

**JOHN SULLIVAN et al., Plaintiffs and Appellants,**

**v.**

**PURE FLIX ENTERTAINMENT LLC et al., Defendants and Respondents.**

No. B280305.

**Court of Appeals of California, Second District, Division Five.**

Filed November 15, 2018.

APPEAL from judgment of the Superior Court of Los Angeles County, Super. Ct. No. BC583431, Mel Red Recana, Judge. Reversed in part.

Singh, Singh & Trauben, Thomas K. Richards, for Plaintiffs and Appellants.

Leopold, Petrich & Smith, Louis P. Petrich and Robert S. Gutierrez, for Defendants and Respondents.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

MOOR, J.

Plaintiffs and appellants Brad Stine and John Sullivan appeal from a judgment following an order granting summary judgment and summary adjudication of their breach of express and implied contract claims in favor of defendants and respondents Pure Flix Entertainment LLC and David A.R. White (collectively, Pureflix). Appellants contend triable issues of fact preclude a grant of summary judgment.

In 2009, Stine's agent shared with Pureflix plaintiffs' film concept about apologetics<sup>[1]</sup> set on a college campus. Plaintiffs expanded upon the concept and sent Pureflix a treatment titled Proof. Pureflix expressly and impliedly agreed to pay for the ideas behind Proof if those ideas were used in a film produced by Pureflix, which would star Stine as a protagonist playing a character similar to Robin Williams's character in the film Dead Poets Society. In accordance with the agreement, Pureflix engaged screenwriters who made revisions to the original Proof treatment and drafted a script, but the film was never made because Pureflix could not find investors to finance it. Working with a different group of investors and screenwriters, Pureflix developed and produced a film titled God's Not Dead in 2012.

Plaintiffs' complaint alleged that God's Not Dead used plaintiffs' ideas from Proof, breaching the express and implied contract between plaintiffs and Pureflix. In its motion for summary judgment, Pureflix argued the undisputed facts demonstrated that (1) no agreement was ever formed between Pureflix and plaintiffs; (2) any agreement only concerned payment for Stine's acting services, not his ideas; (3) the agreement was conditioned on Pureflix obtaining financing for the Proof project, (4) Pureflix did not use the ideas in Proof in making God's Not Dead, as is apparent from a showing that the two films are not substantially similar; and (5) even if similar, God's Not Dead was independently created. Pureflix also argues that summary judgment was proper as to Sullivan, because he was never in privity of contract with Pureflix.

While we express no opinion on the overall strength of plaintiff Stine's case, we conclude he has successfully identified material factual issues that support his claims for breach of express and implied contract,<sup>[2]</sup> and we reverse the order granting summary judgment as to Stine. We affirm the grant of summary judgment as to plaintiff Sullivan, however, because there is insufficient evidence to show he entered an express or implied contract with Pureflix.

## **FACTS**

We summarize the facts supported by the evidence before the trial court, making all reasonable inferences in plaintiffs' favor. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

### ***Exchange of ideas before submission of Proof treatment***

Plaintiffs initially presented their ideas to White at Pureflix through Stine's manager, Michael Smith, in or around March 2009. The proffered idea was to develop a film titled Proof regarding apologetics on a college campus and culminating in a debate about science and God between the protagonist, a Christian professor with his academic career on the line, and an atheist professor who is driven by a mission to force his students to disavow their faith. By April 2009, White was working on another film in which Stine (a comic actor) appeared, and White knew from Stine (or Smith) that Stine was interested in playing a professor character along the lines of Robin Williams as the English teacher with an unorthodox teaching style in the 1989 film *Dead Poets Society*.

The concept of apologetics and the general construct of having a Christian believer placed in a situation where the believer has to defend his or her faith or risk losing something of value or importance was also already known to Pureflix before Smith conveyed the idea for Proof. White had appeared as an actor in a 1995 film titled *End of the Harvest*. The film centered around a Christian college student who presents a defense of God's existence in a philosophy club where atheist students subject the Christian student to ridicule and criticism.

On June 16, 2009, White sent Smith an email attaching a treatment called *God v. Darwin*, written by a third party, about a Christian high school teacher who moves to a town of non-believers and risks dismissal if she strays from the science curriculum and teaches creationism. White's email said, "thinking dead poets society for brad [¶] see if he can tweak — to what he's working on — but could use this as a platform to jump from." In a separate email the same day, White said, "Think [¶] Dead poets in a university maybe he teaches Christian Wrld view class [¶] Maybe is opposed by evolution teacher down hall or it's a liberal university."

On June 22, 2009, White emailed Smith asking what happened, and on June 24, 2009, Smith responded "Brad is really into developing the treatment." He informed White that Stine had enlisted Sullivan to help and thought they would have something for White in about a week. White responded, "This could be great."

On July 1, 2009, Smith sent White a first draft of the *Proof* treatment, authored by plaintiffs.

## ***Proof treatment***

The treatment was five pages long, and the first paragraph laid out many of the key ideas: "In the spirit of *Dead Poets Society*, *Good Will Hunting* and *Patch Adams*, *PROOF* is the story of a young professor seeking to equip and inspire his students. His Christian faith is tested by a hostile student, colleague and even his wife as the tenured position he has worked so hard for during the last seven years falls into jeopardy. And losing his tenure has greater consequences than just his own career, as it will mean the loss of his health insurance, which is so vital for his 7-year-old daughter who has cystic fibrosis." The protagonist is named Marcus Daniels, and he has a dual doctorate in physics and philosophy; he is well liked for his quick wit, sarcastic humor and engaging classes. He is known as an academically demanding teacher who mixes philosophy and physics in unorthodox but engaging ways, including one class session involving Daniels throwing an axe at a target and engaging in a discussion of whether truth can be relative. Daniels does not often discuss his faith, but he comes across a religious studies class session in which Professor Paul Lott openly mocks God and pontificates on the triumph of science over religion, stating "There is no absolute truth." Daniels gets a laugh from the students when he chimes in, "Do you mean that absolutely?" The two professors engage in an impromptu debate which ends abruptly when the class is over. Both agree to continue the discussion at a scheduled debate the following semester.

In the meantime, as the fall semester continues, a graduate student named Josh is angry about how Lott, his mentor and favorite professor, was upstaged by Daniels. Josh despises Christians, especially ones he cannot pigeonhole as idiots. Jamie, an attractive female student, asks to speak to Daniels in private. He suggests his car to get out of the cold. In the car, Jamie confides to Daniels she is pregnant; as she breaks down with emotion, Daniels gives her a hug and holds her like a father. At the same time, Josh and some other students walk by the car, and Josh suspects something nefarious. Later, Daniels and his

wife befriend Jamie as she goes through the process of informing her parents of her pregnancy and her choice to have the baby and place it for adoption. Jamie eventually goes home for the duration of her pregnancy.

Spring semester arrives, the debate takes place in an auditorium filled with students, teachers, and members of the local community, with Daniels and Lott verbally sparring over intelligent design, science, and God. Both sides present good arguments, but Daniels is an audience favorite with his quick wit, clear logic, and humor.

The next day, the department head informs Daniels that two complaints of teacher misconduct have been filed against him, one based on remarks in his physics course and the other an accusation of sexual harassment. Those complaints, along with concerns about his statements regarding intelligent design, have placed his tenure in jeopardy.

Daniels' personal faith and his marriage are tested, as his wife asks him if his faith is worth risking his livelihood and the medical insurance needed for his daughter with cystic fibrosis. Daniels prays for insight, and after his wife overhears a conversation between Daniels and their daughter about talking to students about Jesus, his wife weeps and asks Daniels for his forgiveness.

At the academic review board hearing, Daniels is presented with the tenure opinions and the charges against him. Daniels asks to know who his accusers are, but the board declines to identify them. After a commotion, Lott enters the proceedings and reveals he has uncovered a plot to discredit Daniels. He presents Jamie, who recounts the circumstances of her conversation with Daniels in the car. After he overhears Lott revealing that Josh led the plot against him, Daniels confronts Josh. Josh admits his anger against Christians stems from a belief that his father, a pastor, chose the Church over him. Daniels looks past his anger with Josh to reassure Josh, "He loves you" in a moment of emotional climax and catharsis. The treatment ends with a scene in a church with Josh walking down the aisle towards a pastor preparing a communion table. The two embrace and the father says "I am sorry."

## ***Contract negotiations, screenplay development, and search for investors for Proof***

On July 2, 2009, a day after he received the Proof treatment from Smith, White forwarded the treatment to his Pureflix partners Russell Wolfe and Mike Scott. His email stated, "See below [¶] Brad Stine idea [¶] Thoughts?"

On July 14, 2009, White emailed Smith about Proof, proposing, "we'd partner on this, we'll use that treatment to launch the idea, Get screenwriters on it asap — as [¶] it's much easier to raise \$ with a script — [¶] we'd aim to shoot before end of year." White's email set a budget of \$250,000 for production and proposed a breakdown where Stine and Smith would receive producing credits and 10 points (shorthand for how profits are divided among various participants, including investors, writers, and producers) and they would pay \$4,000

towards the script (repayable once the venture was able to raise outside money); Stine would be paid \$10,000 for 13 days of acting. On July 17, 2009, White sent a revised proposal where Smith and Stine would receive 6 points, rather than 10, Pureflix would pay for the screenwriting, and Stine would be paid \$15,000 for acting. Neither proposal specified why Stine and Smith were receiving points. Smith conferred with Stine and Sullivan, and Smith then contacted White and accepted the offer on behalf of Stine.

Later on July 19, 2009, White sent the Proof treatment to screenwriters Sean Paul Murphy and Timothy Ratajczak for their input. The writers suggested some changes like making Josh and Jamie a couple to add a romantic subplot and provide some build-up to Josh's breakdown and conversion. On August 4, 2009, the writers emailed White a revised Proof treatment changing several aspects of the Proof storyline. Josh is now one of Daniels' teaching assistants, and is at risk of receiving a failing grade from the head of the science department, Paul Destino (a revision of the Lott character from the earlier Proof treatment). The writers deleted the scene where Daniels and Lott first encounter each other, replacing it with an initial confrontation between Josh and Destino, followed by a more public debate between Daniels and Destino. Josh's grade in Destino's class is at risk because Destino does not believe in intelligent design, and Josh's scientifically sound paper makes a positive reference to intelligent design. Daniels encourages Josh to talk to Destino, who intellectually browbeats Josh in front of other students at the end of class. Daniels advises Josh that his only other option is to pursue an appeal to the dean of the college. Josh asks Daniels to represent him. Josh's request presents a dilemma for Daniels, because other faculty members advise Daniels not to get involved, noting Destino's power on campus and the risk to Daniels's tenure and career. Daniels consults with his wife, who advises him that if he really believes in God, he should trust in God to provide. Daniels and Josh present their case to the dean, and Destino tries to browbeat the dean into siding with him. The dean claims he lacks adequate knowledge and appoints six department heads to serve as a jury. When students and other faculty members hear about the upcoming hearing, they want to watch, and Destino—certain he will win—asks for it to be open to the public. A battle between faith and atheism is waged in the main auditorium, and faith wins.

White sent the revised treatment to Smith and Stine, explaining it was more consistent with what Pureflix was thinking, describing the story as "very facing the giants meets rocky with some dead poets in there" making Daniels the underdog with the story climax being his debate with the atheist Destino at the end. A later, more expanded treatment added more detail and includes a love interest for the Josh character. Murphy and Ratajczak completed the Proof screenplay and sent it to White in March 2010.

In April 2010, Stine provided comments on the screenplay, which White forwarded to Murphy and Ratajczak, asking them to put the comments in a proof bin until they were ready for a second draft. Stine's comments discussed having a curriculum tie in that would inspire Christian kids "that not only is Christianity logically true but they can and should be passionate about it." Stine also states, "There is real malicious attacks on Christian kids in

secular university and this could inspire and help train them to defend their faith in this ever secularized academeia [sic]."

Through the rest of 2010 and 2011, White sent periodic updates to Stine regarding the writers' availability and Pureflix's search for investors. White also worked with his Pureflix partners to find financing for the film. In January 2011, White presented Wolfe the revised 2009 treatment, along with a description of how the film could be marketed. Wolfe forwarded the materials to a potential investor. On September 21, 2011, White included a synopsis of Proof in a list of 20 films Pureflix was trying to raise money for, and he emailed the list to Scott and Wolfe.

In March 2012, Stine contacted White to inquire about buying the Proof screenplay back from Pureflix. Pureflix partner Scott expressed concern to White about the sale, stating in an email "since we are doing god's not dead I don't want him coming back if we sell it back to him saying we took his idea." Ultimately, White obtained approval to offer to sell the screenplay to Stine, and he made the offer in May 2012. Stine never responded.

## ***God's Not Dead film***

Rice Brooks is a minister in Nashville, Tennessee, and has been a pastor for more than 30 years. He began engaging in debates with college students and professors about the existence of God in the 1980's, and in 1994 formed a family of churches with a stated goal of establishing socially responsible churches and campus ministries in every nation. Brooks has published a number of books, as well as a copyrighted Christian resource guide called The God Test.

Troy Duhon is president of a company that owns numerous car dealerships. He also owns four Christian music festivals. He has been friends with Brooks since 2004, when they met at a ministry conference. Duhon knew Brooks had a passion for apologetics, defending Christian faith.

## **Duhon's idea and interactions with Pureflix**

Brooks called Duhon in January 2012 and told him that a song called "God's Not Dead" by the Christian band the Newsboys was doing well on the Christian music charts. Brooks planned to write a book to help young people defend God's existence and title the book "God's Not Dead." During the call, Duhon came up with the idea for a film project with the same name, to tie in to apologetics in a college campus setting, as he and Brooks had numerous discussions about how a high percentage of students from Christian backgrounds turn away from their faith after being challenged by their professors and their peers.

Duhon's phone call with Brooks took place the same day Duhon was on the set of a Pureflix film where Duhon's daughter had a role as an actress. White and Scott were on the

film set, and immediately after his call with Broocks, Duhon spoke to them about funding production of an apologetics film to be called "God's Not Dead," set on a college campus with students defending their Christian faith. Duhon wanted the Newsboys and the song to be part of the project, and he explained that he knew the band.

On January 16, 2012, Duhon sent an email confirming an in-person meeting at the home of Newsboys' owner, Wes Campbell, for Friday, January 20, 2012 to discuss timing and joint promotional items. The email was addressed to Broocks and Campbell, with White, Scott, and Wolfe copied.

The following day, Duhon sent an email to White, Scott, and Wolfe, discussing the contemplated film project. Duhon said "along with ironing out the music rights we need to think about the writer that would best fit for the project. I love the idea of three stories at one time. I thought about the young girl losing her parents in a car crash, the Christian college kid who is at a worldly college debating his college professor and the husband losing his wife. But remember I am a car guy and don't have a clue. LOL. The Newsboys are pumped about this and so is [Broocks] because it [sic] knows that the movie will drive people to the GodTest and it will be a[n] evangelism tool for the church." Duhon also asked White, Scott, or Wolfe to watch a recently aired Broocks's TV special "because it will give you an understanding of what and who he can bring to the table." Duhon has declared the ideas described in his email came from conversations he has had with Broocks in the past, and the story ideas did not come from anyone at Pureflix, including White, Scott, or Wolfe.

On January 20, 2012, the following individuals met in person to discuss the God's Not Dead film project: Scott and Wolfe from Pureflix; Broocks; Duhon; Campbell; and David Wagner, manager for the Newsboys. According to all the attendees (except for Wolfe, who is deceased), there was no mention of a project called Proof, and neither Wolfe nor Scott suggested that the film be set on a college campus.

## **Development of God's Not Dead screenplay**

On February 1, 2012, Wolfe emailed screenwriters Chuck Konzelman and Cary Solomon to arrange a phone call the following day to talk about the God's Not Dead project. During the call, Wolfe and Scott told Konzelman and Solomon that Pureflix wanted to make a film about apologetics called God's Not Dead, set on a college campus, and including the Newsboys. Wolfe and Scott asked Konzelman and Solomon to write a screenplay that contained multiple storylines for the film, in the style of the 2003 film Love Actually. Both Konzelman and Solomon were familiar with the subject of apologetics, understanding the term to refer to a rational defense of the Christian faith. Both stated that neither Wolfe nor Scott gave them any storyline ideas, but that the two of them began brainstorming ideas immediately after their phone call, including two scenarios involving conflict between a professor and a student. The first was the film The Paper Chase, where a first year law student is bullied and ridiculed in the classroom by his contracts professor. The second was an account of author Michael Crichton, testing a theory that his English professor could not

appreciate good writing and receiving a B minus on a George Orwell essay he submitted as his own.

Konzelman kept handwritten notes of ideas that came up during the call and his discussion with Solomon. He also emailed Solomon late on February 2, 2012, saying he was unable to sleep and explaining "my mind is racing with ideas for this Pureflix thing. . . . [¶] The kid should set up the `Michael Crichton' gag for the final skewering of the professor."

During a follow up conversation on February 8, 2012, Wolfe, Scott, and Brooks spoke with Konzelman and Solomon by phone. They asked the writers to incorporate Christian personalities Tim Tebow and Manny Pacquiao into the storylines to enhance marketing efforts. They also discussed Brooks's work on apologetics, his earlier work on The God Test, and how he discovered through his campus ministry work that many Christian students lost their faith after they went off to college and were challenged by atheist professors for their Christian beliefs. He felt that students needed resources they could use to defend their faith when confronted with skeptics or atheists.

On February 23, 2012, Konzelman responded to a request for a brief summary for Wolfe to use in a music rights contract with a one sentence synopsis: "A college freshman who's a believer accepts his atheist philosophy professor's challenge: taking up the cause to prove that God isn't dead . . . at the risk of failing the course, and losing everything he holds dear to him." Wolfe forwarded the synopsis to White for his thoughts, and White responded, "sounds exactly like proof — we already wrote this, [¶] where's the `love actually' part?"

Konzelman and Solomon met with minister Brooks for several hours on March 14, 2012 to discuss the God's Not Dead project in Los Angeles. In March 2012, Konzelman and Solomon researched apologetics and first created a 15-page detailed structural outline, which later grew to a 27-page outline describing the various threads and intersections of multiple storylines and multiple characters for God's Not Dead. They sent their first draft of the screenplay to Pureflix on June 23, 2012, and revised drafts in August and October. Both outlines and the screenplays in our record reflect the film's intended structure of multiple, overlapping storylines, similar to either Love Actually or Crash.

## **Summary of God's Not Dead film**

The final film involves multiple characters whose lives intersect in various scenes, each of whom face some conflict or challenge intended to ultimately show the importance and prevalence of God all around us. The two main characters are Josh Wheaton, a college freshman with strong Christian beliefs, and Professor Radisson, a philosophy professor and atheist. In the first class, Radisson dramatically explains atheism by listing a number of famous atheists, and then instructs each student to write "God is dead" on a piece of paper so the class can dispense with the inevitable discussion debating God's existence. When Josh says he cannot, Radisson gives him the option to drop the class, change his mind, or prove the opposite is true, that God is not dead. Josh will have to deliver his argument in class over the next three sessions. Josh asks who will judge whether he has succeeded,



and Radisson responds that he will, as it is his class. Josh proposes the class should judge, pointing out that they have already agreed with Radisson and it would be Josh's task to win them back. Radisson agrees.

The other characters include Josh's Christian girlfriend, who in one scene is happy that Josh bought tickets to a Newsboys concert for their anniversary. She tries, unsuccessfully, to persuade him to forgo the debate with Radisson and just sign the paper saying God is dead rather than taking on Radisson's challenge. She points out that his lack of focus on his other classes will put his plan to go to law school in jeopardy, and she accuses Josh of neglecting their future. Unwilling to support his choice to defend God's existence, she eventually ends their relationship.

Ayesha is the daughter of a Muslim family whose father argues that non-Muslims do not truly know God. When the father discovers Ayesha has secretly been listening to lessons about Christianity, he strikes her and kicks her out of the house. A Chinese student in Josh's philosophy class expresses admiration for the challenge that Josh has undertaken, and wants to learn more about God. When he talks with his father in China, the father admonishes him not to waste his time and to focus on his studies. A young, aggressive, liberal journalist interviews Willie and Korie Robertson of Duck Dynasty, expressing contempt for him and his wife for their duck-hunting Christian lifestyle. She later learns she has cancer, and has to undergo treatment alone after her rich, ambitious, but shallow and non-believing boyfriend abandons her. The boyfriend's sister is Mina, a Christian who is in a relationship with Radisson. Radisson is very attracted to Mina, but is rudely dismissive of any attempt by her to discuss her faith. Mina eventually leaves Radisson.

Mina and her brother have a mother with dementia, and Mina visits the mother to help care for her. The mother does not recognize Mina, but appears happy. Later in the story, when Mina's wealthy brother finally visits the mother, he mocks her for believing in a God that would let her suffer this way, while he—the non-believer—is comfortable and wants for nothing. The ailing mother in a dramatic moment of mental clarity explains that sometimes the devil will ensure people are happy so they forget about or turn away from God, but their choice to do so will inevitably lead to their demise.

One other storyline involves Reverend Dave (played by White), a local pastor hosting another pastor from Africa. The two try to go on a road trip to an amusement park, but keep having car trouble. The foreign pastor reminds Reverend Dave he must have something God wants him to do before he can leave. At various points in the film, several of the characters, including Josh, Ayesha, and Mina, turn to Reverend Dave for guidance.

In the meantime, during the three debate sessions between Josh and Radisson, Josh lays out a compelling, reasoned argument for God's existence, sparring with Radisson over certain points. During the final debate, in a moment filled with emotional tension, Radisson says he hates a God that would let his mother die, and Josh responds quietly, "How can you hate someone who doesn't exist?" Josh also asks why Radisson does not give his students the choice to believe or not, when God himself gives man that same choice. Josh

then asks the class who they choose. The Chinese student is the first to stand and respond that he chooses God, followed by almost everyone in the class.

The final scenes show most of the characters going to the Newsboys concert, where the band prays with the cancer-stricken journalist before the concert. During the concert, the band's lead singer announces they heard about a student who defended God's existence. He asks the audience to text the words "God's Not Dead" to everyone in their contacts while they are playing the song of the same name.

Radisson tries to call Mina. Realizing she is at the Newsboys concert, he starts to make his way to the concert. On his way there, it starts to rain. As he is crossing the street, he is struck by a car. Reverend Dave and the foreign pastor witness the collision and run to assist Radisson. As he lays in the crosswalk dying, Reverend Dave asks him if he has accepted God, and he responds he is an atheist. The pastor says he believes Radisson has been given a final chance to accept God. Radisson accepts God and dies peacefully, as the film returns to the concert.

## **PROCEDURAL HISTORY**

Plaintiffs filed suit, followed by a first amended complaint alleging claims for breach of oral contract, breach of implied contract, breach of confidence, and unfair business practices.

Pureflix filed a motion for summary judgment and a separate statement of undisputed facts. The motion was supported by declarations from David A.R. White, Michael Scott, Jeffrey Peterson, Troy Duhon, Rice Brooks, Wes Campbell, Dave Wagner, Timothy Ratajczak, Chuck Konzelman, Cary Solomon, and attorney Robert S. Gutierrez, and DVDs of the films *End of the Harvest* and *God's Not Dead*. The motion also included a compendium of exhibits comprising 118 exhibits. On the express and implied contract claims, Pureflix's motion raised many of the same arguments they make in response to plaintiffs' appeal, including the arguments that there is no express or implied contract to pay for ideas, and there is no substantial similarity between *Proof* and *God's Not Dead*, and that *God's Not Dead* was created independently of any ideas submitted by either plaintiff.

Plaintiffs filed an opposition, along with objections to defendants' evidence exhibits. Plaintiffs filed supporting declarations from Stine, Sullivan, Smith and plaintiffs' attorney, as well as a compendium of additional exhibits. Along with responses to Pureflix's separate statement, plaintiffs filed a separate statement of additional undisputed facts.

## **DISCUSSION**

In their timely appeal, plaintiffs argue the grant of summary judgment should be reversed because there are material factual disputes concerning the existence of an express contract and the trial court incorrectly applied the law governing analysis of their express and implied contract claims. On the express contract claim, Pureflix argues that it demonstrated as a

matter of law that (1) no express or implied contract for the sale of ideas was formed; (2) even if an express contract was formed, it was (a) solely for Stine's acting services and (b) conditioned upon finding financing for the Proof film. Pureflix also argues summary judgment was correctly granted because there was insufficient evidence that Pureflix actually used material from Proof in God's Not Dead, because the two films are not substantially similar as a matter of law. Finally, even if the films do contain similarities, Pureflix contends summary judgment must be entered because of uncontroverted evidence that God's Not Dead was independently created.

## ***Standard of Review***

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*.) A plaintiff may move for summary judgment on the ground there is no defense to the action; a defendant may move for summary judgment on the ground plaintiff's action lacks merit. (Code Civ. Proc., § 437c, subd. (a)(1); *Aguilar, supra*, at p. 843.) Once the moving party establishes a prima facie showing of the absence of a defense, or lack of merit, as the case may be, the other party may defeat summary judgment by presenting evidence "that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, at p. 850.)

We review a grant or denial of summary judgment de novo. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499.) We consider the record before the trial court at the time of its ruling, with the exception of evidence to which the court sustained objections; we liberally construe the evidence in support of the party opposing summary judgment; and we resolve any doubts regarding the evidence in favor of that same party. (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1039.)

## ***Existence of express and implied contracts***

Pureflix argues plaintiffs fail to raise a material issue of fact as to the existence of express or implied contracts regarding use of the Proof treatment, because plaintiffs never accepted the July 17, 2009 offer made by Pureflix; and, in any event, the discussions between the parties never concerned Pureflix obtaining a film treatment or ideas from plaintiffs, but rather concerned Pureflix using Stine's services as an actor.<sup>[3]</sup> We disagree, as Stine produced evidence sufficient to raise material factual issues that he and Pureflix entered both express and implied contracts regarding the use of the Proof.<sup>[4]</sup>

Mutual consent between the parties is an essential element of any contract and "is generally achieved through the process of offer and acceptance." [Citation.]" (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309; see also Civ. Code, §§ 1550, 1565.) The question of whether offer and acceptance occurred "is

determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." [Citation.] [Citation.]" (*HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1109.) "The essential elements of an implied-in-fact contract and an express contract are the same, namely, mutual assent and consideration." (*Chandler v. Roach* (1957) 156 Cal.App.2d 435, 440 (*Chandler*).)

"An `idea, if valuable, may be the subject of contract. While the idea disclosed may be common or even open to public knowledge, yet such disclosure if protected by contract, is sufficient consideration for the promise to pay.' [Citations.]" (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 791-792 (*Weitzenkorn*).) The assent of the person submitting an idea to a producer is found "in his submission of the idea or material to the producer, with the reasonable expectation of payment which can be inferred from the facts and circumstances. The assent of the producer is manifested by his acceptance of the idea or material submitted under the circumstances, a part of which is that it is reasonably understood that a professional author expects payment of the reasonable value of the idea or the material, if used, so that the conduct of the producer in accepting it implies a promise to fulfill those reasonable expectations." (*Chandler, supra*, 156 Cal.App.2d at pp. 440-441.)

Plaintiffs' first cause of action for breach of express verbal agreement alleges that plaintiffs agreed to Pureflix's offer "to pay to Plaintiffs in connection with Pureflix's production of a film based upon the Plaintiffs' ideas conveyed to Defendants, both orally and through the original treatment, six `points' to Plaintiffs, \$15,000.00 to Brad for his acting, and a credit to Plaintiffs for creating the original story."

There is no room for dispute that Pureflix made an offer to Stine in emails dated July 14 and 17, 2009 from White to Smith. In the first email White proposed "we'll use [the Proof] treatment to launch the idea, Get screen writers on it asap — as it's much easier to raise \$ with a script — . . . ." White initially proposed that Stine and Smith would receive 10 "points" and producing credits and they would pay \$4,000 towards the script (repayable once the venture was able to raise outside money), and Stine would be paid \$10,000 for 13 days of acting. In the second email on July 17, 2009, White made a revised proposal where Pureflix would pay for the screenwriting, Stine would be paid \$15,000 for acting, and Smith and Stine would receive 6 points (the number of points going to Pureflix also increases from 22.5 to 28 in this second proposal).

Pureflix argues that there is no evidence Stine accepted the July 17, 2009 offer. This argument ignores that plaintiffs submitted deposition testimony and a declaration from Smith that he called White by phone and accepted the July 17, 2009 offer on Stine's behalf. Pureflix's subsequent actions provide corroborating evidence to support the inference that an express verbal contract had been reached. Consistent with the July 17, 2009 terms, White hired Murphy and Ratajczak to prepare a revised treatment and write the screenplay, communicated with Stine to invite his input on the revised treatment and the screenplay, and kept Stine apprised on his work trying to find financing.

Pureflix seeks to undermine this evidence of offer and acceptance by pointing to evidence that two years later, in April 2011, Smith and White exchanged emails in which Smith stated that the parties had only worked out "surface terms" and that negotiations were still ongoing. But viewed in the light of other evidence offered by plaintiffs, the 2011 events are equally susceptible to what Smith stated in deposition was an effort by Pureflix to renegotiate the deal already reached. Stine has offered sufficient evidence to raise a material question of fact as to the existence of an express contract.

Plaintiffs' second cause of action for breach of implied contract alleges that in or around June 2009, Stine's manager Smith disclosed the ideas for Proof to White with the understanding that Pureflix would compensate plaintiffs for the use of those ideas and that Pureflix used Proof without compensating plaintiffs. "To state a claim for breach of an implied-in-fact contract based on the submission of a screenplay, a plaintiff must allege that: (1) he submitted the screenplay for sale to the defendants; (2) he conditioned the use of the screenplay on payment; (3) the defendants knew or should have known of the condition; (4) the defendants voluntarily accepted the screenplay; (5) the defendants actually used the screenplay; and (6) the screenplay had value." (*Jordan-Benel v. Universal City Studios, Inc.* (9th Cir. 2017) 859 F.3d 1184, 1191; see also *Desny v. Wilder* (1956) 46 Cal.2d 715 (*Desny*)). The contract claim can apply to ideas, not just screenplays or treatments. (*Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 184 (*Spinner*), citing *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 647, fn. 6 (*Mann*); *Gunther-Wahl Productions, Inc. v. Mattel, Inc.* (2002) 104 Cal.App.4th 27, 35 ["an agreement to disclose an abstract idea may be compensable, even though it lacks novelty"].)

There is conflicting evidence about when Stine or Smith first disclosed the ideas behind Proof to White, but the testimony of Stine and Smith, and the emails exchanged between Smith and White raise a material issue as to whether an implied contract was formed even before plaintiffs sent the initial Proof treatment to Pureflix on July 1, 2009. Smith states that prior to White even mentioning a film about apologetics to him, Smith conveyed plaintiffs' idea of a film about a Christian protagonist whose academic future is jeopardized by an atheist college professor on a secular campus, and based on prior dealings with White and customary industry practice, the disclosure was with the expectation that Pureflix would pay compensation for use of the ideas. Smith's testimony is corroborated by an email White sent to Smith in mid-June 2009, before receiving the Proof treatment. The email attaches a third-party's script, mentioning that it might be used to "tweak — to what [Brad's] working on," showing an awareness of Stine's own project. The evidence discussed above in connection with the express offer provides additional support to Stine's claim that Pureflix impliedly agreed to compensate Stine for use of his idea.

Pureflix next argues that even assuming the existence of an agreement, summary adjudication of plaintiffs' express and implied contract claims is appropriate because the discussions between Pureflix and plaintiffs were never about the sale of the ideas related to the Proof treatment, but were related solely to Stine's acting services. Pureflix points to cases which found no express or implied contract for the sale of an idea where the

disclosure was made not in anticipation of payment for the idea alone, but for some other purpose or prospect of a future business relationship. (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 317-320 [no contract to compensate plaintiff for disclosing idea for sports quiz show to defendant where undisputed evidence that plaintiff was seeking to hire defendant as a master of ceremonies, not compensation for disclosing ideas]; *A Slice of Pie Productions v. Wayans Bros. Entert.* (D.Conn. 2007) 487 F.Supp.2d 41, 51-52 [no contract where plaintiff fails to adduce evidence that defendants understood plaintiff's disclosure of idea for screenplay to defendants was for compensation as opposed to solicit interest of actors]; *Aliotti v. R. Dakin & Co.* (9th Cir. 1987) 831 F.2d 898, 902-903 [no contract to compensate for ideas where plaintiff made disclosure to defendants hoping to be hired by their company].) But here, the offer's language as set forth in the July 14 and 17, 2009 emails can reasonably be read to separate payment for "the idea" in Proof from payment for Stine's acting services. The July 14, 2009 email states at the outset that "[Pureflix will] use [the Proof] treatment to launch the idea," then proposes the sharing of points. Separately, the email closes by stating, "Brad will get 10k for acting in it." The July 17, 2009 email continues to separate out compensation for the acting, raising it to "15k for the 13 day shoot." It is a reasonable inference from the language of the emails that the six points contained in the accepted offer were contemplated as payment for Stine's ideas and creative contributions. This interpretation is further supported by subsequent actions by Pureflix. Within two hours of sending out the offer on compensation, White forwarded what he referred to as "Brad's treatment for the movie idea," noting that Stine and Sullivan "have been working on the concept" and asked the writers for comments. In 2012, when Stine approached Pureflix about buying the rights to Proof, Scott sent an email to White stating "if we sell it back to him," which suggests that Pureflix understood it had previously purchased the idea, not just Stine's acting services. Stine has raised material facts regarding the existence of both express and implied contracts that include Pureflix compensating him for use of the ideas in Proof.

We agree with Pureflix that there is insufficient evidence to support a breach of express or implied contract claim by Sullivan against White or Pureflix, because Sullivan fails to raise an issue of material fact that he had any agreement with Pureflix. Smith was the individual who dealt directly with Pureflix, including negotiating the terms of any contract. Smith testified unequivocally that he did not represent Sullivan or ever negotiate an agreement for him. Smith's testimony is that he accepted the agreement in the emails for Stine: those emails never reference Sullivan. Moreover, Smith states that when he accepted the offer for Stine, he knew there was a separate agreement between Stine and Sullivan "to split equally whatever percentage of gross profits I was able to secure in an agreement for Brad Stine." The record evidence therefore fails to raise an issue of fact that Pureflix understood that Sullivan, in addition to Stine, "expect[ed] payment of the reasonable value of the idea or the material, if used." (*Chandler, supra*, 156 Cal.App.2d at pp. 440-441; see *Rokos v. Peck* (1986) 182 Cal.App.3d 604, 617-618 ("A cause of action for breach of an implied-in-fact contract bears upon the relationship between the individual parties and makes breaches of such agreements actionable between parties because of the nature of their *personal relationship*").

## ***Breach of the express or implied contracts between Pureflix and Stine***

Stine contends that Pureflix breached both the express and implied contracts by using the ideas from Proof in making God's Not Dead. Pureflix contends that summary adjudication of the breach of contract claims is appropriate because there is insufficient evidence of use, and in any event, the undisputed evidence establishes that God's Not Dead was developed independently of any ideas conveyed to Pureflix in Proof. We find that Stine has raised material issues of fact that preclude summary adjudication of his breach of contract causes of action.

### **The law relating to an inference of use under express and implied contract claims**

Stine's causes of action for breach of express contract and breach of implied contract require a finding that Pureflix actually used ideas from Proof. (*Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 650.) The requisite use can be inferred from some combination of access to the earlier work or idea and similarity between the earlier and later works. (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1073 (*Ryder*); see also 5 Nimmer on Contracts § 19D.07[C].) "Access means that the defendants had an opportunity to view or to copy the plaintiffs' work. [Citation.] More than a "bare possibility" of access is required, however. [Citations.] When there is no direct evidence of access, the defendants must have had a "reasonable possibility" to view the plaintiffs' work, which must be based on more than mere speculation. [Citations.]" (*Spinner, supra*, 215 Cal.App.4th at p. 186.)

The key distinction between claims for breach of express or implied contract is the level of similarity required to prove the claim. For a plaintiff alleging breach of an express agreement to compensate him for use of his ideas, "the level of similarity permitting an inference of use is keyed to the language of the parties' agreement. [Citations.]" (*Ryder, supra*, 246 Cal.App.4th at p. 1073.) "For implied contract . . . claims, the works must be *substantially* similar. (*Benay v. Warner Bros. Entm't, Inc.* (9th Cir. 2010) 607 F.3d [620,] 630 [(*Benay*)] ["The requirement of substantial similarity for implied-in-fact contract claims "aligns this field with copyright infringement . . . [and] also means that copying less than substantial material is non-actionable"]; *Spinner, supra*, 215 Cal.App.4th at p. 185; see *Fink v. Goodson-Todman Enterprises, Ltd.* (1970) 9 Cal.App.3d 996, 1010-1011, (*Fink*) [applying substantial similarity test to breach of confidence claim]; Nimmer, *supra*, The Law of Ideas, § 19D.08[A], p. 19D-97 ["In implied contract and confidential relationship cases, the weight of California authority is that there must be 'substantial similarity' between plaintiff's idea and defendant's production to render defendant liable.].)" (*Ryder, supra*, at p. 1073.)

Nimmer explains the relationship between the two factors as follows: "Although access and similarity are separate components of the 'actual use' equation, they are linked to one another whenever they constitute the evidence from which an inference of actual use arises. The law recognizes that a great deal of evidence of one of these elements can compensate for a shortage of evidence of the other, in the minds of reasonable people asked whether they would infer actual use from the evidence presented. Thus, when circumstantial evidence of actual use must be relied on, the law requires less similarity when the evidence of access is great, and less evidence of access when the similarity is great." (5 Nimmer on Copyright § 19D.07[C][1][c].)

## **Defense based on lack of substantial similarity**

Pureflix argues the undisputed facts cannot support an inference of use as a matter of law because there is no substantial similarity between the Proof ideas and God's Not Dead. Pureflix emphasizes not only that God's Not Dead is a different story and has a different format from Proof, but that any comparison of the two works should be limited to ideas contributed by plaintiffs and should filter out any *scènes à faire* elements<sup>[5]</sup> or ideas already possessed by Pureflix or third parties.

Because California law recognizes the formation of express and implied contracts with respect to ideas that are not novel or protected by copyright, a court is not necessarily required to ignore *scènes à faire* or preexisting ideas when analyzing substantial similarity. We conclude that similarities between Proof and God's Not Dead preclude us from finding no substantial similarity as a matter of law. The determination of whether the two works are substantially similar must be left for a jury to determine.

## ***Pre-existing works or scènes à faire***

Nimmer explains the relationship between copyright law and idea submission law in analyzing substantial similarity: "In implied contract and confidential relationship cases, the weight of California authority is that there must be 'substantial similarity' between plaintiff's idea and defendant's production to render defendant liable. That language aligns this field with copyright infringement, in which a well-developed exegesis gives content to that term. It also means that copying less than substantial material is non-actionable." (5 Nimmer on Copyright § 19D.08[A], fns. omitted.) "From the invocation of the copyright term 'substantial similarity' it does not follow, however, that plaintiffs in idea-submission cases must prove substantial similarity of copyright-protected elements. It simply means that, in idea submission cases, substantial similarity may be shown between the elements of plaintiff's and defendant's ideas. (*Ibid.*, fns. omitted.)

In *Benay, supra*, 607 F.3d 620, a panel of the Ninth Circuit reviewed Nimmer and California law on this question and succinctly explained, "California case law does not support the proposition that when a complete script is submitted under an implied-in-fact contract, only those elements of the script that are protected under federal copyright law are covered by



the contract." (*Id.* at p. 631.) The court also explained that its holding that the two works were not substantially similar for purposes of copyright infringement "does not preclude a finding of substantial similarity for purposes of an implied-in-fact contract under California law." (*Ibid.*; see *Grosso v. Miramax Film Corp.* (9th Cir. 2004) 383 F.3d 965, 967.)

For express and implied contract claims, "the material claimed to be similar need not be protectible under copyright law." (*Ryder, supra*, 246 Cal.App.4th at p. 1073; see also *Fink, supra*, 9 Cal.App.3d at p. 1008.) Many older California cases clearly establish that an idea need not be novel to be the subject of an express or implied contract. In a 1970 opinion reversing summary judgment on a producer's claims for breach of contract, this court pointed to earlier cases discussing the key distinction between a copyright claim and a contract claim for idea submission: "It is held that . . . if a producer obligates himself to pay for the disclosure of an idea, whether it is for protectible or unprotectible material, in return for a disclosure thereof he should be compelled to hold to his promise. There is nothing unreasonable in the assumption that a producer would obligate himself to pay for the disclosure of an idea which he would otherwise be legally free to use, but which in fact, he would be unable to use but for the disclosure. [¶] The producer and the writer should be free to make any contract they desire to make with reference to the buying of the ideas of the writer; the fact that the producer may later determine, with a little thinking, that he could have had the same ideas and could thereby have saved considerable money for himself, is no defense against the claim of the writer. This is so even though the material to be purchased is abstract and unprotected material." (*Chandler* [, *supra*,] 156 Cal.App.2d [at pp.] 441-442.) An idea which can be the subject matter of a contract need not be novel or concrete. (*Donahue v. Ziv Television Programs, Inc.* [(1966)] 245 Cal.App.2d 593, 600; *Minnear v. Tors* [(1968)] 266 Cal.App.2d 495, 502.)" (*Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 183 (*Blaustein*).)

Pureflix argues that any similarity analysis should exclude ideas already in possession of the defendants or contributed by third parties. They point to evidence showing Pureflix already had knowledge of prior works and treatments (1) concerning apologetics; (2) with a secular college campus setting; (3) with a Christian student under attack for their beliefs and standing up for them; (4) an atheist teacher putting the Christian protagonist's future opportunities in jeopardy based on the protagonist's Christian beliefs; and (5) the construct of a Christian student being challenged by an atheist professor, the two engaging in a debate, and the student prevailing.

Citing to *Ryder, supra*, 246 Cal.App.4th at pages 1074 to 1076, they argue that courts will not allow any inference of copying when a defendant already has the same ideas. This argument is not persuasive for two reasons. First, the facts at issue in *Ryder* are distinguishable. In that case, it was undisputed that the defendant James Cameron in 1995 had written a detailed 102-page scriptment that set out the characters, setting and story of *Avatar* in great detail, and that the earliest anyone at Cameron's company could have seen plaintiff *Ryder*'s proposal was early 2000. (*Id.* at pp. 1068-1069.) In determining whether *Ryder*'s proposal was substantially similar to the final *Avatar* movie, the court ignored any similarities that were already part of the 1995 scriptment, quoting from a federal Sixth Circuit

case to explain its approach: "where an element occurs both in the defendant's prior work and the plaintiff's prior work, no inference of copying can be drawn. [Citations.] Such elements should be removed from consideration." (*Murray, supra*, 361 F.3d at p. 326.) The *Ryder* court rejected the argument that *Murray*—a copyright case—was inapplicable, reasoning that plaintiff had "provided no persuasive reason why the same common-sense 'filtering' concept cannot apply to his idea submission claims." (*Ryder*, 246 Cal.App.4th at p. 1075, fn. 8.) But the utility of the filtering concept in deciding a motion for summary judgment is limited to instances where the evidence clearly establishes what material should be filtered. In *Ryder*, the pre-existing details subject to filtering were undisputed and well documented in Cameron's 102-page scriptment. Here, in contrast, Pureflix attempts to argue that the general ideas relating to apologetics and Christian believers defending God's existence and overcoming opposition to their views were pre-existing ideas known to White and therefore should not be included in the similarity analysis.

Second, the approach used in *Ryder* ignores the difference between copyright law and idea submission law. As *Murray*, the copyright case, explains, "The purpose of the substantial-similarity analysis is to answer the question whether the defendant copied the work of the plaintiff. Ordinarily, similar elements between known work of the plaintiff and the defendant's work will, depending on the degree of uniqueness and originality of the element, support such an inference. However, where defendant owns a prior work containing the same elements, he has no reason, beyond the illicit thrill of copyright infringement, to copy wrongfully from another what he could legally copy from himself." (*Murray, supra*, 361 F.3d at p. 326.) Determining copying under copyright law and determining use under idea submission law do have parallel frameworks, and California courts may look to copyright cases for guidance, but there are limitations. The reasons articulated in *Murray* for eliminating pre-existing works from a similarity analysis in deciding whether a prior work has been copied do not translate to more abstract ideas which do not enjoy copyright protection.

Plaintiffs also contend it was error for the trial court to ignore *scènes à faire* elements when analyzing substantial similarity. Pureflix responds that the trial court's approach is supported by controlling California law. Plaintiffs are correct that it was improper for the trial court to rely on *Murray* to ignore *scènes à faire* elements, as the concept is unique to copyright law and inapplicable to analyzing substantial similarity in idea submission cases under California law.

The *Murray* opinion explains how the concept of *scènes à faire* is only pertinent to determining whether a work has been copied in violation of copyright law. "Copyright does not protect ideas, but only the expression of ideas." (*Murray, supra*, 361 F.3d at p. 318.) Judge Learned Hand explained in a 1930 opinion, "[u]pon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his

property is never extended." (*Nichols v. Universal Pictures Corporation* (2d Cir. 1930) 45 F.2d 119, 121.) "Within the realm of works of fiction, literary or cinematographic, expressions not protectible because they follow directly from unprotectible ideas are known as scenes a faire, 'those elements that follow naturally from the work's theme, rather than from the author's creativity.' [Citations.]" (*Murray, supra*, at p. 319.) Scènes à faire are excluded from the substantial similarity analysis under copyright law because they represent ideas, not expressions of ideas.

While it is widely understood that copyright law only protects the expression, not the idea itself, it is also widely recognized under California law that two parties can be bound by contract for the disclosure of an idea, and that if the party receiving the idea uses it without paying the party that disclosed the idea, an action for breach of contract will lie. (*Desny, supra*, 46 Cal.2d at p. 744 [implied-in-fact contract claim for disclosure of idea]; *Ryder, supra*, 246 Cal.App.4th at pp. 1072-1073 [to survive summary judgment on contract claims, plaintiff must provide evidence that defendants used his ideas].)

Here, before Pureflix entered into an express or implied contract with plaintiffs, nothing prevented it from using its pre-existing ideas or scènes à faire relating to apologetics and independently working with screenwriters to develop a movie. But once plaintiffs raise a material factual dispute on the question of whether the parties had an express or implied contract for disclosure of ideas, Pureflix cannot argue that preexisting ideas or scènes à faire should be excluded from the similarity analysis in determining whether there is a basis for an inference of use. ""The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed."" (*Blaustein, supra*, 9 Cal.App.3d at pp. 177-178, quoting Traynor dissent in *Stanley v. Columbia Broadcasting System* (1950) 35 Cal.2d 653, 674; see also *Weitzenkorn, supra*, 40 Cal.2d at p. 791-792.)

## ***Substantial similarity***

Having explained why the law does not permit us to filter out pre-existing ideas or scènes à faire on the facts before us, we must still determine whether there is enough similarity to support an inference that the ideas from Proof were used in God's Not Dead. (See, e.g., *Ryder, supra*, 246 Cal.App.4th at pp. 1076-1078 [finding elements of plaintiff's treatment bore no substantial similarity to later work, defeating any inference of use as a matter of law].)

The key difference between Proof and God's Not Dead is not the underlying idea, but the approach. Proof was to have a more singular storyline with a quirky Christian protagonist professor, akin to the Robin Williams character in *Dead Poets Society*, whereas in *God's Not Dead*, the Christian protagonist was a student, and the film would have multiple intersecting storylines similar to *Love Actually*.

But the core concepts of the main storylines are similar. Both films were set on a college campus and centered around a debate in which the Christian protagonist would risk losing something of importance (either tenure or an important grade) if he could not successfully present a reasoned defense of Christian beliefs against an atheist opponent. In fact, Konzelman's summary of the main storyline stated it was about a Christian college freshman who "accepts his atheist philosophy professor's challenge: taking up the cause to prove that God isn't dead . . . at the risk of failing the course, and losing everything he holds dear to him."

Pureflix's own contemporaneous communications acknowledge the similarities. When Wolfe forwarded Konzelman's summary of the main storyline for *God's Not Dead* to White for his thoughts, White responded, "Sounds exactly like proof — we already wrote this, [¶] where's the 'love actually' part?" When Stine approached Pureflix in March 2012 about buying the *Proof* screenplay back from them, White discussed the matter with his partner Scott, who responded negatively, stating "since we are doing *god's not dead* I don't want him coming back if we sell it back to him saying we took his idea."

On balance, the similarities in the core storylines of both *Proof* and *God's Not Dead* are sufficient to preclude a finding of no substantial similarity as a matter of law. Instead, the question is a factual one that we leave for a jury to decide. With respect to Stine's first cause of action for breach of an express verbal contract, while the precise terms of that contract are not fully defined on the current record, Stine has at least raised an issue of material fact that use of the core story by Pureflix would breach the contract terms as defined in White's emails on July 14 and 17, 2009.<sup>[6]</sup> With respect to the second cause of action for breach of an implied contract, Stine has raised issues of material fact by showing an inference of use of the treatment shared with Pureflix.

## **Independent creation defense**

Pureflix argues it was entitled to summary judgment because it provided uncontroverted evidence of independent creation, which overcomes any inference of use. We disagree.

### ***Law on independent creation***

Even in situations where evidence of access and similarity support an inference of actual use, "that inference may be rebutted by `clear, positive and uncontradicted evidence of independent creation.'" (5 Nimmer on Copyright § 19D.07[C][2].) When access and substantial similarity support an inference of actual use, a defendant "may dispel that inference [of use] with evidence that conclusively demonstrates the defendants independently created their product. [Citation.] When the defendants produce evidence of independent creation that is ``clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved,'" the inference of use is dispelled as a matter of law. [Citations.] In such a case, it is appropriate to grant summary judgment on the plaintiffs' implied-in-fact contract claim on the ground that the use element has been negated by

uncontroverted evidence of independent creation." (*Spinner, supra*, 215 Cal.App.4th at p. 185; see also *Mann, supra*, 128 Cal.App.3d at p. 648 [similarities between two works were without legal significance when inference of use was rebutted with clear, positive, and uncontradicted evidence of independent creation].)

In *Spinner*, Division Eight of this court affirmed a grant of summary judgment in favor of defendants, explaining that even if it were to assume for the sake of argument that there were substantial similarities between plaintiff's 1977 script titled L.O.S.T. and a later television series that debuted in 2004, "we agree with the trial court that [defendant TV network] ABC presented conclusive and uncontradicted evidence of independent creation so as to negate the use element of Spinner's cause of action. Moreover, the independent creation defense is bolstered by the fact that Spinner's so-called evidence of access is actually speculation, conjecture, or guesswork, which weakens any inference of use that ABC must dispel." (*Spinner, supra*, 215 Cal.App.4th at p. 185.) Spinner was a television writer and producer who was asked to develop a TV movie titled "L.O.S.T." about a group of people stranded in impossible circumstances. He submitted an outline and eventually a full script in 1977, but ABC passed on the project and the movie was never made. (*Id.* at p. 176.) One of the creators of the 2004 TV series LOST came up with the concept while on a beach in Hawaii in late 2002. He and the other individuals involved in the development of LOST denied having any contact with Spinner or any knowledge of his 1977 script. They explained their creative process in great detail, and Spinner testified he had no contact with the creators of the 2004 series. Spinner sued ABC, alleging an implied-in-fact contract was created when he submitted the 1977 script, and that ABC owed him ongoing royalties for the use of his ideas. The trial court granted summary judgment based on uncontroverted evidence establishing that the creators of the 2004 TV series had no access to Spinner's 1977 script and that the 2004 TV series was created independently. (*Id.* at pp. 182-183.) The appellate court affirmed, holding that Spinner's evidence was "insufficient as a matter of law because he relies on a bare possibility of theoretical access premised on mere speculation." (*Id.* at p. 187.)

## ***Analysis of Pureflix's independent creation defense***

Here, while Pureflix offered declarations from the creators of God's Not Dead stating they were unaware of the existence of Proof, and while the level of detail offered by Konzelman and Solomon about their creative process is impressive, there is adequate non-speculative evidence to support a reasonable inference that the idea for the main storyline in God's Not Dead—the debate between an atheist college professor and a Christian student about God's existence—was not a matter of independent creation, but instead originated with Stine and was communicated through Pureflix.

In *Spinner*, the court found no evidence of any connection between Spinner and the creators of the 2004 TV series. (*Spinner, supra*, 215 Cal.App.4th at pp. 182-187.) In the current case, the evidence supports a reasonable inference that one of the Pureflix

principals with knowledge of the ideas embodied in Proof may have—knowingly or not—injected those ideas into the creative conversation.

The record contains a number of documents demonstrating that the two Pureflix principals most actively involved in the God's Not Dead film project, Wolfe and Scott, were kept apprised of progress on Proof and were aware of the main storyline. White shared the Proof treatment with Scott and Wolfe shortly after receiving it from Smith in 2009. In January 2011, Wolfe was involved in communications with a potential investor for Proof, and White presented him the revised 2009 treatment, along with a description of how the film could be marketed. Wolfe forwarded the materials to the investor. As late as September 21, 2011, mere months before beginning discussions about making the God's Not Dead film, White emailed to Scott and Wolfe a list of 20 films Pureflix was trying to raise money to produce. Number one on the list was Proof, which was described as "The Faith based Dead Poets society [¶] Starring Brad Stine . . . Follows a Christian professor in a secular school that is seeking Tenure. His desire is to inspire college kids to know God and lead them away from secular/atheist worldviews I.E. Darwinism=life is meaningless/relativism=there is no morality/PC=there is no free speech." The synopsis ends by describing the intended audience and potential impact of the film: "Proof will be shown across the country in youth groups, Brad will teach Christian worldview, in essence, the film will become a catalyst for curriculum. Proof will end with the professor having to defend a Christian student from a bad grade given him by an atheist professor because the student believes in Intelligent Design. He puts his tenure on the line to do the Christian virtue of standing for justice. The film ends with a "courtroom style" finale to the film on a debate of atheist worldview."

With full awareness of the ideas embodied in Proof, White, Scott, and Wolfe had multiple interactions with the individuals involved in the creation and writing of God's Not Dead. After Duhon had the phone discussion with Broocks that gave him the idea to fund a film about apologetics, his first conversation was with White and Scott, both of whom were familiar with Proof. Scott and Wolfe participated in the initial discussions with Broocks, Duhon, Campbell, and Wagner.

Scott initially contacted Konzelman and Solomon about the God's Not Dead film project. Although Konzelman and Solomon insist that neither Wolfe nor Scott gave them any story ideas, their declarations acknowledge that during the initial phone conversation, they were told that the contemplated film would be about apologetics, would be set on a college campus, and would include the Newsboys and their song, God's Not Dead. It is entirely possible Konzelman and Solomon came up with the idea of a debate between an atheist professor and a Christian student on their own. It is just as possible to draw a different inference, based on more than mere speculation, that Scott or Wolfe provided the idea to the writers directly, to Duhon, or to Broocks, who later gave the idea to the writers.

Pureflix has provided significant evidence of independent creation. But we conclude that there are reasonable inferences to be drawn from the evidence—not simply mere speculation—that could lead a jury to reject the defense. Based on the evidence in the record on appeal, Pureflix cannot show that it is entitled to judgment as a matter of law.

Stine has identified enough evidence to raise a material factual issue to support each element of his breach of contract claims, and to refute the defense of independent creation.

## ***Adequacy of Pureflix's Separate Statement***

Lastly, plaintiffs contend it was error for the trial court to consider a separate statement of undisputed facts that did not comply with the Code of Civil Procedure, section 437c, subdivision (b)(1), and the California Rules of Court, rule 3.1350(c). Plaintiffs argue that Pureflix's statement violated statutory and rule requirements because it combined various facts, rather than setting forth each fact and its supporting evidence separately.

The rules permit a court to strike a noncompliant separate statement, but do not require a court to do so, and the court's determination in this respect is subject to an abuse of discretion standard of review. (*Rush v. White Corp.* (2017) 13 Cal.App.5th 1086, 1100 [finding no abuse of discretion where party did not correct inadequate separate statement despite multiple warnings and opportunities to correct]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263 [striking noncompliant separate statement without giving party opportunity to amend would be an abuse of discretion]).

Plaintiffs called this defect to the trial court's attention, and the trial court nevertheless chose to rely on the facts as presented. We do not consider the choice to be an abuse of the court's wide discretion in this arena.

## **DISPOSITION**

The judgment is affirmed as to plaintiff Sullivan. The judgment is reversed as to plaintiff Stine. Costs on appeal are awarded to plaintiff and appellant Stine.

BAKER, Acting P.J. and JASKOL, J.<sup>[1]</sup>, concurs.

[1] The term "apologetics" is defined in the Merriam-Webster International dictionary as "(1): systematic argumentative tactics or discourse in defense (as of a doctrine . . .) (2): that branch of theology devoted to the defense of a religious faith and . . . Christian faith." (Webster's 3d New Internat. Dict. (2002) p. 101.)

[2] Plaintiffs did not make any argument on appeal about the court's decision to grant summary judgment on their claims for breach of confidence or violation of Business and Professions Code section 17200. We therefore affirm summary adjudication as to those two claims.

[3] Pureflix also argues that obtaining financing for Proof was a condition precedent, and that the absence of financing excused any performance. This argument ignores the fact that if it is ultimately determined that God's Not Dead used Proof ideas, then the financing for God's Not Dead would satisfy the condition precedent.

[4] As set forth below, we reach a different conclusion as to plaintiff Sullivan.

[5] "Scenes a faire are those `incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.' [Citation.]" (*Murray Hill Pubs. v. Twentieth Century Fox* (6th Cir. 2004) 361 F.3d 312, 319 (*Murray*)).

[6] In declarations supporting their opposition to Pureflix's motion for summary judgment, plaintiffs characterize the express agreement much more broadly: "in the event [Pureflix] ever produced a film on the subject of apologetics on a college campus involving a debate about the existence of God, then [Pureflix] would be required to make this film with [plaintiffs] and pay the agreed upon 6% of gross profits to [plaintiffs] and the acting fee to [Stine]." We need not decide whether the scope of the contract is this broad to reach the conclusion that Stine has raised a material issue of fact regarding breach of an express contract more narrowly defined.

[\*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.