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9
 10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**

12 SHOSH YONAY and YUVAL YONAY,

13 Plaintiffs,

14 v.

15 PARAMOUNT PICTURES
 16 CORPORATION, a Delaware corporation,
 and DOES 1-10,

17 Defendants.
 18

Case No. 2:22-CV-3846-PA

**PARAMOUNT PICTURES
 CORPORATION'S NOTICE OF
 MOTION AND MOTION FOR
 SUMMARY JUDGMENT**

[Statement of Uncontroverted Facts,
 Supporting Declarations, Notice of
 Lodging, and Proposed Judgment
 filed concurrently herewith]

Hearing Date: January 8, 2024

Hearing Time: 1:30 PM

Place: Courtroom 9A

Judge: Hon. Percy Anderson

1 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that, as soon as the matter may be heard, in
3 Courtroom 9A of this Court, located at 350 West First Street, Los Angeles,
4 California 90012, Defendant Paramount Pictures Corporation (“PPC”) will and
5 hereby does move pursuant to Federal Rule of Civil Procedure 56 for an order
6 granting summary judgment in favor of PPC and against Plaintiffs Shosh Yonay
7 and Yuval Yonay on all claims presented in this action. This Motion is made on
8 the grounds that Ehud Yonay’s 1983 article entitled “Top Guns” is not substantially
9 similar in protectable expression to PPC’s 2022 film *Top Gun: Maverick*, which is
10 fatal to Plaintiffs’ causes of action for copyright infringement (Count III) and
11 declaratory judgment (Count II). The Motion is also made on the grounds that the
12 unambiguous language of the 1983 assignment between Ehud Yonay and PPC,
13 coupled with the lack of substantial similarity between the subject works, dooms
14 Plaintiffs’ breach of contract claim (Count I).

15 This Motion is made following the Local Rule 7-3 conference of counsel,
16 which took place on October 13, 2023. Declaration of Matthew Kaiser ¶¶ 3-4.
17 This Motion is based on the files, records, and proceedings in this action, this
18 Notice, the Memorandum of Points and Authorities, the Statement of
19 Uncontroverted Facts, the Declaration of Matthew Kaiser and exhibits thereto, the
20 Declaration of Jerry Bruckheimer and exhibit thereto, the Declaration of Andrew
21 Craig and exhibits thereto, the Declaration of Peter Craig, the Declaration of Joseph
22 Kosinski and exhibits thereto, the Declaration of Ehren Kruger, the Declaration of
23 James McDonald and exhibit thereto, the Declaration of Chris McQuarrie, the
24 Declaration of Justin Marks, the Declaration of Ralph Bertelle and exhibit thereto,
25 the Declaration of Eric Singer, the reply memorandum that PPC intends to file, the
26 arguments of counsel, and such other matters as may be presented at the hearing on
27 this Motion or prior to the Court’s decision.

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Dated: November 6, 2023

O'MELVENY & MYERS LLP

By: /s/ Molly M. Lens
Molly M. Lens

*Attorneys for Defendant Paramount
Pictures Corporation*

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1 **I. INTRODUCTION**

2 Plaintiffs seek a ruling antithetical to copyright law—that they be awarded an
3 effective monopoly over stories about the U.S. Navy’s real-life Fighter Weapons
4 School, known as Top Gun, because journalist Ehud Yonay wrote one of the first
5 accounts of the school in his 1983 non-fiction article “Top Guns” (the “Article”).
6 But copyright law does not protect facts or ideas, and it certainly does not allow an
7 author to stake out an exclusive claim to a subject, simply because he came first.
8 To the contrary, copyright law “encourages others to build freely upon the ideas
9 and information conveyed by a work,” as part of its constitutional charge “[t]o
10 promote the Progress” of the “useful Arts.” *Feist Publ’ns, Inc. v. Rural Tel. Serv.*
11 *Co.*, 499 U.S. 340, 349-50 (1991); U.S. Const. art. I, § 8, cl. 8.

12 Plaintiffs claim that PPC’s 2022 blockbuster film *Top Gun: Maverick*
13 (“*Maverick*”) infringes the copyright in the Article based on a hodgepodge of
14 purported similarities, many of which are imagined and virtually all of which distill
15 to unprotectable facts, ideas, or *scènes-à-faire*. The only resemblance between
16 *Maverick* and the Article is their shared subject of Top Gun and the fighter pilots
17 who teach and train there, to which Plaintiffs have no special right. Even then,
18 *Maverick* derives its hyper-realistic portrayal of Top Gun not from the forty-year-
19 old Article but rather from the years of painstaking research, conversations with
20 pilots, and direct consultation with naval advisors that went into the making of the
21 film—not to mention its use of real military aircraft and flight sequences, which
22 Plaintiffs still somehow contend encroach on their intellectual property. In short,
23 Plaintiffs can come nowhere close to establishing the *substantial* similarity of
24 *protectable* expression required to make out a claim for copyright infringement.

25 Left with no viable copyright count, Plaintiffs tacked on a claim that PPC
26 breached its decades-old contract with Yonay—which Plaintiffs unilaterally
27 terminated in January 2020, years before *Maverick*’s release—because Yonay did
28 not receive credit on the film. But even if the contract were live, its plain language

1 would not entitle Yonay to credit for a film like *Maverick* that is not based on any
2 rights granted by the contract. Plaintiffs' contract claim is thus dead on arrival.

3 Last year, Plaintiffs staved off an early dismissal of their claims by pleading
4 for discovery. Over and over, they warned against a "premature[] dismiss[al]
5 without the benefit of a fully developed record, including the vital input of literary
6 experts." Pls.' Opp. to Mot. to Dismiss, Dkt. 21, at 2; *see also id.* at 4-7, 11-12, 16-
7 17. So this Court gave them a chance. But discovery and a developed record have
8 only confirmed that, as a matter of law, Plaintiffs cannot prevail on a single claim
9 they advance. This Court should grant summary judgment for PPC in full.

10 **II. STATEMENT OF FACTS**

11 **A. The Works At Issue.**

12 **The Article.** Investigative reporter Ehud Yonay contracted to write an
13 article for *California Magazine* and to "use all reasonable care in reporting and
14 writing the article to make sure that it is factual and accurate." Statement of
15 Uncontroverted Facts ("SUF") ¶¶ 1, 4-5. *California Magazine*, which specialized
16 in "long-form non-fiction," published that article, *Top Guns*, in 1983. *Id.* ¶¶ 3-6.

17 The Article centers on the real-life Navy Fighter Weapons School,
18 commonly called "Top Gun," whose "mission" is to prepare the best young fighter
19 pilots for combat. *Id.* ¶¶ 8, 11, 157. The Article reports that "Top Gun's hotshot
20 aces have virtually revolutionized the fighter pilot business and...established
21 themselves as the international masters of the deadly art of air-to-air combat." *Id.* ¶
22 11. The Article credits the school's success to its training program, which works to
23 "hammer[]" two-person F-14 crews into a team. *Id.* ¶¶ 10, 52. Invoking "navy
24 jargon," such as "hops" (air combat maneuvers), "dogfighting" (air-to-air combat),
25 and "bogeys" (enemy planes), the Article outlines that program. *Id.* ¶¶ 15-16. For
26 example, it explains, on top of tactical "lectures and briefings," aerial exercises
27 include "one-versus-one hops (one student crew against one instructor), then two-
28 versus-two hops, and then...the tough two-versus-unknown hop." *Id.* ¶ 16.

1 The Article describes the F-14 Tomcat (among other planes), which at the
2 time was the Navy’s “supreme air war machine” and the aircraft flown by Top Gun
3 trainees. *Id.* ¶ 33. It details the F-14’s core features, including its flexible wings,
4 haul capacity, and shooting capabilities—it can “track 24 targets at once and fire six
5 missiles in six different directions in rapid sequence.” *Id.* ¶ 48. And the pitfalls too,
6 such as the plane’s “enormous size,” exorbitant cost, and “stall prone” engine. *Id.*

7 The Article reports on two real-life lieutenants, Alex “Yogi” Hnarakis and
8 Dave “Possum” Cully—a pilot and radar intercept officer (“RIO”)—who train
9 together as a fighter crew. *Id.* ¶¶ 9-10, 42. It documents the process by which they
10 become a team, including a simulated training exercise in which they “escorted”
11 attack planes “over ‘enemy’ land on a bombing mission.” *Id.* ¶¶ 10, 52.

12 Yonay also recounts his own flight in an F-5, documenting the experience of
13 “pulling Gs” and “withstanding several times the force of the earth’s gravitational
14 pull.” *Id.* ¶ 25. Experiencing “classic air moves,” including “flying upside down,”
15 Yonay notes feeling “sheer nirvana” coupled with the “physical torture” from
16 “pressure on your chest...so intense that you can hardly breathe.” *Id.*

17 The Article is structured in a non-linear fashion, switching between narrating
18 Yogi and Possum’s personal experiences and the history of Top Gun. *Id.* ¶¶ 41-53.
19 It begins with the details of a Top Gun training exercise in which Yogi and Possum
20 are defeated by a mock bogey, *id.* ¶¶ 42-43, before transitioning to a description of
21 Naval Air Station (“NAS”) Miramar and explaining the role for which Yogi and
22 Possum are training, *id.* ¶¶ 8, 44. It next provides the two trainees’ biographical
23 details, such as their hometowns, education, and prior Navy experience. *Id.* ¶¶ 45,
24 47. The Article then shifts to a description of their plane and how pilots learn to fly
25 the aircraft, including the use of flight simulators and training for night landings.
26 *Id.* ¶¶ 48-49. It recalls how prior to arriving at Top Gun, Yogi and Possum—along
27 with their squadron—went on a six-month tour aboard an aircraft carrier. *Id.* ¶ 50.
28 Jumping further back in time, the Article covers the history of Top Gun, from the

1 school's 1968 genesis. *Id.* ¶ 51. Returning to 1983, the Article describes Yogi and
2 Possum's final "hop" and concludes with their graduation from Top Gun. *Id.* ¶ 53.

3 **Top Gun: Maverick**. *Maverick* is the 2022 sequel to the 1986 motion picture
4 *Top Gun*. *Id.* ¶ 56. Set more than 30 years after the events of *Top Gun*, *Maverick*
5 features Pete "Maverick" Mitchell, the fictional protagonist from the original film,
6 now a Captain and a test pilot who, at the film's outset, is working on the Navy's
7 hypersonic scramjet program (not located at Top Gun). *Id.* ¶¶ 56, 162. After
8 learning Vice Admiral Chester "Hammer" Cain plans to shut down the program in
9 favor of funding drone technology, *Maverick* takes one last flight in an attempt to
10 meet the program's goal of reaching Mach 10. *Id.* ¶ 56. He succeeds, but he
11 pushes the prototype beyond its limits and destroys it. *Id.* ¶¶ 57, 162.

12 *Maverick*'s career has stalled due to similar insubordinate acts, and Admiral
13 Cain wants to ground him permanently, but *Maverick*'s friend and former Top Gun
14 rival, Tom "Iceman" Kazansky, now an Admiral and the U.S. Pacific Fleet
15 Commander, sends him to North Island to serve as a Top Gun instructor. *Id.* ¶¶ 54,
16 59, 118, 135. Once *Maverick* arrives, he reunites with Penny Benjamin—the owner
17 of the neighborhood bar and a single mother to a teenage daughter—with whom
18 *Maverick* had an on-again-off-again relationship years earlier. *Id.* ¶ 64.

19 The Navy tasks *Maverick* with training an elite group of Top Gun graduates
20 for a mission to destroy an unsanctioned uranium enrichment plant located at the
21 bottom of a steep canyon in enemy territory. *Id.* ¶ 61. To account for the surface-
22 to-air missiles ("SAMs") and fifth-generation fighters defending the plant,
23 *Maverick* devises an attack strategy premised on fast-paced, low-altitude flying, but
24 both air boss Vice Admiral Beau "Cyclone" Simpson and the trainees express
25 skepticism that the approach is viable. *Id.* ¶¶ 60, 63, 108.

26 Among the trainees is Bradley "Rooster" Bradshaw, the son of *Maverick*'s
27 late best friend and RIO, "Goose," who died in a training accident with *Maverick*
28 piloting. *Id.* ¶¶ 62, 116. *Maverick* reveals that he pulled Rooster's first Naval

1 Academy application because of a promise Maverick made to Rooster’s late
2 mother. *Id.* ¶¶ 72, 127. Rooster, unaware of the promise, resents Maverick for
3 impeding his career and blames Maverick for Goose’s death. *Id.* ¶¶ 62, 72, 116.

4 Rooster also clashes with fellow trainee Jake “Hangman” Seresin over their
5 contrasting styles: Rooster calls Hangman reckless, and Hangman criticizes Rooster
6 as too cautious. *Id.* ¶ 120. Other trainees include pilots Natasha “Phoenix” Trace
7 and Reuben “Payback” Fitch, and weapons systems officers Robert “Bob” Floyd
8 and Mickey “Fanboy” Garcia. *Id.* ¶¶ 121-22. Maverick works to earn the trainees’
9 respect and instills teamwork and camaraderie through unconventional training. *Id.*
10 ¶¶ 71, 73, 93. He also rekindles his relationship with Penny. *Id.* ¶¶ 64, 74, 89.

11 As the mission date draws near, none of the trainees is able to complete the
12 course simulation within Maverick’s parameters. *Id.* ¶ 69. Maverick particularly
13 fears sending Rooster on a mission that might result in Rooster’s death. *Id.* But a
14 meeting with Iceman—who is suffering from late-stage cancer—convinces
15 Maverick to release his anxiety and let go of his past guilt. *Id.* ¶¶ 70-71, 118.

16 Iceman soon dies, and Cyclone removes Maverick as instructor. *Id.* ¶
17 73. Cyclone announces new and more dangerous mission parameters, but then
18 Maverick takes off on an unauthorized run of the course and successfully completes
19 it, stunning everyone. *Id.* Cyclone reluctantly appoints Maverick team leader, and
20 Maverick decides the mission will be carried out by two strike teams—one led by
21 him and the other led by Rooster. *Id.* ¶¶ 74, 76.

22 The strike teams successfully destroy the enemy target, but on the way out of
23 the canyon, they are confronted by SAMs. *Id.* ¶¶ 77-80. Maverick sacrifices his
24 plane to protect Rooster and is shot down. *Id.* ¶ 79. Cyclone orders the remaining
25 fighters back to the aircraft carrier, but Rooster ignores him and returns to look for
26 Maverick. *Id.* On the ground, Maverick is about to be attacked by an enemy
27 helicopter when Rooster arrives and shoots it down. *Id.* ¶ 80. Rooster is then hit by
28 a SAM and ejects. *Id.* Stranded, Maverick and Rooster steal an F-14 from a nearby

1 base, but are intercepted by fifth-generation enemy fighters. *Id.* ¶¶ 81-83.

2 Maverick takes out two enemy planes, but then runs out of ammunition. *Id.*

3 Resigned to their fate, Maverick apologizes for failing to keep Rooster safe.
4 *Id.* ¶ 83. Just then, Hangman, who had been on standby for the mission, shoots
5 down the enemy fighter, all three return to the carrier in triumph, and Maverick and
6 Rooster emotionally reconcile. *Id.* ¶¶ 84-86. The film ends with Rooster reflecting
7 on his renewed relationship with Maverick, his father figure, while Maverick and
8 Penny fly off into the sunset. *Id.* ¶¶ 87-89.

9 **B. The Assignment And Termination.**

10 On May 18, 1983, Yonay assigned motion picture rights in the Article to
11 PPC (the “Assignment”). *Id.* ¶ 199. As contemporaneous records demonstrate,
12 PPC viewed the Assignment as gratuitous—it felt it “d[id]n’t need this article to do
13 our movie as all the facts are public domain”—but nonetheless pursued the rights
14 for “p[ea]ce of mind.” *Id.* ¶ 35.

15 In the Assignment, Yonay agreed that PPC could use his name “in
16 connection with any use, version or adaptation” of the Article, but would “not be
17 required to announce [Yonay’s name] in or in connection with any such use” unless
18 certain conditions were met. *Id.* ¶ 200. Specifically, Yonay is only entitled to a
19 credit on any movie that is “produced...[u]nder” the Assignment and that is
20 “substantially based upon or adapted from [the Article] or any version or adaptation
21 thereof, substantially incorporating the plot, theme, characterizations, motive and
22 treatment of [the Article] or any version or adaptation thereof.” *Id.* ¶ 201.

23 On January 23, 2018, Plaintiffs sent PPC a notice of termination, terminating
24 the Assignment’s grant of copyright rights effective January 24, 2020. *Id.* ¶ 204.

25 **C. Plaintiffs’ Lawsuit.**

26 Plaintiffs assert claims for copyright infringement, declaratory judgment, and
27 breach of contract, claiming that *Maverick* is derived from and substantially similar
28 to the Article, First Am. Compl. (“FAC”) ¶¶ 35-36, that PPC infringed Plaintiffs’

1 copyright by releasing *Maverick*, *id.* ¶ 70, and that the Court should declare that
 2 PPC cannot exploit *Maverick* or “any other derivative work” based on the Article or
 3 *Top Gun*, *id.* ¶ 65. Their contract claim further alleges that Yonay is entitled to a
 4 credit on *Maverick*, *id.* ¶ 52, notwithstanding Plaintiffs’ termination of the grant of
 5 copyright in the Assignment.

6 For the reasons set forth below, all three claims fail as a matter of law.

7 **III. ARGUMENT**

8 **A. The Copyright Infringement Claim Fails Because The Article And** 9 ***Maverick* Are Not Substantially Similar (Count III).**

10 1. *Discovery Confirmed That Plaintiffs Have No Basis For Their* 11 *Copyright Infringement Claim.*

12 Plaintiffs dodged a dismissal on the pleadings by claiming that discovery and
 13 a developed record would reveal the merit to their infringement claim. Plaintiffs
 14 asserted the input of literary experts was “vital,” as was broader factual
 15 development—and that it would be error to rule on substantial similarity on the
 16 pleadings alone. Pls.’ Opp. to Mot. to Dismiss, Dkt. 21, at 2, 4-6. But one year
 17 later, Plaintiffs have nothing more to show for their claims. They proffered an
 18 inadmissible expert whose opinions fall short on every metric embedded within
 19 Rule 702¹ and fail to provide insight into the extrinsic analysis before the Court.²
 20 They furnished no evidence in discovery, and obtained none from PPC, that could
 21 support their strained claim of substantial similarity. To the contrary, fact
 22 discovery only reinforced that *Maverick* did not infringe on the Article. The Court
 23 should now put Plaintiffs’ unsupported infringement claim to rest.

24 Discovery confirmed that the Article is—and was intended to be—a factual

25 ¹ The inadmissibility of Plaintiffs’ proffered expert, Henry Bean, is addressed in PPC’s
 26 concurrently filed Motion to Exclude (“Mot. to Excl.”). The many flaws in Bean’s report
 27 are also discussed in greater detail in the rebuttal report of James McDonald.

28 ² Plaintiffs also contended that “expert evidence would be needed” to assess “the
 progression of the genres” and evaluate whether the tropes that appear in *Maverick* were
 attributable to the Article or prior art, Dkt. 21 at 11-12, yet their proffered expert does not
 cite prior art (or any other sources, for that matter) even once in his report.

1 work. Yonay was a self-described “investigative reporter.” SUF ¶ 1. When he
2 contracted with California Magazine, Yonay “agree[d] to use all reasonable care in
3 reporting and writing the article to make sure that it is factual and accurate.” *Id.* ¶¶
4 4-5. Plaintiffs’ proffered expert agreed the Article is a work of non-fiction and
5 “presents itself as truthful.” *Id.* ¶ 7. Plaintiffs also admitted the Article is based in
6 fact, and were unable to identify a single purported fictional element in it. *Id.*

7 Discovery also confirmed the factual accuracy of Yonay’s reporting on his
8 indisputably real-life topic: Top Gun.³ For example, as Yonay reported, Top Gun
9 was founded in the late 1960s and housed at NAS Miramar in San Diego, where it
10 remained at the time of the Article and for a decade thereafter. *Id.* ¶¶ 8, 157. Yonay
11 followed two real-life lieutenants, Alex Hnarakis and Dave Cully, whose Top Gun
12 class photo still hangs in the present-day Top Gun schoolhouse. *Id.* ¶¶ 9, 17.
13 Yonay accurately narrated the rigors of Top Gun training, with its intense flying
14 regimen, including dogfighting, and classroom-style briefing sessions. *Id.* ¶¶ 16,
15 18, 27. He portrayed the real-life strain that G-forces put on pilots’ bodies, the
16 mechanics of the aircraft, and the “call signs” pilots use to refer to one another. *Id.*
17 ¶¶ 9, 15, 24-26. He described the bond that inherently forms between a two-person
18 “crew” of a pilot and RIO, and the reality that a crew will spend more time together
19 than with their spouses. *Id.* ¶¶ 13-14, 52. Yonay accurately depicted the social side
20 of Top Gun, too, with an officer’s club where pilots could decompress and have a
21 beer, and where club rules were enforced with a bell. *Id.* ¶¶ 30-31, 102. Over and
22 over, the details reported in the Article were shown to be factual. *Id.* ¶¶ 7-34.

23 That the Article is factual dramatically constrains the scope of Plaintiffs’
24 copyright—and, in turn, the basis for any infringement claim. After all, “[n]o
25 author may copyright his ideas or the facts he narrates.” *Harper & Row Publishers,*
26 *Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). Thus, others remain free to copy

27 _____
28 ³ The initial and rebuttal expert reports of Andrew Craig provide a more fulsome
breakdown of the factual accuracy of the Article.

1 facts even from a copyrighted work. *Corbello v. Valli*, 974 F.3d 965, 973 (9th Cir.
 2 2020). Accordingly, in *Corbello*, the Ninth Circuit held that the creators of a play
 3 about the musical quartet the Four Seasons did not infringe one band member’s
 4 nonfiction autobiography, “even if the writers of the Play appropriated [plaintiff’s]
 5 historical research.” *Id.* at 984. Yet with *Maverick*, PPC did not even do *that*.

6 Discovery has shown the great lengths that PPC went to ensure the film’s
 7 accuracy, consulting directly with the U.S. Navy throughout the project. SUF ¶¶
 8 36-39. *Maverick*’s director and writers visited naval air stations, including the
 9 current location of the Top Gun school and NAS North Island (where *Maverick* is
 10 set), and interviewed naval aviators. *Id.* ¶¶ 36, 39, 166. Navy personnel reviewed
 11 draft scripts, consulted on plotlines, and vetted the accuracy of the technical feats
 12 and equipment depicted. *Id.* ¶ 37. And the film used real Navy planes in real
 13 flight. *Id.* ¶¶ 36, 94. With the Navy’s partnership, the film hewed as closely as
 14 possible to the realities of Top Gun. What Plaintiffs claim PPC derived from the
 15 Article, it actually took from real life. *Id.* ¶¶ 36-40.

16 2. *Plaintiffs Must Prove That The Works Are Substantially Similar In*
 17 *Their Protected Elements.*

18 A copyright plaintiff must prove substantial similarity between “*protected*
 19 *elements*” of his work and the allegedly infringing work. *Rentmeester v. Nike, Inc.*,
 20 883 F.3d 1111, 1117 (9th Cir. 2018).⁴ Even if a plaintiff can establish that the
 21 defendant actually copied his work, that does not establish liability because the
 22 Copyright Act does not prohibit all copying, but only “unlawful appropriation”—
 23 that is, where the defendant copied enough protected “expression...to render the
 24 two works ‘substantially similar.’” *Id.*; *see also Skidmore v. Led Zeppelin*, 952 F.3d
 25 1051, 1064 (9th Cir. 2020) (en banc) (“only substantial similarity in *protectable*
 26 expression may constitute actionable copying that results in infringement liability”).

27 “[D]etermining whether works are substantially similar involves a two-part

28 ⁴ All emphasis is added and internal citations and quotations omitted.

1 analysis consisting of the ‘extrinsic test’ and the ‘intrinsic test.’” *Rentmeester*, 883
2 F.3d at 1118. The extrinsic test “assesses the *objective* similarities of the two
3 works, focusing only on the protectable elements of the plaintiff’s expression,” *id.*,
4 whereas the intrinsic test “examines an ordinary person’s *subjective* impressions,”
5 *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).
6 On a motion for summary judgment, only the extrinsic test is relevant; if the works
7 fail that test, the court must enter judgment for the defendant. *Kouf v. Walt Disney*
8 *Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

9 The extrinsic test’s objective analysis “focuses on articulable similarities
10 between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of
11 events” in the two works. *Id.* The Ninth Circuit has emphasized that courts
12 applying the extrinsic test “must take care to inquire only whether the *protectible*
13 *elements, standing alone*, are substantially similar,” and therefore must “filter out
14 and disregard the non-protectible elements.” *Cavalier v. Random House, Inc.*, 297
15 F.3d 815, 822 (9th Cir. 2002) (emphasis in original). Three categories of
16 unprotectable elements—facts, ideas, and *scènes-à-faire*—are relevant here.

17 **Facts.** It is axiomatic that “[n]o author may copyright his ideas *or the facts*
18 *he narrates*,” and “copyright does not prevent subsequent users from copying from
19 a prior...work those constituent elements that are not original—for example...
20 facts.” *Corbello*, 974 F.3d at 973; *Hoehling v. Universal City Studios, Inc.*, 618
21 F.2d 972, 974 (2d Cir. 1980) (copyright protection “has never extended to history,
22 be it documented fact or explanatory hypothesis”). There is a compelling reason
23 for this rule: “the cause of knowledge is best served when history is the common
24 property of all, and each generation remains free to draw upon the discoveries and
25 insights of the past,” and “[t]o avoid a chilling effect on authors who contemplate
26 tackling an historical issue or event, broad latitude must be granted to subsequent
27 authors who make use of historical subject matter, including theories or plots.”
28 *Hoehling*, 618 F.2d at 974, 978. Thus, copyright “in historical accounts is narrow

1 indeed, embracing no more than the author’s original *expression* of particular
2 facts,” *Narell v. Freeman*, 872 F. 2d 907, 911 (9th Cir. 1989), and it is “a feature of
3 copyright law, not a bug or anomaly, that an author who deals in fact rather than
4 fiction receives incomplete copyright protection for the results of his labor,”
5 *Corbello*, 974 F.3d at 973.

6 Copyright protection does not extend to facts even where the idea at issue is
7 an “interpretation” of a historical event. *Corbello v. Devito*, 2015 WL 5768531, at
8 *12 (D. Nev. Sept. 30, 2015). After all, “every relation of a historical fact beyond
9 direct observation is tainted to some degree by some person’s interpretation, so
10 distinguishing between historical facts and ‘interpretations’ of those facts...would
11 destroy the rule that historical facts are unprotected.” *Id.*; *see also Corbello*, 974
12 F.3d at 976 (depiction of non-fiction character’s “cool” personality not protectable);
13 *Hoehling*, 618 F.2d at 978 (“[W]here, as here, the idea at issue is an interpretation
14 of an historical event, our cases hold that such interpretations are not copyrightable
15 as a matter of law.”). Thus, “[h]istorical facts and theories may be copied, as long
16 as the defendant does not ‘bodily appropriate’ the expression of the plaintiff.”
17 *Narell*, 872 F.2d at 910-11.

18 Not only does the evidence confirm that the Article is factual, SUF ¶¶ 1-35,
19 but the asserted truths doctrine would preclude Plaintiffs from claiming otherwise.
20 (And they do not—Plaintiffs were unable to identify a single element in the Article
21 they contend is fictional. *Id.* ¶ 7.) “Under the doctrine, elements of a work
22 presented as fact are treated as fact, even if the party claiming infringement
23 contends that the elements are actually fictional.” *Corbello*, 974 F.3d at 978; *see*
24 *also, e.g., Marshall v. Yates*, 1983 WL 1148, at *2 (C.D. Cal. Oct. 26, 1983) (“Any
25 reader...would have concluded that the book presented a true account of the life of
26 Frances Farmer, the result of Arnold’s investigative journalism.”).

27 **Ideas and Stock Elements.** It is also axiomatic that copyright does not
28 protect *ideas*, 17 U.S.C. § 102(b), and the extrinsic test examines “not the basic plot

1 ideas for stories, but the actual concrete elements that make up the total sequence of
 2 events and the relationships between the major characters,” *Funky Films*, 462 F.3d
 3 at 1077. Similarly, *scènes-à-faire*—“situations and incidents that flow necessarily
 4 or naturally from a basic plot premise”—and “[f]amiliar stock scenes and themes
 5 that are staples of literature” cannot “sustain a finding of infringement,” *Cavalier*,
 6 297 F.3d at 823; *see also Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985)
 7 (“General plot ideas are not protected....”). Accordingly, ideas, *scènes-à-faire*, and
 8 stock elements are “unprotectable elements” that the Court must filter out. *Musero*
 9 *v. Mosaic Media Group, Inc.*, 2010 WL 11595453, at *2 (C.D. Cal. Aug. 9, 2020).

10 3. The Works Are Not Substantially Similar As A Matter of Law.

11 Plaintiffs incorrectly claim that *Maverick* is an infringing derivative work
 12 because it is “plainly derived from” the Article. *See* FAC ¶ 70. “Of course, a work
 13 based upon an idea or kernel contained in another work may in some sense be
 14 ‘derivative’ of the first work.” *Sobhani v. @radical.media, Inc.*, 257 F. Supp. 2d
 15 1234, 1238 (C.D. Cal. 2003). But to be an infringing derivative work *within the*
 16 *meaning of the Copyright Act*, a work must be substantially similar to the original
 17 work’s protectable elements. *Id.*; *see Litchfield v. Spielberg*, 736 F.2d 1352, 1357
 18 (9th Cir. 1984). Applying the Ninth Circuit’s actual extrinsic test—filtering out
 19 unprotected elements and comparing the works’ plots, themes, dialogue, characters,
 20 setting, mood, pace, sequence, and arrangement—confirms there is no similarity in
 21 protected expression between the Article and *Maverick*, much less a substantial one.

22 **Plot and Sequence (SUF ¶¶ 41-109).** As explained above, *see supra*
 23 Section II.A., the plots and sequence of the two works are fundamentally dissimilar.
 24 The Article is a non-fiction piece about the U.S. Navy Fighter Weapons School.
 25 SUF ¶¶ 7-8, 42, 44. Structured in a non-linear fashion, the Article bounces back
 26 and forth between two young pilots’ then-current training at the school, the history
 27 of the school, an overview of fighter jets, and a first-hand account by Yonay of
 28 what it is like to experience G-force. *Id.* ¶¶ 25, 41-53. *Maverick*, by contrast, is a

1 narrative fictional tale about a veteran fighter pilot, Maverick, who returns to Top
2 Gun to train a new generation of pilots—including Rooster, who blames Maverick
3 for the death of Rooster’s father—for an attack on an enemy installation. *Id.* ¶¶ 54,
4 61-62, 115-116. None of the graduates can complete the mission’s training course.
5 *Id.* ¶ 69. Maverick takes an unauthorized flight through the course, proving that it
6 can be done, and is then appointed team leader. *Id.* ¶¶ 73-74. Maverick leads his
7 team on a successful mission, then sacrifices his jet to protect Rooster, who in turn
8 saves Maverick. *Id.* ¶¶ 77-80. The two steal a plane from an enemy air base,
9 survive an aerial chase, and are saved by Hangman. *Id.* ¶¶ 81-84. Any similarity
10 between the works’ “plots” stems from the fact that both are set (in part) at Top
11 Gun—a real naval academy not invented by Yonay and not owned by Plaintiffs.

12 Indeed, Plaintiffs’ proffered expert does not identify *any* similarity, much
13 less a substantial one, between the works’ actual narratives or storylines. Instead,
14 he provides a hodgepodge list of supposed “similarities,” Kaiser Decl., Ex. 10,
15 Expert Report of Henry Bean (“Bean Rep.”), but the Ninth Circuit has repeatedly
16 cautioned that such lists are inherently subjective and unreliable, especially when
17 they emphasize “random similarities scattered throughout the works,” which are
18 insufficient to support an infringement claim. *Litchfield*, 736 F.2d at 1356. Worse
19 yet, their expert’s report is riddled with mischaracterizations and false similarities.⁵
20 *See* Mot. to Excl. at 11-15. And it improperly attempts to elide the lack of similarity
21 between the Article and *Maverick* by comparing the Article to the original *Top Gun*
22 film—even though that picture is indisputably non-infringing and is not at issue.⁶

23 But even setting aside those defects, all of the allegedly similar “plot

24 ⁵ *E.g.*, Bean Rep. at 12 (claiming both works include “surprising interludes on ‘glorious’
25 sailing yachts,” whereas *Maverick* includes a single scene with Maverick and Penny
26 manually sailing her broken two-person sailboat through rough seas to get the boat’s
27 engine repaired); *id.* at 15-16 (claiming Yonay’s description of the loss of control he felt
as a fighter jet passenger is similar to Maverick instructing trainees to act instinctively).

28 ⁶ *E.g.*, Bean Rep. at 11 (claiming the Article’s Yogi and Possum “get reproduced in” the
1986 *Top Gun* film’s Maverick and Goose).

1 elements”—such as those involving the history and operations of the “Top Gun”
 2 school, Bean Rep. at 11-15, risky aerial maneuvers, *id.* at 17-20, combat training,
 3 *id.* at 15-17, descriptions and depictions of fighter jets, *id.* at 15, 17-20, pilots doing
 4 push-up exercises, *id.* at 13, pilots being upset when they are shot down, *id.* at 15,
 5 and depictions of pilots’ social lives and bar outings, *id.* at 12, 14—are reported in
 6 the Article as factual. Facts such as these do not receive copyright protection, *see*
 7 *Corbello*, 974 F.3d at 977 (“Though the creative expression that is in the Work—
 8 the ‘writing style and presentation’—is protected by copyright, the assertedly
 9 historical elements are not.”), and must be extracted from consideration for the
 10 substantial similarity analysis (a task that Plaintiffs’ expert did not even attempt).

11 By way of example only:

12 • Plaintiffs’ expert claims as a similarity that both works feature a brass
 13 bell that is rung when someone violates a bar’s house rules. Bean Rep. at 12.
 14 But not only does the Article describe a real bell that exists to this day,
 15 similar bells and house rules exist at Navy Officer’s Clubs across the country
 16 and the world. SUF ¶¶ 30-31, 102, 179. Indeed, *Maverick*’s director visited
 17 several such Officer’s Clubs—and was required to buy a round after
 18 violating bar rules, just as in *Maverick*. *Id.* ¶ 102.

19 • Plaintiffs’ expert claims as “similarities” that both works depict Top
 20 Gun training as being “extremely arduous and demanding,” that only the best
 21 pilots are chosen for Top Gun (and only the best of those are invited back as
 22 instructors), that pilots are “crestfallen” when shot down in training, and that
 23 the Top Gun program is a critical component of national security. Bean Rep.
 24 at 12, 14-16. But these are all facts described in the Article about the nature
 25 of Top Gun and its pilots; Plaintiffs do not have a monopoly over these facts
 26 merely because Yonay once reported on them. SUF ¶¶ 11, 16, 43, 103-04.

27 • Plaintiffs’ expert claims that because the Article described certain
 28 fighter jet controls and features (such as a targeting system, an ejection seat,
 and wings on an F-14 that can “sweep back” depending on the needs of the
 pilot), *Maverick* infringes their copyright by depicting those elements. Bean
 Rep. at 15, 17, 19. Obviously, the Article’s *description* of real-life features
 of fighter jets does not allow Plaintiffs to stop others from *depicting* those
 features (much less with real jets).

• Plaintiffs’ expert claims that both works discuss and depict the effects
 of gravitational forces on fighter pilots, *id.* at 18, but the effect of G-forces is
 a fact of physics, and is not subject to copyright protection.

Even if the Court were to ignore that such “plot” elements are factual (which
 it should not), these elements would *still* need to be filtered out as common,

1 unprotected *scènes-à-faire*. See, e.g., *Tiscareno v. Netflix, Inc.*, 2014 WL
 2 12558125, at *8, *9 (C.D. Cal. Mar. 6, 2014) (finding no substantial similarity
 3 between two works involving “hotshot young pilots showing off their impressive
 4 aviation skills in which they maneuver their aircraft to avoid being shot down by a
 5 superior jet aircraft” and the protagonist saved the day after being chased by a more
 6 advanced fighter jet because these features were unprotected *scènes-à-faire*,
 7 common in action films, as “risky rescue missions, narrow escapes...or
 8 protagonists saving the day” are not “unique elements”); *Hist. Truth Prods., Inc. v.*
 9 *Sony Pictures Ent., Inc.*, 1995 WL 693189, at *8-9 (S.D.N.Y. Nov. 22, 1995)
 10 (unprotected *scènes-à-faire* included “military training”); see also SUF ¶¶ 105-09,
 11 123-24. For all these reasons, the works share no protectable similarities in plot.

12 **Themes (SUF ¶¶ 125-56)**. The Parties agree that *Maverick*’s primary
 13 themes are guilt, reconciliation, and redemption. SUF ¶¶ 125, 130, 134. The film
 14 features an older hero, facing the end of his military career, who makes peace with
 15 his past, while also achieving a great victory and disproving his doubters. *Id.* ¶¶ 54,
 16 115, 131-32, 135-39. Along the way, he mends relationships—reconciling and
 17 forming a father-son connection with Rooster, and entering into a renewed romantic
 18 relationship with Penny. *Id.* ¶¶ 88-89, 131-32, 142-44. The need to make peace
 19 with one’s past to move forward is reinforced in the emotional scene in which
 20 Iceman advises: “IT’S TIME TO LET GO.” *Id.* ¶¶ 70, 118.

21 Nothing resembling these themes appears in the Article, which is a non-
 22 fiction piece about two pilots at Top Gun, the history of the school, and the features
 23 of fighter planes. Plaintiffs’ expert argues that a “gentler” version of a “redemption”
 24 theme appears in the Article, in that Yogi and Possum are shot down in their initial
 25 “hop” but later successfully outmaneuver their opponents. Bean Rep. at 20. But
 26 that is not redemption, it is *improvement*—and to the extent this is even a “theme”
 27 of the Article, it flows from the unprotectable premise of a story set at Top Gun, the
 28 very purpose of which is to train great fighter pilots. See *Benay v. Warner Bros.*

1 *Entm't., Inc.*, 607 F.3d 620, 627 (9th Cir. 2010) (no substantial similarity where
 2 allegedly shared themes “arise naturally from the premise of an American war
 3 veteran who travels to Japan to fight the samurai”). And it bears no resemblance to
 4 *Maverick*, in which redemption comes not from Maverick improving his skills, but
 5 from his personal growth and redeeming himself to Penny, Rooster, and those in
 6 the Navy that doubted there was a place for him. SUF ¶¶ 132, 134-39.

7 Plaintiffs’ expert also argues that the Article features thematic elements
 8 based on the pilots who Yonay profiled—such as “‘true grit’ and jocular heroism,”
 9 “the camaraderie of brothers in arms,” “man vs. technology” and “the sheer love
 10 of...flying,” Bean Rep. at 20—but the Article’s interpretation of historical people
 11 and events is not protectable. Moreover, even if such themes were not based on
 12 facts, and even if such themes actually appeared in the works (and many of them do
 13 not),⁷ they flow from the unprotectable premise of a story set at Top Gun. *See*
 14 *Benay*, 607 F.3d at 627. And, in any event, they are too generic to be protectable.
 15 *See, e.g., Briggs v. Blomkamp*, 70 F. Supp. 3d 1155, 1177 (N.D. Cal. 2014) (“heroic
 16 sacrifice” not a protectable theme), *aff’d* 714 F. App’x 712 (9th Cir. 2018);
 17 *Goldberg v. Cameron*, 787 F. Supp. 2d 1013, 1020 (N.D. Cal. 2011) (man-versus-
 18 machine a “commonplace” theme); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d
 19 1108, 1113 (C.D. Cal. 2010) (“Themes of self-reliance and the importance of
 20 friendship and teamwork,” which “often predominate stories of competition” are
 21 “generic and not protectable.”); *Whitehead v. Paramount Pictures Corp.*, 53 F.
 22 Supp. 2d 38, 50 (D.D.C. 1999) (“patriotism” not a protectable theme).

23 **Dialogue (SUF ¶¶ 196-97).** “[E]xtended similarity of dialogue” is “needed

24 _____
 25 ⁷ For example, Plaintiffs’ expert’s purported “themes” of “the stoicism of the Western
 26 gunslinger,” “nostalgia for an earlier, simpler America,” and “the difficulty in balancing
 27 one’s personal passions with duty and family,” Bean Rep. at 20, do not appear anywhere
 28 in *Maverick*. And his “theme” of “individualism against institutional authority,” *id.*,
 appears to derive from a single, briefly-mentioned historical fact in the Article regarding
 the real-life Admiral Fellowes, who set out to restore decorum during his brief tenure at
 Top Gun in the 1970s. SUF ¶¶ 110, 114. This is not a “theme” of the Article in any sense.

1 to support a claim of substantial similarity,” *Olson v. Nat’l Broad. Co.*, 855 F.2d
2 1446, 1450 (9th Cir. 1988), and “[o]rdinary words and phrases are not entitled to
3 copyright protection,” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp.
4 2d 1043, 1071 (C.D. Cal. 2010). The Article does not contain dialogue: it quotes
5 individuals other than the author, SUF ¶ 196, but quotes are not dialogue and
6 cannot be copyrighted. *See Suid v. Newsweek Mag.*, 503 F. Supp. 146, 148 (D.D.C.
7 1980) (“The author of a factual work may not...claim copyright in statements by
8 others...reported in the work since the author may not claim originality as to those
9 statements.”). In any case, Plaintiffs do not, and cannot, allege any similarity
10 between the words in the Article and the dialogue in *Maverick*—let alone *extended*
11 similarity. SUF ¶ 197. Plaintiffs’ own proffered expert concedes that the words of
12 the Article—spoken or otherwise—do not actually appear in *Maverick*. *Id.*

13 **Settings (SUF ¶¶ 157-80)**. Plaintiffs’ expert contends both works are set at
14 NAS Miramar, “near the beach and the Pacific Ocean.” Bean Rep. at 24. That is
15 problematic on three levels. First and foremost, *Maverick* is not set at Miramar, but
16 rather at NAS North Island, a real (and different) naval base. SUF ¶¶ 39, 166, 169-
17 70. The settings are further differentiated by the fact that the Article is set in the
18 early 1980s (and even earlier for its historical detours), whereas *Maverick* is set in
19 the 2020s. *Id.* ¶¶ 8, 157, 159, 161. Second, Miramar is where the real-life Top Gun
20 training program was founded, so that setting is not protectable. *Id.* ¶¶ 8, 44, 157.
21 Third, while the real-life Miramar (like North Island) is located near the beach,
22 beaches are not mentioned or depicted anywhere in the Article. *Id.* ¶ 176. Thus,
23 that *Maverick* sets scenes at a beach is not a similarity in setting, much less a
24 protectable one.

25 Plaintiffs’ expert also claims similarities in that both works depict “cockpits,”
26 “the pilots’ favorite bar,” “briefing rooms and [] aircraft carriers,” and (most
27 absurdly) “the sky,” Bean Rep. at 25, but any similarities between these “settings”
28 “flow naturally from the works’ shared unprotected premise” and must be

1 “disregarded for purposes of the extrinsic test.” *Benay*, 607 F.3d at 628; *see also*
 2 SUF ¶ 180. As to the bar in particular, bars with bells that are rung when house
 3 rules are broken are a real-life feature at Navy Officer’s Clubs the world over,
 4 including at Miramar and North Island. *Id.* ¶¶ 30-31, 102. In any event, “[b]ar
 5 scenes are too common to carry much significance.” *See Carlini v. Paramount*
 6 *Pictures Corp.*, 2021 WL 911684, at *13 (C.D. Cal. Feb. 2, 2021), *aff’d*, 2022 WL
 7 614044 (9th Cir. Mar. 2, 2022).⁸

8 **Pace (SUF ¶¶ 192-95) and Mood (SUF ¶¶ 181-91).** The pace and mood of
 9 the works are very different: whereas the Article is a non-linear journalistic work
 10 that tells the true story of young pilots at Top Gun, provides information on the
 11 program’s history, and discusses the strengths and weaknesses of the F-14 fighter
 12 jet, SUF ¶¶ 1-34, 192-93, *Maverick* is a fast-paced, action-packed dramatic film, *id.*
 13 ¶¶ 194-95. And *Maverick* embodies a serious and intense mood, *id.* ¶¶ 183-86,
 14 whereas the Article is upbeat and lighthearted, *id.* ¶ 181. To the extent Plaintiffs
 15 allege similarities based on the pace or mood inherent in aerial combat, they are
 16 factual and unprotectable. *Id.* ¶ 188. These elements also reflect “[a] general mood
 17 that flows naturally from unprotectible basic plot premises” inherent to a story
 18 about fighter pilot training school, so are “not entitled to protection.” *Silas v. HBO,*
 19 *Inc.*, 201 F. Supp. 3d 1158, 1180 (C.D. Cal. 2016).

20 **Characters (SUF ¶¶ 110-24).** Plaintiffs try to claim that characters in
 21 *Maverick* resemble pilots profiled in the Article, but all of the pilots described in the
 22 Article are *actual people*, SUF ¶¶ 12, 110-11, 114, and “[a] character based on a
 23 historical figure is not protected for copyright purposes.” *Corbello*, 974 F.3d at
 24 976; *see also, e.g., Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1186 (C.D.

25 ⁸ Plaintiffs ignore that the Article reports on events in Hawaii, the Philippines, Singapore,
 26 and the Indian Ocean, none of which appears in *Maverick*, SUF ¶¶ 159-60, and that
 27 *Maverick* features locations that do not appear in the Article, including the desert
 28 headquarters of the scramjet program, a diner in the desert, NAS North Island, Penny and
 Iceman’s homes, beach football settings, a small sailboat, scenes of *Maverick* riding his
 motorcycle, and the unnamed country where the climax takes place, *id.* ¶¶ 76, 161-78.

1 Cal. 2001) (“much of this elucidation of the ‘character’ of Idema depends on
2 ‘historical fact’ and/or on the allegedly ‘true’ events of his life, and as such even
3 Idema can claim no exclusive right to these ‘facts’ of his life”), *aff’d in relevant*
4 *part*, 90 F. App’x 496 (9th Cir. 2003). That Yonay may have described a real-life
5 pilot’s *personality* does not change this result; each pilot described in the Article “is
6 not a fictional character whose personality was created in the work.” *Corbello*, 974
7 F.3d at 976 (author’s depiction of non-fiction character’s “voice, cool demeanor,
8 and braggadocio” is “not a protectable element”). The analysis thus ends here.

9 But even if the pilots profiled in the Article were not real-life figures,
10 Plaintiffs’ claims would still be baseless. Fictional characters are only protected
11 when they are “especially distinctive” and “contain some unique elements of
12 expression.” *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015). A “stock
13 character or basic character type...is not entitled to copyright protection,” *Shame on*
14 *You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1164 (N.D. Cal. 2017), *aff’d* 690
15 F. App’x 519 (9th Cir. 2017), and “[w]hen analyzing whether two protectible
16 characters are substantially similar, courts require a very high degree of similarity
17 between characters,” *Silas*, 201 F. Supp. 3d at 1177.

18 Plaintiffs’ expert argues that the title character in *Maverick* is similar to the
19 real-life Alex “Yogi” Hnarakis, because both are “jocular, confident, competitive,
20 good-humored and deeply committed,” “good looking with dark hair,” and close
21 with their RIO. *Bean Rep.* at 27-29. But courts routinely reject alleged character
22 similarities premised on “traits that are so generalized and/or cliché as to be nearly
23 *scenes a faire* of the military/action genre: i.e., the brash, cocky military officer
24 who does things his own way, and who triumphs over the forces of evil through his
25 own guile, wit, and pure physical abilities.” *Idema*, 162 F. Supp. 2d at 1186;
26 *Tiscareno*, 2014 WL 12558125, at *8, 9 (no substantial similarity where works
27 involved “hotshot young pilots showing off their impressive aviation skills,” as
28 “hotshot protagonists are certainly not unique elements”); *Whitehead v. Paramount*

1 *Corp.*, 53 F. Supp. 2d 38, 50 (D.D.C. 1999) (“General characteristics such as black
 2 hair, intelligence, patriotism and slight paranoia, however, are not copyrightable
 3 and do not establish substantial similarity.”), *aff’d* 2000 WL 3363291 (D.C. Cir.
 4 Apr. 19, 2000). Moreover, beyond vague generalities, the characters are wholly
 5 different. Yogi, at the time of the Article, is a 26-year-old Lieutenant and Top Gun
 6 student whose RIO is alive and well. SUF ¶¶ 112-13. Maverick, by contrast, is a
 7 50-something Captain, whose RIO died decades earlier, whose long career has been
 8 hindered by clashes with authority, and who returns to teach at Top Gun. *Id.* ¶¶ 59,
 9 115. Plaintiffs’ expert’s efforts to elide these differences by comparing Yogi to the
 10 version of Maverick in the original *Top Gun*, over thirty-five years ago, *see* Bean
 11 Rep. at 27-29, are improper; the original *Top Gun* is not at issue here.

12 Plaintiffs’ expert also improperly attempts to compare the real-life Dave
 13 “Possum” Cully to the character of Goose from *Top Gun*, *id.* at 27-29, though
 14 Goose *does not even appear* in *Maverick*, apart from photographs and a brief
 15 flashback, SUF ¶ 115. Obviously, a character who does not appear in *Maverick*
 16 cannot support a finding of infringement. Regardless, the alleged “similarities”—
 17 that both Possum and Goose are married, have a moustache, and are friends with
 18 their pilot, *see* Bean Rep. at 28-29—would be insufficient to support a claim.

19 His remaining claims of character similarities are nonsensical. They involve
 20 generic and factual features of fighter pilots,⁹ or are completely invented and/or
 21 depend on subjective impressions, rather than objective expression in the works.¹⁰

22 **Selection and Arrangement (SUF ¶ 198).** To the extent that Plaintiffs
 23 claim there is substantial similarity between the Article and *Maverick* based on the
 24 “selection and arrangement” of *unprotectable* elements, such argument also fails as

25 ⁹ *E.g.*, Bean Rep. at 28 (listing as similarity that pilots are portrayed as “elites with strict
 26 codes of honor”); *id.* at 29 (similarity that “pilots and crews are highly competitive”).

27 ¹⁰ *E.g.*, Bean Rep. at 27 (“All of them...we feel, are ‘men’s men,’ more comfortable with
 28 each other than with women...”); *id.* at 28 (claiming that both works “portray pilots as
 courageous cowboys”); *id.* at 30 (claiming as character similarity that “[t]hey all wanted
 to fly since they were boys,” although that is never stated or even implied in *Maverick*).

1 a matter of law. As the Ninth Circuit recently explained *en banc*, “a selection and
2 arrangement copyright protects...the *particular* way in which the artistic elements
3 form a coherent pattern, synthesis, or design,” and is infringed “only where the
4 works share, in substantial amounts, the ‘particular,’ *i.e.*, the ‘same,’ combination
5 of unprotectable elements.” *Skidmore*, 952 F.3d at 1074-75 (emphasis in original).
6 Critically, a plaintiff cannot state a “selection and arrangement claim” simply by
7 identifying “random similarities scattered throughout...the works” and “[l]abeling
8 them a ‘combination’ of unprotectable elements.” *Id.* at 1075. Without showing
9 how these unprotectable elements were specifically “arranged”—and how such
10 “arrangement” was copied by the defendant—there is no liability. *Id.*

11 The Article provides a different sequence of events from *Maverick*, which is
12 a fictional action movie culminating in a daring attack on an enemy target. SUF ¶¶
13 54-55, 76-86, 198. That there are some alleged similarities between the works is
14 not enough: a plaintiff cannot “establish substantial similarity by reconstituting the
15 copyrighted work as a combination of unprotectable elements and then claiming
16 that those same elements also appear in the defendant’s work, in a different
17 aesthetic context.” *Skidmore*, 952 F.3d at 1075.

18 Indeed, even Plaintiffs’ proffered expert does not seriously attempt to assert a
19 “selection and arrangement” claim. Although he describes some of Yonay’s basic
20 creative choices, he does not begin to explain how *Maverick* supposedly copies
21 Yonay’s “particular” selection or arrangement of elements. The best he musters is
22 to point out that the Article and *Maverick* share a (general) subject in Top Gun,
23 “give[]” their protagonists a “problem” to “overcome,” highlight those
24 protagonists’ respective “backstor[ies],” and feature a mix of scenes in the sky and
25 on the ground. *See* Bean Rep. at 36-38. Those generalities come nowhere close to
26 showing a “substantial” overlap in the “same” combination of elements. And while
27 Plaintiffs’ expert contends that, in both works, aerial training is followed by tactical
28 discussions in the briefing room, *id.* at 37-38, this real-life sequence is how Top

1 Gun actually operates, SUF ¶¶ 16, 158, and cannot support a selection and
 2 arrangement claim. *Corbello*, 974 F.3d at 974 n.2 (“The selection of the true stories
 3 behind the Band’s most popular songs and the arrangement of those stories in
 4 roughly chronological order is not original, and so not protectable by copyright.”).

5 For two works about Top Gun, the Article and *Maverick* are remarkably
 6 *different*. And the little they share is unprotectable. Courts in this Circuit routinely
 7 toss out claims premised on far more similar *fictional* works.¹¹ As a matter of law,
 8 the works here are not substantially similar, and Plaintiffs’ infringement claim fails.

9 **B. The Declaratory Judgment Claim Fails (Count II)**

10 The lack of substantial similarity between the Article and *Maverick* is also
 11 fatal to Plaintiffs’ declaratory judgment claim. Because the request for declaratory
 12 relief is premised on Plaintiffs’ allegation that *Maverick* is an infringing derivative
 13 work of the Article, this claim rises and falls with the copyright infringement claim.

14 **C. The Contract Claim Fails (Count I)**

15 Plaintiffs’ breach of contract claim fails because PPC was not obligated to
 16 credit Yonay on *Maverick* under the plain language of the Assignment. A credit
 17 obligation attaches only if a film is both produced under the Assignment and

18 ¹¹ *E.g.*, *Benay*, 607 F.3d at 625 (no substantial similarity between film *The Last Samurai*
 19 and screenplay of the same name, even though “both share the historically unfounded
 20 premise of an American war veteran going to Japan to help the Imperial Army by training
 21 it in the methods of modern Western warfare for its fight against a samurai uprising; both
 22 have protagonists who are authors of non-fiction studies on war and who have flashbacks
 23 to battles in America; both include meetings with the Emperor and numerous battle
 24 scenes; both are reverential toward Japanese culture; [] both feature the leader of the
 25 samurai rebellion as an important foil to the protagonist”; and in both “the American
 26 protagonist is spiritually transformed by his experience in Japan”); *Shame on You*, 120 F.
 27 Supp. 3d at 1152 (no substantial similarity between film *Walk of Shame* and screenplay of
 28 the same name, even though “both works feature a female lead character living in a big
 city, who breaks up with her boyfriend, gets drunk, spends a ‘one-nighter’ with a man she
 just met who works as a busboy/bartender, wakes up disoriented the next morning at his
 place, puts on the bright dress she was wearing the night before, and embarks on a walk of
 shame through the city to get to an important event”); *Funky Films*, 462 F.3d at 1075-78
 (no substantial similarity between funeral-home screenplay and television mini-series
 even though “[a]t first blush, the[] apparent similarities in plot appear significant”).

1 substantially based upon or adapted from the Article—yet *Maverick* is neither.

2 Paragraph 7(b) of the Assignment provides that PPC will “announce on the
3 film of any motion picture photoplay that may be *produced by it hereunder and*
4 *substantially based upon or adapted from [the Article] or any version or adaptation*
5 *thereof*, substantially incorporating the plot, theme, characterizations, motive and
6 treatment of [the Article] or any version or adaptation thereof, that said motion
7 picture photoplay is based upon or adapted from or suggested by a work written by
8 [Yonay], or words to that effect.” SUF ¶ 201. This language is unambiguous—
9 “and” means “and,” providing two conditions that must both be satisfied—and the
10 Court is therefore “bound to give effect to the plain and ordinary meaning of the
11 language used by the parties.” *People ex rel. Lockyer v. R.J. Reynolds Tobacco*
12 *Co.*, 107 Cal. App. 4th 516, 524 (2003).

13 “The English Oxford Dictionary defines ‘and’ as a conjunction ‘used to
14 connect words of the same part of speech, clauses, or sentences that are to be taken
15 jointly.’” *RBB2, LLC v. CSC ServiceWorks, Inc.*, 2019 WL 1170484, at *5 (E.D.
16 Cal. Mar. 13, 2019). Consistent with that common understanding, California courts
17 have repeatedly interpreted “and” as a conjunctive term used to connect distinct
18 contractual requirements. *See id.*; *see also, e.g., Alfaro v. Cmty. Hous.*
19 *Improvement Sys. & Plan. Assn., Inc.*, 171 Cal. App. 4th 1356, 1379 (2009) (no
20 “uncertain[ty]” in deed restriction because “[a]nd” does not mean “or”).

21 Giving the word “and” its common and ordinary meaning, Paragraph 7(b)
22 clearly imposes two distinct requirements. To trigger PPC’s credit obligation, a
23 film must be (1) produced under the Assignment’s copyright grant; and (2)
24 substantially based on or adapted from the Article or an adaptation of the Article,
25 including substantially incorporating its plot, theme, characterizations, motive, and
26 treatment. Plaintiffs nevertheless contend Paragraph 7(b)’s two subparts are not
27 distinct requirements but rather “part and parcel of the same thing”—a so-called
28 “hendiadys”—so they need not prove both conditions are satisfied. Dkt. 21 at 25.

1 Plaintiffs’ argument runs afoul of basic contract principles. First, a “contract
 2 term should not be construed to render some of its provisions meaningless or
 3 irrelevant.” *In re Marriage of Nassimi*, 3 Cal. App. 5th 667, 688 (2016). Plaintiffs’
 4 proposed interpretation does just that. It would strip the “produced...hereunder”
 5 language straight out of Paragraph 7(b). Second, even if California law permitted
 6 the Court to look beyond the contract’s “clear and explicit” language, discovery
 7 confirmed there is *no evidence* to support this untenable interpretation. Yet to
 8 indulge Plaintiffs’ argument, there must be “at least *some* evidentiary support for
 9 [the] competing interpretation[] of the contract’s language.” *Nat’l Union Fire Ins.*
 10 *Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983).

11 1. Maverick Was Not “Produced Hereunder.”

12 At the outset, *Maverick* was not produced under the Assignment of rights in
 13 the Article, because *Maverick* does not use any protectable expression from the
 14 Article. *See supra* Section III.A. Thus, for the same reasons that Plaintiffs’
 15 infringement claim fails, their contract claim fails too.

16 Plaintiffs’ own allegations further confirm there is no material dispute that
 17 *Maverick* was not “produced by [PPC] hereunder”—i.e., it was not produced under
 18 the Assignment’s copyright grant. SUF ¶ 205. As Plaintiffs repeatedly allege,
 19 “[o]n January 24, 2020, the copyright to the [Article]...reverted to [Plaintiffs] under
 20 the Copyright Act.” FAC ¶¶ 4, 27, 29. According to Plaintiffs, *Maverick* “was not
 21 completed until May 8, 2021, more than one year *after* Paramount’s grant in the
 22 1983 Agreement had been statutorily terminated.” *Id.* ¶ 37. Plaintiffs further label
 23 PPC’s argument that *Maverick* was substantially complete *before* Plaintiffs’
 24 termination was effective on January 24, 2020 as “disingenuous,” and seek a
 25 declaration that *Maverick* “was not completed until long after January 24, 2020,”
 26 when the Assignment’s copyright grant reverted to Plaintiffs. *Id.* ¶¶ 40, 61.

27 Plaintiffs cannot have it both ways—alleging that *Maverick* was produced
 28 under the Assignment’s copyright grant for purposes of their contract claim, but

1 disclaiming that fact to support their assertion of infringement. As this Court has
 2 recognized, “[w]hile it is permissible for a plaintiff to plead legal theories in the
 3 alternative, a plaintiff may not plead inconsistent facts.” *Buniatyan v. Volkswagen*
 4 *Grp. of Am., Inc.*, 2016 WL 6916824, at *5 (C.D. Cal. Apr. 25, 2016) (Anderson,
 5 J.). Plaintiffs cannot dispute that *Maverick* was *not* produced under the grant in the
 6 Assignment, and the Court should grant summary judgment in PPC’s favor.

7 2. *Maverick Is Not “Substantially Based Upon Or Adapted From” The*
 8 *Article.*

9 Plaintiffs likewise have no basis to claim that *Maverick* was “substantially
 10 based upon or adapted from” the Article—defined to require “substantially
 11 incorporating the plot, theme, characterizations, motive and treatment of said
 12 work”—because it does not use any of the Article’s protectable expression (and in
 13 fact has a very different plot, theme, etc.), *see supra* Section III.A.

14 Plaintiffs alternatively argue that since Yonay received a “suggested by”
 15 credit on the 1983 Top Gun film, and *Maverick* is an “adaptation” of that film
 16 “substantially incorporating” its elements, Paragraph 7(b) required PPC to credit
 17 Yonay on *Maverick* even if it did not use any protected expression from the Article.
 18 That argument, however, is belied by Paragraph 8, which provides: “Nothing
 19 contained in this agreement shall be construed to be or operate in derogation of or
 20 prejudicial to any rights, licenses, privileges or property which [PPC] may enjoy or
 21 to which [PPC] may be entitled as a member of the public even if this agreement
 22 were not in existence.” SUF ¶ 203. Any member of the public can make a movie
 23 about Top Gun (the Navy Fighter Weapons School), provided they do not use the
 24 Article’s (or PPC’s) protected expression. *Id.* Paragraph 8 thus confirms that PPC
 25 was entitled to make *Maverick* without doling out a credit. For this reason, too, the
 26 Court should grant summary judgment for PPC on the contract claim.

27 **IV. CONCLUSION**

28 Summary judgment should be granted in PPC’s favor on all claims.

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Dated: November 6, 2023

O'MELVENY & MYERS LLP

By: /s/ Molly M. Lens
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Paramount Pictures Corporation*

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Paramount Pictures Corporation, certifies that this brief complies with the Court’s October 23, 2023 Order, Dkt. 51, in that it is 25 pages in length.

Dated: November 6, 2023

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