 2006), *overruled on other grounds, Skidmore as Tr. For Randy Craig Wolfe Tr.*
23 *v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *see also Rentmeester v. Nike, Inc.*, 883
24 F.3d 1111, 1118 (9th Cir. 2018) (“Only the extrinsic test’s application may be decided by
25 the court as a matter of law, so that is the only test relevant in reviewing the district
26 court’s ruling on a motion to dismiss”. (internal citations omitted)), *overruled on other*
27 *grounds, Skidmore*, 952 F.3d 1051; *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d
28

1 1123 (granting motion to dismiss on a copyright infringement claim by applying the
2 extrinsic test and analyzing the works).³

3
4 “The extrinsic test focuses on articulable similarities between the plot, themes,
5 dialogue, mood, setting, pace, characters, and sequence of events in the two works.” *Id.*
6 (quotation omitted). When applying the extrinsic test, courts compare “not the basic plot
7 ideas for stories, but the actual concrete elements that make up the total sequence of
8 events and the relationships between the major characters.” *Berkic v. Crichton*, 761 F.2d
9 1289, 1293 (9th Cir. 1985). In other words, the Court must assess whether the works’
10 “protectable expression [of] the specific details of an author’s rendering of ideas” are
11 substantially similar, *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002), *overruled*
12 *on other grounds*, *Skidmore*, 952 F.3d 1051, and disregard non-protectable elements,
13 *Cavalier*, 297 F.3d at 822.

14
15 Both parties submit video files of Plaintiffs’ work in *Scare Tactics* and the
16 Defendants’ allegedly infringing episodes of *Prank Encounters*. (See Dkt. 21 [Plaintiffs’
17 Notice of Lodging]; Dkt. 30 [Defendants’ Notice of Lodging].) Neither party questions
18 the authenticity of the video files of *Scare Tactics* and *Prank Encounters*. The Court has
19 reviewed the videos to assess the alleged similarities in context. Because each episode of
20 *Prank Encounters* and *Scare Tactics* contain standalone storylines, the Court will
21 compare the corresponding episodes separately.

22
23 //

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25 //

26
27 ³ A substantial similarity inquiry generally requires the application of both an “extrinsic test” and
28 “intrinsic test.” *Funky Films*, 462 F.3d at 1077. Only the extrinsic test is assessed prior to a jury trial
because “the intrinsic test, which examines an ordinary person’s subjective impressions of the
similarities between two works, is exclusively the province of the jury.” *Id.*

1 Plaintiffs have sufficiently established that the episodes are substantially similar under
2 the extrinsic test.

3
4 **ii. “Face Fears”**

5
6 Plaintiffs allege that *Prank Encounters* episode “Face Fears” infringes on *Scare*
7 *Tactics* episode “Dangerous Obsession”. The Court finds that there is substantial
8 similarity of key elements of expression between the two episodes even if there are some
9 differences. Both stories feature Marks hired to be caregivers for the purported wife of an
10 apparently loving husband. Both wives are bedridden due to accidents that require them
11 to be sedated. A significant element of the episodes’ plots involves the husband exiting
12 the room, leaving the Marks alone with the wife. The wife then wakes up and reveals to
13 the Mark that she is not actually the man’s wife but was kidnapped and is being held
14 captive by an obsessive man. In “Face Fears”, the man is obsessed with his late-wife who
15 he is trying to replace by performing plastic surgery on the kidnapped woman. The man
16 in “Dangerous Obsession” appears to be obsessed with the actual kidnapped woman but is
17 not her husband. The man’s relationship to the woman, however, is not a significant
18 element of the story because the “scare” in the story is that the man has kidnapped a
19 woman. Both stories also incorporate a “shrine” which emphasizes the men’s
20 obsessiveness. The plot, characters, and sequencing of events of the two shows are
21 substantially similar under the extrinsic test.

22
23 **iii. *Fright at the Museum***

24
25 Plaintiff alleges *Prank Encounters* episode “Fright at the Museum” infringes on
26 *Scare Tactics* episode “The Mummy”. Both episodes involve Marks hired to work with
27 ancient Egyptian artifacts that turn out to be cursed, but that is where the similarities end.
28

1 There are sufficient differences between key elements of the plot, characters, and
2 sequence of events in the stories to differentiate them.

3
4 In “Fright at the Museum”, Marks are hired to process newly discovered artifacts
5 from an Egyptian tomb. The show suggests that mysterious occurrences are happening
6 due to these artifacts, leading to one of the workers getting injured. A key moment of the
7 story is when the Marks re-set a broken-off piece of a sarcophagus. This causes the lights
8 to momentarily flicker and the injured worker finds snakes that have mysteriously
9 appeared. Another key moment of the story is when the Marks translate hieroglyphs on
10 the sarcophagus. One of the Marks reads the translation which triggers the “curse.” The
11 lights continuously flicker, more snakes appear, bugs fall out of the vents, and a
12 humanoid-snake creature appears knocking boxes over in the office. The host then
13 appears and reveals that the Marks are on *Prank Encounters*.

14
15 In “The Mummy”, a Mark is hired to catalog Egyptian artifacts for an
16 archeologist’s presentation. She is working with another actor who serves as an
17 antagonist. Though the archeologist tells them to be careful and not to touch the artifacts,
18 the actor begins carelessly playing around with them. The actor triggers the curse by
19 knocking on a box containing the mummy. The mummy knocks back and bursts out of
20 the box, attacking the actor. The only similarity in the scare is that the lights also flicker
21 here when the curse is triggered. The mummy starts going after the Mark, who runs
22 away. The archeologist then reveals to the Mark that she is on *Scare Tactics*.

23
24 The only similarity between the two stories is that they involve a curse attributed to
25 ancient Egyptian artifacts. The stories diverge in how the curse is triggered and how the
26 curse manifests, two key elements in the stories’ expression. In “Fright at the Museum”,
27 the curse is triggered by re-setting the broken piece of the sarcophagus and saying the
28 forbidden words. In “The Mummy”, the curse is triggered when the worker knocks on

1 the box containing the mummy. The actual curse in “Fright at the Museum” involves real
2 snakes, mysterious injuries, bugs falling from the vents, and a humanoid-snake creature
3 that menaces the Marks. The curse in “The Mummy” reanimates the dead mummy who
4 attacks the workers and the Mark. Accordingly, the key elements of the two stories are
5 not substantially similar under extrinsic test.

6 7 **iv. “Urgent Scare”** 8

9 Plaintiffs allege that *Prank Encounters* episode “Urgent Scare” infringes on *Scare*
10 *Tactics* episode “Satan’s Baby”. While both episodes involve Marks hired to be
11 assistants in a doctor’s office, the episodes’ plots, dialogue, and characters are not
12 substantially similar.

13
14 “Urgent Scare” involves an astronaut who has recently returned from a mission to
15 space where he extracted “something” from an asteroid. One of the Marks works for a
16 VIP shuttle service who is transporting the astronaut to an event to speak about his
17 mission. On the way the event, the astronaut experiences stomach pains and begins
18 bleeding from the abdomen. The astronaut is rushed to the hospital where the other Mark
19 is working as a doctor’s assistant.

20
21 At the hospital, the astronaut’s wife explains that the astronaut has been acting
22 strange since he returned from his mission and has been losing significant weight while
23 eating much more than before. The astronaut is in significant pain and the doctor brings
24 the other Mark, working as his assistant, to the examination room. The doctor performs
25 an ultrasound which reveals something moving in the astronaut’s stomach. The astronaut
26 tells the doctor to call a General saying, “It might be too late for me. It needs to be
27 contained!” The doctor calls the General who says he is sending two experts.
28

1 The doctor then goes back to the operating room with the assistant Mark and asks
2 her to place her hands on the astronaut to check his abdomen. As she is checking his
3 abdomen, she feels something moving. The General's experts then burst into the room
4 and put everything on lockdown. As they secure the examination room, the astronaut's
5 pain escalates. Something that looks like a large human baby bursts out of the astronaut's
6 stomach, which kills the astronaut. The baby then attacks the doctor, killing him as well.
7 The host then enters the room and reveals that the Marks are on *Prank Encounters*.

8
9 “Satan's Baby” involves a Mark hired as a doctor's assistant. A man rushes in
10 with his pregnant wife who is going into labor. As the doctor takes the wife to the
11 operating room, the husband says that he needs to call someone, “it's time.” The husband
12 also says, “it's a glorious time, the world is receiving a son,” suggesting religious
13 references. The doctor brings the Mark into the operating room to assist the wife. The
14 wife tells the Mark that she is only five months pregnant. The husband comforts her,
15 saying, “this is all part of the plan.” The Mark then sees a creepy man looking through
16 the window of the operating room. The husband says it's a priest. The doctor and
17 husband go out to the priest, and there is a shot of all three of them ominously staring into
18 the operating room. When the doctor, husband, and priest return to the room the
19 woman's labor escalates. The priest says, “we just need the baby, she doesn't matter.”
20 The wife then dies, but the doctor revives her. A red baby with horns, Satan's baby,
21 comes out of the wife and attacks the doctor. The devil baby stares into the camera and
22 yells “praise me!” The priest asks the Mark, “Why are you scared?” The priest then
23 reveals the Mark is on *Scare Tactics*.

24
25 While both stories involve medical emergencies, they have few other similarities.
26 “Urgent Scare” is based on science-fiction with an astronaut infected by a parasitic alien.
27 In contrast, “Satan's Baby” is based on a traditional horror movie plot where a woman is
28 giving birth to the Satan's child. Though the setting and the doctor character are similar,

1 the scare and the events leading up to the scare are different. Accordingly, the Court
2 finds “Urgent Scare” and “Satan’s Baby” are not substantially similar under the extrinsic
3 test.

4
5 **v. “Storage War of the Worlds”**
6

7 Plaintiffs allege that *Prank Encounters* episode “Storage War of the Worlds”
8 infringes on *Scare Tactics* episode “Phantom Power”. After review of the episodes, the
9 Court finds that there are significant differences between the characters, plot, and
10 sequence of events to distinguish the two stories.

11
12 “Storage War of the Worlds” involves a “highly classified government storage
13 facility” which holds a lifeform containment unit (“LFCU”) which has been using an Air
14 Force pilot to keep three alien lifeforms alive for decades. A Mark is hired to work with
15 a military archivist to catalogue documents in the storage facility. Another Mark is hired
16 by an electrician to serve as his assistant. As the electrician and the Mark inspect a power
17 station, the electrician switches something off which triggers alarms at the warehouse.
18 The electrician and the Mark follow a wire from the power station to the warehouse
19 where they discover the other Mark and the military archivist. As they investigate the
20 source of the alarm, they discover the LFCU which was hidden behind the gate. They
21 prop the gate open and enter the office containing the LFCU. The office is in disarray
22 and a computer screen displays that the LFCU has a “system error.” The electrician,
23 investigating the alarm, pulls a switch which causes the gate to close, locking everyone
24 inside the LFCU room. The group tries to unlock the gate to get out of the office and
25 they call the LFCU tech-support who tells them that no one has been in that room for
26 sixty-five years. Tech-support gives them instructions on how to get out of the room, but
27 it doesn’t work. The electrician discovers a pod containing the Air Force pilot and frees
28 him, but the pilot attacks the electrician and dies. The Marks discover that the LFCU was

1 using the Air Force pilot's blood to keep three aliens alive. When the pilot dies, a
2 speaker announces that there is a "Failure, Code Red" and the room will self-destruct in
3 five minutes. To stay alive, they will have to keep the alien lifeforms alive. One at a
4 time, the electrician tries to keep each of the three aliens alive by cranking a manual
5 power generator but fails each time. When the final alien dies, the speaker announces
6 that there is 30 seconds left until self-destruction. The final alien then breaks out of its
7 LFCU and attacks the electrician. The alien threatens and scares the Marks, but the
8 military archivist incapacitates the alien with a laser. The host then enters the room and
9 reveals the Marks are on *Prank Encounters*.

10
11 "Phantom Power" involves a Mark hired by an electrician to investigate a bootleg
12 power meter that is wired to a nearby house. They follow the wire to the house where
13 they discover the owner is siphoning off electricity to power his robot experiments. In
14 the garage, they discover a robot and a mysterious machine. The owner then enters,
15 appearing to be a crazy, paranoid inventor. The owner accuses them of trying to steal his
16 inventions and the Mark notices a bag is moving. Inside the bag is a restrained man who
17 says the inventor is performing experiments on him. The electrician wants to shut down
18 the mysterious machine, but the restrained man says that it is the only thing keeping him
19 alive. The electrician shuts off the machine and the restrained man dies. A door opens
20 and a cyborg, super-soldier enters, strangles the electrician, and threatens the Mark with a
21 gun. The inventor then reveals that the Mark is on *Scare Tactics*.

22
23 The only significant similarity between "Storage War of the Worlds" and
24 "Phantom Power" is that a Mark is hired by an electrician to assist with investigating a
25 power issue. The stories then diverge. One follows a plot involving confidential
26 government secrets and aliens, while the other involves a mad-scientist character who is
27 trying to make cyborg super-soldiers. The similarity in how the Mark is brought into the
28 prank is not enough to make the episodes similar under the extrinsic test.

1
2 “It’s My Party” involves a Mark hired to work at a wealthy man’s birthday party.
3 An uninvited guest appears who has a grudge with the wealthy man. He reveals that he
4 poisoned the cake they are eating and the only way to get the antidote is to watch a video
5 on a DVD. When the Mark plays the video, the host of the show appears and reveals that
6 she is on *Scare Tactics*. The only similarity between “It’s My Party” and “Split Party” is
7 the poisoned cake, which is not sufficient to establish substantial similarity under the
8 extrinsic test.

9
10 “Send in the Clowns” involves a Mark hired to perform as a clown at a child’s
11 birthday party. The Mark discovers a woman locked in a closet who was also hired to be
12 a clown for a previous party. The woman reveals that there is no child and that the father
13 is actually crazy. The father returns to the room wearing a girl’s dress and knocks out the
14 captive woman. The father tells the Mark to start making balloon animals and threatens
15 the clowns. The Mark then runs away, and the actors chase him down to reveal that he is
16 on *Scare Tactics*.

17
18 The key elements of “Send in the Clowns” are substantially similar to elements in
19 “Split Party”. In both, Marks are hired to work a child’s birthday party, but it is revealed
20 that the father is the “child” who the party is for. The stories use a captive worker to
21 reveal that the father is crazy and there is no child’s party. Instead, the father acts like a
22 little girl and is throwing a child’s party for himself. This premise is specific enough to
23 constitute protectable expression under the extrinsic test. Accordingly, Plaintiff has
24 sufficiently alleged substantial similarity between “Split Party” and “Send in the Clowns”
25 under the extrinsic test.

26
27 //

28 //

1 extrinsic test, the above-mentioned *Prank Encounters* episodes have substantially similar
2 elements of expression to the shorter, corresponding *Scare Tactics* episodes.

3 Accordingly, Defendants’ motion to dismiss the claim of copyright infringement is
4 **DENIED** as to its copyright infringement claims involving “Camp Scarecrow”, “Face
5 Fears”, “End of the Road”, and “Split Party”, as related to “Send in the Clowns”, and
6 **GRANTED** as to “Fright at the Museum”, “Urgent Scare”, “Storage War of the Worlds”,
7 and “Split Party” as related to “It’s My Party”.

8
9 **2. Breach of the Implied Covenant of Good Faith and Fair Dealing**
10 **and Interference with Contract**

11
12 Plaintiffs also assert claims for breach of the implied covenant of good faith and
13 fair dealing and interference with contract based on the alleged breach of the 2016
14 Agreement. Plaintiffs allege that Defendants’ *Prank Encounters* not only infringed on
15 their copyrighted work, but also used “unprotected elements”—including the format and
16 exploitation of *Scare Tactics*—in violation of the 2016 Agreement. (FAC ¶ 76.)

17 Defendants argue that these claims are preempted by the Copyright Act.

18
19 “The Ninth Circuit employs a two-part test to determine whether the Copyright Act
20 preempts a particular state law claim.” *Rumble, Inc. v. Daily Mail & Gen. Tr. PLC*,
21 2020 WL 2510652, at *3 (C.D. Cal. Feb 12, 2020). “Preemption occurs when: (1) the
22 work at issue comes within the subject matter of copyright; and (2) the rights that the
23 plaintiff asserts under state law are equivalent to those protected by the [Copyright] Act.”
24 *Id.* The works at issue here clearly fall within the subject matter of copyright. Thus,
25 preemption hinges on whether the rights Plaintiffs assert are equivalent to those protected
26 by the Copyright Act. Under the second part of the test, “[i]f a state law claim includes
27 an ‘extra element’ that makes the right asserted qualitatively different from those
28 protected under the Copyright Act, the state law claim is not preempted.” *Altera Corp. v.*

1 *Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005); *see also Chesler/Perlmutter*
2 *Prods., Inc. v. Fireworks Ent., Inc.*, 177 F. Supp. 2d 1050, 1058 (C.D. Cal. 2001) (“non-
3 preempted copyright cases often involve written contracts that ha[ve] specific promises
4 that provide [] an extra element” (internal quotations omitted)).

5
6 In an attempt to create an “extra element,” Plaintiffs refer to a clause in the 2016
7 Agreement which states that the Agreement “shall not have the effect of a non-
8 competition clause, and does not prevent HEALEY from pursuing other scary,
9 paranormal-themed or hidden camera shows.” (*Id.* ¶ 77.) They frame *Prank Encounters*
10 as a “Reboot” in violation of the 2016 Agreement because it is a combination of all three:
11 scary, paranormal-themed, and a hidden camera show. (Dkt. 33 [Plaintiffs’ Opposition to
12 MTD, hereinafter “MTD Opp.”] at 20.)

13
14 Yet the Court is unpersuaded that these “unprotected elements” are rights different
15 from those protected by the Copyright Act. Plaintiffs’ reading of the 2016 Agreement as
16 preventing Healy from creating a show which combines these three elements would
17 contradict the clause itself, that is, turn it into a non-competition clause. Thus, a holistic
18 reading of the 2016 Agreement indicates that Healey was permitted to make a competing
19 scary, paranormal-themed, hidden camera show, as long as he did not use intellectual
20 property related to *Scare Tactics*. Plaintiffs’ claim for breach of the covenant of good
21 faith and fair dealing alleges nothing more than an act of copyright infringement and is
22 therefore preempted. *See Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416,
23 1429 (C.D. Cal. 1994). Plaintiffs’ claim for interference with contract is solely based on
24 their breach of the covenant of good faith and fair dealing claim and is also preempted.
25 Accordingly, the motion to dismiss the claims for breach of the implied covenant of good
26 faith and fair dealing and interference with contract is **GRANTED** and the claims are
27 **DISMISSED WITH PREJUDICE**.

3. Breach of Contractual Duty to Account and Pay Proceeds

1
2
3 Plaintiffs assert a fourth claim for a breach of a contractual duty to account and pay
4 proceeds related to a show titled *Freak Encounters*. Plaintiffs allege that under the 2012
5 Agreement, Healey transferred all his rights in *Freak Encounters* to Hallock but retained
6 the rights to exploit the title. (FAC ¶¶ 89–90.) These rights, however, were limited by
7 preventing either Hallock or Healey from individually exploiting the show without
8 obtaining the other’s written approval. (*Id.* ¶ 90.) If approval was given, the individual
9 exploiting the show would pay the other 50% of certain fees and 5% of certain revenues.
10 (*Id.*)

11
12 Plaintiffs allege that Healey used protected elements from *Freak Encounters*’
13 “Werewolf” episode in *Prank Encounters* without paying Hallock the agreed upon sums
14 from its exploitation. Here, Plaintiffs, unlike with their previous contractual claims, have
15 alleged the extra element required to escape preemption by the Copyright Act. *See*
16 *Chesler/Perlmutter*, 177 F. Supp. 2d at 1058. The promise to pay portions of certain fees
17 and revenues differentiates this right from those protected by the Copyright Act.

18
19 Plaintiffs also sufficiently establish that *Prank Encounters* used protected elements
20 from “Werewolf” in its “End of the Road” episode. Like “Werewolf” (and *Scare Tactics*
21 episode “Road Kill”), the Mark is hired to investigate a car crash in the middle of the
22 night at a remote road in the forest. The car has claw marks with fur in them which
23 suggests to the Mark that it was an animal attack. Both “End of the Road” and
24 “Werewolf” use actors acting as scared victims to make the Mark believe there is an
25 unknown creature causing the attacks. At this stage of the proceedings, this is sufficient
26 to allege that “End of the Road” used protected elements from “Werewolf”.
27 Accordingly, Defendants’ motion to dismiss the claim of breach of contractual duty to
28 account and pay proceeds is **DENIED**.

1 **B. Anti-SLAPP Motion to Strike**

2
3 In addition to their motion to dismiss, Defendants’ separately move to strike
4 Plaintiffs’ state law claims under California’s anti-SLAPP statute, Cal. Code Civ. Proc.
5 § 425.16. Although Defendants prevailed on their motion to dismiss on two of Plaintiffs’
6 claims, this does not “moot the anti-SLAPP motion, because the anti-SLAPP statute
7 mandates that ‘a prevailing defendant on a special motion to strike shall be entitled to
8 recover his or her attorney’s fees and costs.’” *Collins v. Allstate Indem. Co.*, 428 Fed.
9 App’x 688, 690 (9th Cir. 2011) (quoting Cal. Code Civ. Proc. § 415.16(c)(1)).

10
11 The anti-SLAPP statute provides:

12 A cause of action against a person arising from any act of that
13 person in furtherance of the person's right of petition or free
14 speech under the United States Constitution or the California
15 Constitution in connection with a public issue shall be subject
16 to a special motion to strike, unless the court determines that
17 the plaintiff has established that there is a probability that the
18 plaintiff will prevail on the claim.

19 Cal. Code Civ. Proc. § 425.16(b)(1). The statute is to “be construed broadly,” Cal. Code
20 Civ. Proc. § 425.16(a), and entitles a prevailing defendant to “recover his or her
21 attorney’s fees and costs,” Cal. Code Civ. Proc § 425.16(c)(1). Furthermore, the statute
22 applies in federal court. *See Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1132 (C.D.
23 Cal. 2015) (“California’s anti-SLAPP statute protects substantive rights and thus applies
24 in federal court.”).

25
26 Anti-SLAPP motions are subject to a two-step analysis with shifting burdens.
27 “First, the defendant must make a prima facie showing that the plaintiff’s suit arises from
28 an act in furtherance of defendant’s rights of petition or free speech. Second, once the

1 defendant has made a prima facie showing, the burden shifts to the plaintiff to
2 demonstrate a probability of prevailing on the challenged claims.” *Mindys Cosmetics,*
3 *Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (internal citations and quotation marks
4 omitted).

6 **1. Protected Act**

8 The threshold requirement of an anti-SLAPP motion is a showing “that the act or
9 acts of which the plaintiff complains were taken in furtherance of the [defendant’s] right
10 of petition or free speech under the United States or California Constitution in connection
11 with a public issue.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010).
12 Although this first step is “somewhat amorphous,” *id.*, in most cases it involves a three-
13 step analysis: (1) determining what activity underlies the cause of action, (2) determining
14 whether that activity was in furtherance of defendants’ right of free speech, and
15 (3) whether the activity is in “connection with a public issue” or issue of public interest.
16 *See Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142–43 (2011).

17
18 Plaintiffs allege that Defendants wrongly copied their protected expression from
19 *Scare Tactics* and *Freak Encounters* to create *Prank Encounters*. Under California law,
20 “[t]he creation of a television show is an exercise of free speech.” *Id.* Accordingly,
21 production of *Prank Encounters* satisfies the second step. When evaluating the third
22 step, courts are instructed to construe public issue or public interest broadly. *See Sarver*
23 *v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016). For example, the court in *Tamkin* found
24 “the creation and broadcasting of [a *CSI* episode] an issue of public interest because the
25 public was demonstrably interested in the creation and broadcasting of that episode, as
26 shown by the postings of the casting synopses on various Websites and the ratings for
27 that episode.” 193 Cal. App. 4th at 143. Here, the production and broadcasting of *Prank*
28 *Encounters* is similarly an issue of public interest, as shown by the news articles

1 surrounding the release of the show. (*See* Dkt. 31-3 [Declaration of James Berkley] Exs.
2 15–22.) Plaintiffs’ FAC also describes public discussion on social media regarding the
3 overlap between *Prank Encounters* and *Scare Tactics* indicating that the connection
4 between the two shows was a public issue. (*See* FAC at 19, Ex. 30.) Under the mandate
5 that the Court construe “connection with a public issue” broadly, this is sufficient.
6 Accordingly, Defendants have met the threshold requirement under the anti-SLAPP
7 statute.

8

9 **2. Plaintiffs’ Probability of Prevailing on Their Claims Against**

10 **Defendants**

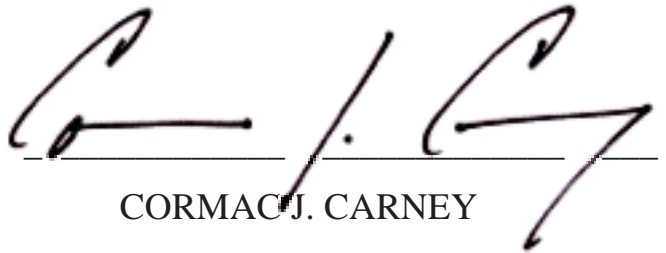
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12 Because Defendants have made a threshold showing that the activity of which
13 Plaintiffs complain was taken in furtherance of their right to free speech in connection
14 with a public issue or an issue of public interest, the burden shifts to Plaintiffs to
15 demonstrate a probability of prevailing on their claims. To meet their burden, Plaintiffs
16 “must demonstrate that the [FAC] is legally sufficient and supported by a prima facie
17 showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff
18 is credited.” *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010) (internal quotation
19 marks omitted). As discussed above, Plaintiffs cannot prevail on their claims for breach
20 of the implied covenant of good faith and fair dealing and interference with contract
21 because they are preempted by the Copyright Act. Thus, they cannot meet their burden
22 to show they will sustain a favorable judgment on those claims. Plaintiffs have, however,
23 met their burden with the claim of breach of contractual duty to account and pay
24 proceeds. Accordingly, Defendants’ motion to strike under California’s anti-SLAPP
25 statute is **GRANTED** as to the claims for breach of the implied covenant of good faith
26 and fair dealing and interference with contract and **DENIED** as to the claim for breach of
27 contractual duty to account and pay proceeds.

1 **V. CONCLUSION**

2
3 For the foregoing reasons, Defendants’ motion to dismiss and motion to strike are
4 **GRANTED IN PART**. Plaintiffs’ copyright infringement claims involving “Fright at
5 the Museum”, “Urgent Scare”, “Storage War of the Worlds”, and “Split Party” as related
6 to “It’s My Party” are **DISMISSED WITH PREJUDICE**. Plaintiffs’ claims of breach
7 of the implied covenant of good faith and fair dealing and interference with contract are
8 **DISMISSED WITH PREJUDICE** and **STRUCK** pursuant to California’s Anti-SLAPP
9 statute.

10
11
12 DATED: September 24, 2020

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14 _____
15 CORMAC J. CARNEY
16 UNITED STATES DISTRICT JUDGE
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