

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN CHARLES,

Plaintiff,

v.

JERRY SEINFELD, COLUMBUS 81  
PRODUCTIONS, INC., EMBASSY ROW,  
COMEDIANS IN CARS, LLC, SONY PICTURES  
TELEVISION INC., and NETFLIX, INC.,

Defendants.

No. 18 Civ. 01196 (AJN) (KHP)

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW OF DEFENDANTS JERRY SEINFELD, COLUMBUS 81  
PRODUCTIONS, INC., EMBASSY ROW, COMEDIANS IN CARS, LLC, SONY  
PICTURES TELEVISION INC., AND NETFLIX, INC. IN SUPPORT OF THEIR  
MOTION TO DISMISS THE COMPLAINT**

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Dated: April 4, 2018

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Row, LLC, Comedians in Cars, LLC, Sony  
Pictures Television Inc., and Netflix, Inc.*

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Defendants Jerry Seinfeld, Columbus 81 Productions, Inc., Embassy Row, LLC (incorrectly sued as Embassy Row), Comedians in Cars, LLC, Sony Pictures Television Inc. (“Sony”), and Netflix, Inc. (collectively, “Defendants”) respectfully submit this memorandum of law in support of their motion to dismiss the Complaint (“Compl.”) filed by *pro se* Plaintiff Christian Charles for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **PRELIMINARY STATEMENT**

This lawsuit is an opportunistic—and belated—attempt to capitalize on the success of comedian Jerry Seinfeld’s award-winning and popular talk show, *Comedians in Cars Getting Coffee* (the “Show”).<sup>1</sup> The Show premiered on July 19, 2012 to widespread critical acclaim and quickly became a hit. Viewers have streamed episodes of the Show over 100 million times and it received Emmy Award nominations in 2013, 2014, and 2016. In January 2017, Mr. Seinfeld signed a deal to move the Show from Crackle, Sony’s online streaming service, to Netflix, with media outlets reporting that Netflix paid Mr. Seinfeld \$100 million.<sup>2</sup> On December 27, 2017—five-and-a-half years after the Show premiered—Plaintiff came out of the woodwork and sent an email to Mr. Seinfeld, claiming for the first time to be the true creator of the Show and threatening to sue unless he received a share of the profits. Plaintiff followed with this *pro se* lawsuit on February 9, 2018. The Complaint is as legally deficient as it is fictitious—it should be dismissed because it contains binding judicial admissions that are fatal to Plaintiff’s claims as a matter of law.

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<sup>1</sup> Columbus 81 Productions, Inc., owned by Mr. Seinfeld, worked with Embassy Row, LLC, a subsidiary of Sony Pictures Entertainment Inc., to produce the Show. Comedians In Cars, LLC, an entity controlled by Mr. Seinfeld, owns the copyright for the Show.

<sup>2</sup> See Compl. ¶¶ 37, 38 (attached as Exhibit A to the Declaration of Orin Snyder, executed on April 4, 2018 (“Snyder Decl.” or “Snyder Declaration”). All references to Exhibits (“Ex.”) herein shall be to Exhibits to the Snyder Declaration, unless otherwise stated.

Citing his limited role in directing the pilot episode of the Show in October 2011, Plaintiff alleges that he—not Jerry Seinfeld—is the “true creator-author behind the series.” *See* Compl. ¶¶ 13, 36. In support of this folly, Plaintiff manufactures a host of objectively meritless copyright and state law claims consisting of conclusory and inflammatory accusations that lack even a threadbare recital of the elements of the ten claims listed on a single page of the Complaint. *See id.* at page 4 of 15. More fundamentally, Plaintiff’s copyright claims fail as a matter of law for at least two separate and distinct reasons: (1) they are barred by the statute of limitations and (2) they fail to allege a protectable copyright interest.

**(1) Statute of Limitations.** Plaintiff’s claim of copyright ownership is time-barred under the Copyright Act’s three-year statute of limitations. Plaintiff’s copyright claim “does not involve the nature, extent or scope, of copying, and therefore, *ownership* forms the backbone of the ‘infringement’ claim at issue here.” *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011) (emphasis added). And “[w]here, as here, the ownership claim is time-barred, and ownership is the dispositive issue, any attendant infringement claims must fail.” *Id.* at 230.

Here, Plaintiff filed suit over five-and-a-half years after the date the first episode of the Show was publicly released, July 19, 2012. Plaintiff also admits that on at least two occasions *before* the public launch of the Show, Mr. Seinfeld expressly rejected Plaintiff’s demands for an ownership interest in the Show. *See* Compl. ¶¶ 23, 24. Defendants’ public release of the Show without crediting Plaintiff as a creator and Mr. Seinfeld’s “consistent[] claims [of] sole credit,” (Compl. ¶ 36), constituted further rejections of Plaintiff’s “express assertion of authorship.” *Kwan*, 634 F.3d at 229. Accepting the Complaint’s allegations as true for the limited purpose of deciding this motion, “there is no question that [Plaintiff] was aware of the dispute regarding [his] rights to [the Show] by [July 19, 2012], when the first [episode] was published, and therefore, [his]

ownership claim accrued at that time.” *Id.* And “[b]ecause [Plaintiff] did not file suit until [February 2018], more than three years after the publication of the first [episode of the Show] . . . any ownership claim relating to [the Show] is untimely.” *Id.*

**(2) No Protectable Copyright Interest.** The Complaint fails to state a cause of action because Plaintiff does not—and cannot—allege a protectable copyright interest. As a matter of law, Plaintiff’s alleged idea of creating a show based on comedians driving in a car to get coffee and engaging in comedic banter “is not subject to copyright protection because it consists of nothing but ‘common stock ideas’ and unoriginal *scènes à faire* that do not rise to the level of original protectable expression.” *Williams v. A & E Television Networks*, 122 F. Supp. 3d 157, 163 (S.D.N.Y. 2015).

Plaintiff’s tag-along state law claims are preempted by his deficient copyright cause of action. To the extent they are not preempted (which they are), Plaintiff’s state law claims for misappropriation and implied contract also fail because the Complaint’s own description of the Show’s concept makes it abundantly clear that the idea is not novel. Plaintiff concedes that the Show’s concept was developed “in response to” the filming of Mr. Seinfeld’s “cross-country road trip . . . in a ’67 Volkswagen Beetle with a friend,” Barry Marder, in 2000. Compl. ¶ 5. Indeed, the Show’s pilot episode—which Plaintiff had a limited role in directing—was filmed eleven years after Mr. Seinfeld’s road trip and features Mr. Seinfeld driving in a small car with a friend, Mr. Marder. Plaintiff’s admissions concerning the lack of novelty in the Show’s concept mandate dismissal of Plaintiff’s misappropriation and implied contract causes of action. Plaintiff also fails to allege any facts to plausibly state a claim for relief for the remaining state law claims listed on a single page of the Complaint. *See* Compl. at page 4 of 15. Quite simply, Plaintiff “plead[s] himself out of court by averring facts which, if true, would foreclose the exercise of [this Court’s]

jurisdiction.” *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 600 (S.D.N.Y. 2013) (Nathan, J.) (quoting *White v. Wellington*, 627 F.2d 582, 591 (2d Cir. 1980)).

Finally, Plaintiff does not come to this Court with clean hands. In addition to lying in the weeds for nearly six years before launching this baseless lawsuit, Plaintiff has committed fraud on the U.S. Copyright Office in an egregious effort to bolster his manufactured case. As explained in greater detail below, *ten days after* Mr. Seinfeld obtained a copyright registration for the first episode of *Comedians in Cars Getting Coffee*, Plaintiff fraudulently obtained his own copyright registration for the Show by listing himself as the sole author of “COMEDIANS IN CARS GOING FOR COFFEE.” By tweaking the Show’s title (“going for” as opposed to “getting”), Plaintiff deliberately misled the Copyright Office into accepting a bogus copyright application that directly conflicted with the legitimate one obtained by Mr. Seinfeld ten days earlier.

For these reasons and those discussed below, Plaintiff’s Complaint confirms that this case has no foundation in fact or law, and this Court should dismiss the Complaint in its entirety and with prejudice.

## **ALLEGATIONS IN THE COMPLAINT**

### **I. Background**<sup>3</sup>

Recognized as one of the best stand-up comedians of all time, Jerry Seinfeld is also an award-winning actor, writer, producer, and director. Mr. Seinfeld is perhaps best known for his starring role in *Seinfeld*, the famous television sitcom he created and wrote with Larry David. Mr. Seinfeld conceived of the concept for *Comedians in Cars Getting Coffee* in July 2000, during a cross-country road trip he took in a 1967 Volkswagen Beetle with a fellow comedian, Barry

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<sup>3</sup> While Defendants must address the allegations as pled under the applicable legal standards, to be clear, Plaintiff’s material allegations concerning the development and copyright ownership of the Show are false and wholly without merit.

Marder. Eleven years later, Mr. Seinfeld hired Plaintiff to direct the Show's pilot episode, which also featured Mr. Seinfeld and Mr. Marder driving in a small car.

Plaintiff alleges he had an "18 year working relationship with Jerry Seinfeld" and that his "work and development on the concept [of the Show] began in 2000 in response to filming Seinfeld's return to New York City after a cross-country road trip he had taken in a '67 Volkswagen Beetle with a friend. The filming was in connection with 'Comedian', a documentary feature film about Jerry Seinfeld," which Plaintiff directed. Compl. ¶¶ 4, 5. After Mr. Seinfeld's road trip, Plaintiff alleges that *he* came up with the idea of a show "called 'Two Stupid Guys In A Stupid Car Driving To A Stupid Town', also called "'67 Bug.'" *Id.* ¶ 5. Plaintiff alleges—without further elaboration—that in 2002, he "formally pitched this new car talk show to Seinfeld" and that "[t]he pitch that [he] presented was made with the intent and confidence that Seinfeld, *if agreeing* to the ideas and material presented, would partner and produce the Show with [Gary] Streiner and [him]." *Id.* ¶¶ 6, 7 (emphasis added). However, "Seinfeld *rejected* it." *Id.* ¶ 6 (emphasis added).

Nine years later, in July 2011, Plaintiff alleges that "Seinfeld emailed me and met with me to discuss the car talk show idea" and "asked if I would help him work on developing the show, as well as produce and direct the show." *Id.* ¶ 9. Plaintiff claims he reminded Mr. Seinfeld "that the idea [they] were discussing was the same idea [Plaintiff allegedly had] pitched to him in 2002." *Id.* Plaintiff alleges that he "shared [his] concept treatment ('The Treatment'), synopsis, script and camera shot list with Seinfeld. It was at this point that Seinfeld said that he wanted [Plaintiff] to proceed with shooting a test pilot for which he would contribute a portion of the cost." *Id.* ¶ 11. Plaintiff alleges, "my crew and I shot footage over a few days in early October 2011" and "created an edit of a pilot episode of 'Comedians In Cars Getting Coffee' as proof-of-concept of the Show." *Id.* ¶¶ 13, 15. "Upon seeing the proof of concept film/pilot," Plaintiff claims that Mr. Seinfeld

“supported my vision for the Show and began working on setting up meetings to exploit ‘Comedians in Cars Getting Coffee’.” *Id.* ¶ 17. Plaintiff alleges that he and Mr. Seinfeld “successfully pitched my completed edit of the test shoot/pilot to EMBASSY ROW.” *Id.* ¶ 18.

After the pitch, Plaintiff began demanding an ownership interest in the Show. Plaintiff admits that on at least two occasions—*before* the series entered production—Mr. Seinfeld expressly repudiated Plaintiff’s attempts to claim an ownership interest:

(1) “When Seinfeld heard that my reps were negotiating creative contribution and backend participation terms, his response was an irrational belief that *only he deserved any form of credit for the show*. In a phone call exchange between Seinfeld and I, *Seinfeld expressed outrage at the notion that I should participate as anything more than a work-for-hire director*, even though it was my concept. . . .” *Id.* ¶ 23 (emphasis added).

(2) “I emailed to suggest a *second* phone call with Seinfeld. On that call, he *reiterated* that I would *make money off of director’s fees* for shooting each episode of ‘Comedians In Cars Getting Coffee’. *I disagreed*. I expressed that I was a *creative partner* and not work-for-hire. The call ended with Seinfeld yelling and calling me ungrateful and out-of-line.” *Id.* ¶ 24 (emphasis added).

Even though Plaintiff alleges that he was “assured by Seinfeld’s rep” and “by Seinfeld’s sister” that “this would all blow over and that the relationship and collaboration would continue,” (*id.* ¶ 25), Plaintiff never alleges (because he cannot) that Mr. Seinfeld reconsidered and agreed that Plaintiff deserved an ownership interest. To the contrary, Plaintiff claims that Mr. Seinfeld “expresses in interviews that he alone created, directed and produced the Show” and “has failed to attribute, compensate and recognize me, the true creator-author behind the series.” *Id.* ¶ 36.

## **II. This Action**

On February 9, 2018, Plaintiff filed this *pro se* lawsuit against Defendants, alleging claims under the “Copyright Act of 1976” and the following “Pendant State Law Claims”: “Breach of Implied-In-Fact Contract”; “Tortious Interference with Prospective Business Relations”; “Quantum Meruit”; “Breach of Implied Covenant of Good Faith and Fair Dealing”; “Negligent

Infliction of Emotional Distress”; “Negligent Misrepresentation”; “Fraudulent Misrepresentation”; “Unfair Competition (Misappropriation/Bad Faith/Unconscionability)”; and “Breach of Confidence.” *Id.* at page 4 of 15. Even though Plaintiff’s ownership dispute with Mr. Seinfeld allegedly occurred in “2011-2012,” (*id.* ¶ 28), Plaintiff waited nearly six years to file suit, after he “learned that as of July 2017, Seinfeld has earned millions of sponsorship and advertising dollars.” *Id.* ¶ 37. Plaintiff filed suit just over a year after Mr. Seinfeld allegedly, “as of mid-January of 2017 [] sold ‘Comedians In Cars Getting Coffee’ to NETFLIX as part of a deal worth upwards of \$100 million.” *Id.* ¶ 38.<sup>4</sup>

On March 1, 2018, Defendants notified Plaintiff via email and letter that his copyright claims are time-barred—having expired at least two-and-a-half years ago—and that his other claims fail as a matter of law. Defendants explained that the claims are “objectively unreasonable” and urged Plaintiff to withdraw the Complaint. Given Plaintiff’s *pro se* status, Defendants notified him of the consequences of asserting “objectively unreasonable” claims and explained that the Court has the power to award attorney’s fees and costs to the prevailing party under 17 U.S.C. § 505 of the Copyright Act. *See Littel v. Twentieth Century–Fox Film Corp.*, 1996 WL 18819, at \*3 (S.D.N.Y. 1996) (imposing attorney’s fees against plaintiffs for an “objectively unreasonable” copyright infringement claim, “[e]ven if pursued in subjective good faith”). Having not been yet been served, Defendants also offered to waive formal service if Plaintiff decided to pursue his lawsuit. Defendants provided the Court’s service waiver form to Plaintiff and explained that this

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<sup>4</sup> On December 27, 2017, Plaintiff emailed Mr. Seinfeld, claiming to be the creator of the Show. Plaintiff demanded a share of the Show’s profits and threatened to sue Mr. Seinfeld if he did not agree to “confidential mediation.” Mr. Seinfeld’s counsel responded to Plaintiff on January 10, 2018, (Compl. ¶ 27), explaining that Plaintiff’s ownership claims were meritless and warning that Mr. Seinfeld would seek redress if he were to pursue his unwarranted claims. In two subsequent letters, Plaintiff again threatened to sue Mr. Seinfeld unless he agreed to a monetary settlement. After Mr. Seinfeld chose not to respond to Plaintiff’s continued demands, Plaintiff filed this lawsuit on February 9, 2018.

would save the time and expense of serving each individual Defendant. Plaintiff ignored Defendants' good faith offer to waive service. Instead, Plaintiff sent police officers to serve Mr. Seinfeld in the lobby of his apartment building and Mr. Seinfeld's sister at her office.

### **LEGAL STANDARD**

A motion to dismiss must be granted where, as here, a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although courts generally assume the truth of "well-pleaded factual allegations" on a motion to dismiss, that assumption does not apply to "legal conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678–79 (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Courts first disregard "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then "determine whether [the remaining pleadings] plausibly give rise to an entitlement to relief." *Id.* at 679.

On a Rule 12(b)(6) motion, the Court may consider "documents attached as exhibits, incorporated by reference, or that are 'integral' to the complaint." *McDonald v. West*, 138 F. Supp. 3d 448, 453 (S.D.N.Y. 2015), *aff'd*, 669 F. App'x 59 (2d Cir. 2016) (Nathan, J.) (citation omitted). "[C]ertain documents outside the complaint, including judicially noticeable documents such as federal copyright registrations, may be considered on a motion to dismiss for the limited purpose of 'determin[ing] what the documents state[ ].'" *Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 441 (S.D.N.Y. 2014) (Nathan, J.) (citations omitted).

## ARGUMENT

All of Plaintiff's causes of action are either time-barred, preempted, or unquestionably fail to state a claim for relief.

### **I. THE COPYRIGHT CLAIM MUST BE DISMISSED AS TIME-BARRED.**

#### **A. Plaintiff's Copyright Claim Concerns Ownership, Not Infringement.**

Plaintiff's copyright claim is absolutely time-barred under the Copyright Act's statute of limitations and must be dismissed as a matter of law. The primary copyright dispute here concerns the *ownership* of the Show, not the *infringement* of Plaintiff's alleged copyright. The Second Circuit explains that, "[t]o maintain an action for infringement, a plaintiff must establish '(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.' In many infringement cases, the first element (ownership) is not in dispute." *Kwan*, 634 F.3d at 229 (citation omitted). In this case, however, ownership of the Show's copyright is the key dispute. In *Kwan*, the court found that "the dispute over [a book] does not involve the nature, extent or scope, of copying, and therefore, ownership forms the backbone of the 'infringement' claim at issue here. That is, the dispute involves . . . whether [plaintiff's] editorial contributions to [the book] were significant enough to qualify her as the author and therefore owner of the copyright in [the book]." *Id.* "When confronted with analogous facts, a number of district courts in this Circuit have held that 'infringement' claims . . . are time-barred as a matter of law where, as here, the underlying ownership claim is time-barred." *Id.*; see also *Ortiz v. Guitian Bros. Music Inc.*, 2008 WL 4449314 at \*3 (S.D.N.Y. Sept. 29, 2008) ("Where, as here, a plaintiff's copyright ownership is not conceded (and, in fact, the defendant holds a prior copyright registration certificate for the disputed work), copyright ownership, and not infringement, is the gravamen of the plaintiff's claim to which the statute of limitations is applied.").

There is no doubt that “ownership forms the backbone of the ‘infringement’ claim at issue here.” *Kwan*, 634 F.3d at 229. Plaintiff alleges he was the original creator of the Show and takes issue with Mr. Seinfeld’s taking sole credit for it. *See, e.g.*, Compl. ¶ 36. (“In the press and awards recognition, *Seinfeld* consistently claims sole credit for ‘Comedians in Cars Getting Coffee’. Explicitly and implicitly, *Seinfeld* expresses in interviews that he alone created, directed and produced the Show. Seinfeld knowingly deprives me of my due credit. He has failed to attribute, compensate and recognize me, the *true creator-author* behind the series.”) (emphasis added). Plaintiff’s claims of sole ownership or of being the “true creator-author” are the very allegations that place a dispute over ownership squarely at issue. *See, e.g.*, *Ortiz*, 2008 WL 4449314, at \*3 (“Here, Ortiz places ownership of the copyright squarely at issue when he alleges . . . that he ‘is the sole owner of the copyrights in the [Score],’ Thus, ‘the infringement claims are barred if the ownership determination is time-barred.’”) (emphasis added).

**B. Plaintiff’s Copyright Claim Has Been Time-Barred For At Least Two-And-A-Half Years.**

Claims under the Copyright Act must be brought “within three years after the claim has accrued.” 17 U.S.C. § 507(b). “An ownership claim accrues only once, when ‘a reasonably diligent plaintiff would have been put on inquiry as to the existence of a right.’” *Kwan*, 634 F.3d at 228 (quoting *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992)). In *Kwan*, the Second Circuit instructs that “[a]ny number of events can trigger the accrual of an ownership claim, including ‘[a]n express assertion of sole authorship or ownership.’” *Id.* (quoting *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1315 (S.D.N.Y. 1997)). “By contrast, an infringement action may be commenced within three years of *any* infringing act, regardless of any prior acts of infringement.” *Id.* (citation omitted). “*Kwan* controls this case. As in *Kwan*, more than three years prior to [Plaintiff’s] filing of his suit, [Mr. Seinfeld] had made clear to him that he rejected

[Plaintiff's] assertion of an interest in the copyright and had gone on to exploit the copyrighted work in a manner of which [Plaintiff] was on notice. [Plaintiff's] assertion of his claim of a copyright interest was therefore time-barred." *Simmons v. Stanberry*, 810 F.3d 114, 116 (2d Cir. 2016). "[F]urthermore, [Plaintiff] [can] not revive the time-barred claim of ownership of a copyright interest by relying on the [D]efendants' continued exploitation of the copyright within three years of his filing suit." *Id.*

Plaintiff's own Complaint provides at least three separate and distinct admissions that confirm the accrual of Plaintiff's copyright ownership claim was triggered "well before three years prior to filing [his] complaint." *Parks v. ABC, Inc.*, 341 F. App'x 737, 738 (2d Cir. 2009).

**(1) Pre-Production Repudiation.** Plaintiff admits that after he and Mr. Seinfeld "successfully pitched [the] completed edit of the test shoot/pilot to EMBASSY ROW," (Compl. ¶ 23), but *before* "Mr. Seinfeld and SONY/Defendants . . . moved forward with [producing] the Show," (*id.* ¶ 26), Mr. Seinfeld expressly repudiated Plaintiff's attempts to claim an ownership interest in the Show. *See id.* ¶ 23 (informing Plaintiff on a phone call that "only he deserved any form of credit for the show" and that Plaintiff only participated as "work-for-hire director"); *id.* ¶ 24 (on a second phone call, "reiterat[ing] that [Plaintiff] would make money off of director's fees for shooting each episode of 'Comedians In Cars Getting Coffee'" and disagreeing with the assertion that Plaintiff was "a creative partner and not work-for-hire"). Plaintiff's allegations confirm that Mr. Seinfeld directly communicated his clear and unequivocal repudiation of Plaintiff's ownership interest to Plaintiff over the phone on two occasions. Although Plaintiff does not assign specific dates to these phone calls, he dates his "collaboration with Seinfeld [on the Show] from 2011-2012," (*id.* ¶ 28), which is six to seven years prior to Plaintiff filing this action.

**(2) Public Release of the Show and Failure to Credit or Compensate Plaintiff as a Creator.** Plaintiff alleges that Mr. Seinfeld “has failed to attribute, compensate and recognize me, the true creator-author behind the series” and that each released episode does not credit his alleged role in the creation of the Show. Compl. ¶ 36. The first episode of the Show was publicly released on July 19, 2012, which is the “Date of 1st Publication” that appears on the certificate of copyright registration for the first episode of the series, “Comedians In Cars Getting Coffee: Larry David: Larry Eats A Pancake – Episode #1001.” Ex. B. Defendants request that the Court judicially notice the fact that the publication date of the Show’s first episode is July 19, 2012.<sup>5</sup>

Courts routinely find that public distribution of a disputed work that fails to credit or acknowledge a plaintiff’s ownership interest creates sufficient notice to begin the running of the statute of limitations. *See, e.g., Simmons*, 810 F.3d at 115 (“Despite Simmons’s evident awareness of Stanberry’s repudiation . . . and of the[] release of the allegedly infringing song, Simmons did not file suit until more than three years after the song had been released.”); *Kwan*, 634 F.3d at 229 (“[T]here is no question that Kwan was aware of the dispute regarding her rights to [the book] by January 1999, when the first edition was published, and therefore, her ownership claim accrued at that time.”); *Ortiz*, 2008 WL 4449314, at \*3 (“Public distribution of the work at issue bearing copyright notices in the name of the defendant(s) which exclude the plaintiff claiming to own the subject copyright has been held to create sufficient notice to begin the running of the statute of limitations.”). As such, Defendants’ public distribution of the Show on July 19, 2012—while Plaintiff openly disputed Mr. Seinfeld’s claim of sole ownership, (Compl. ¶¶ 23, 24), and without

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<sup>5</sup> As this Court has previously recognized, “judicially noticeable documents such as federal copyright registrations, may be considered on a motion to dismiss for the limited purpose of ‘determin[ing] what the documents state[ ].’” *Ace Arts, LLC*, 56 F. Supp. at 441 (citations omitted); *see also Ledesma v. Del Records, Inc.*, 2015 WL 8023002, at \*4 (C.D. Cal. Dec. 4, 2015) (“The Court judicially notices the fact that the publication date of ‘Solo Soy Yo’ is September 30, 2014, based on the government-issued copyright certificate.”).

crediting Plaintiff as a creator (*id.* ¶ 36)—triggered the running of the statute of limitations on Plaintiff’s copyright ownership claim. Plaintiff filed this action five-and-a-half years after the Show was publicly released, which is two-and-a-half years after the statute of limitations expired.

In a similar vein, Plaintiff alleges Mr. Seinfeld “has failed to . . . compensate . . . me, the true creator-author behind the series,” (*id.* ¶ 36), and “exploited my work . . . without appropriate payment.” *Id.* ¶ 39. Courts also find that the failure to compensate a purported copyright owner, such as through royalty payments, “constitutes clear ‘express repudiation’ of [a plaintiff’s] alleged co-ownership of the copyright” and triggers the accrual of an ownership claim. *Mahan v. Roc Nation, LLC*, 634 F. App’x 329, 331 (2d Cir. 2016); *see also Ortiz*, 2008 WL 4449314, at \*4 (“Defendants’ open distribution and exploitation of the Motion Picture and Score without paying any royalties to Ortiz should have put Ortiz on notice that Defendants rejected his claim to copyright in the Score.”); *Dewan v. Blue Man Group Ltd. P’ship*, 73 F. Supp. 2d 382, 387 (S.D.N.Y. 1999) (finding non-payment of royalties gave plaintiff “ample reason to know a lawsuit was necessary”). Here, Plaintiff alleges that Defendants never compensated him as a copyright owner. *See* Compl. ¶ 26 (“[I]nstead of lawfully acquiring the material and compensating me for my work, Seinfeld and SONY/Defendants willfully and swiftly moved forward with the Show . . . .”). The “open distribution” of the Show—beginning on July 19, 2012—“without paying any royalties to [Plaintiff] should have put [Plaintiff] on notice that Defendants rejected his claim to copyright” and triggered the accrual of the ownership claim. *See Ortiz*, 2008 WL 4449314, at \*4.

**(3) Mr. Seinfeld Consistently and Publicly Claims Sole Credit for Creating the Show.**

Plaintiff alleges that “[i]n the press and awards recognition, Seinfeld consistently claims sole credit for ‘Comedians in Cars Getting Coffee,’” and that Mr. Seinfeld “expresses in interviews that he alone created, directed and produced the Show.” Compl. ¶ 36. This allegation is perhaps the

clearest basis for dismissing Plaintiff’s copyright claim as time-barred. Courts in this Circuit have long held that “[a]n express assertion of *sole authorship or ownership* will start the copyright statute of limitations running.” *Netzer*, 963 F. Supp. at 1315 (emphasis added). Here, Plaintiff alleges Mr. Seinfeld “consistently claims *sole credit*” for the Show in the press. Compl. ¶ 36 (emphasis added). News reports published shortly after the release of the Show’s first episode reveal that Mr. Seinfeld credits himself as the only person who came up with the concept of the Show. For example, in an August 23, 2012 press interview—just over a month after the first episode of the Show was released—Mr. Seinfeld claims he first “started playing around” with the idea for the Show “in 2002 with my ‘Comedian’ documentary.”<sup>6</sup> This public assertion is in direct tension with Plaintiff’s allegation that *he* first pitched the idea for the Show to Mr. Seinfeld in “in 2002, . . . shortly after the premiere of my feature film ‘Comedian.’” Compl. ¶ 6. Defendants ask the Court to take judicial notice of the fact that press coverage close to the release date of the Show’s first episode contain assertions by Mr. Seinfeld that he was the sole creator of the show.<sup>7</sup>

The allegations contained in the Complaint are clear: Plaintiff filed this lawsuit over five-and-a-half years after his copyright ownership claim accrued, well in excess of the three-year statute of limitations. *See TufAmerica, Inc.*, 968 F. Supp. 2d at 600 (“[T]he facts alleged in a complaint . . . can be self-defeating.”). Plaintiff’s *pro se* status cannot avail him here, as courts within this Circuit do not hesitate to dismiss copyright claims as time-barred when the allegations in a *pro se* “complaint demonstrate that [plaintiff] was aware of [defendants’] claims to her works

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<sup>6</sup> Katla McGlynn, *Jerry Seinfeld Opens Up About ‘Comedians In Cars Getting Coffee’: ‘This Is Just What We Like To Do’ (EXCLUSIVE)*, HUFFINGTON POST, Aug. 23, 2012, available at [https://www.huffingtonpost.com/2012/08/23/jerry-seinfeld-comedians-in-cars-getting-coffee\\_n\\_1825716.html](https://www.huffingtonpost.com/2012/08/23/jerry-seinfeld-comedians-in-cars-getting-coffee_n_1825716.html).

<sup>7</sup> *See Grecco v. Associated Press*, 2017 WL 2913501, at \*3 (S.D.N.Y. July 7, 2017) (“[A] court may ‘take judicial notice of the fact that press coverage . . . contained certain information, without regard to the truth of their contents.’”) (quoting *Staehr v. Hartford Fin. Services Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)).

well before three years prior to filing her complaint.” *Parks*, 341 F. App’x at 738 (dismissing *pro se* plaintiff’s copyright ownership claim as time-barred when plaintiff contacted defendant regarding her claim over three years before filing the complaint); *see also Brand v. RMM*, 2011 WL 1496344, at \*5 (S.D.N.Y. Apr. 18, 2011); *Poindexter v. Warner/Chappell Music Inc.*, 2009 WL 302064, at \*4 (S.D.N.Y. Feb. 9, 2009), *aff’d sub nom.*, 372 F. App’x 103 (2d Cir. 2010).

**C. There Is No Basis For Tolling The Statute Of Limitations.**

The allegations contained in the Complaint provide no basis for the doctrines of equitable estoppel or equitable tolling to suspend the running of the limitations period, which are only available under “extraordinary circumstances.” *Netzer*, 963 F. Supp. at 1316. “Plaintiff proffers no evidence from which it can be reasonably inferred that he was justifiably ignorant of his ability to bring the instant suit from [when his claim accrued], that [Defendants] committed any egregious wrongdoing whatsoever that caused Plaintiff’s extensive delay, or that Plaintiff pursued his claims . . . with reasonable diligence.” *Poindexter*, 2009 WL 302064, at \*5 (finding no equitable tolling for *pro se* plaintiff’s time-barred copyright ownership claims).

Moreover, “[s]tatutes of limitations are not arbitrary obstacles” and are especially important “in the area of copyright, where certainty and repose are essential to the functioning of the copyright market.” *Netzer*, 963 F. Supp. at 1318 (citations omitted). There is no need to speculate why Plaintiff chose to file suit now, as Plaintiff only filed this baseless lawsuit after he “learned” that the Show became a success and that “Seinfeld has earned millions of sponsorship and advertising dollars.” Compl. ¶ 37. Plaintiff’s decision to sit on his claim until he “learned” of the Netflix deal is precisely the type of tactical behavior the Copyright Act’s statute of limitations is designed to address, and is an insufficient rationale “to warrant tolling the limitations period and undermining settled expectations and investments made by the Defendants.” *Netzer*, 963 F. Supp. at 1318–19. “It is inequitable to allow the putative co-owner to lie in the weeds for years after his

claim has been repudiated while large amounts of money are spent developing a market for the copyrighted material.” *Id.* at 1318 (quoting *Zuill v. Shanahan*, 80 F.3d 1366, 1370–71 (9th Cir. 1996)). “Given the facts pleaded by Plaintiff, Plaintiff will not be able to overcome the statute of limitations with an Amended Complaint” and granting leave to amend would be futile. *Parks v. ABC, Inc.*, 2008 WL 205205, at \*3 (S.D.N.Y. Jan. 24, 2008), *aff’d*, 341 F. App’x 737 (2d Cir. 2009) (declining to grant *pro se* plaintiff leave to amend her time-barred copyright claim).

**D. In The Alternative, Plaintiff’s Copyright Claim Must Be Dismissed Because It Fails To Allege A Protectable Copyright Interest.**

The Complaint fails to state a copyright infringement claim for a second and independent reason: Plaintiff does not, and cannot, allege a protectable copyright interest. “To state a claim for copyright infringement, a plaintiff must plausibly allege facts that demonstrate (1) ownership of a valid copyright, and (2) the defendants’ copying of constituent, *original elements* of plaintiff’s copyrighted work.” *McDonald*, 138 F. Supp. 3d at 453 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)) (emphasis added). “Not every aspect of every creative work is protected by copyright.” *McDonald*, 138 F. Supp. 3d at 454 (citing *Feist*, 499 U.S. at 345). The work must “possess[] at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345.

As a matter of law, Plaintiff cannot claim that his alleged idea of creating a show based on comedians driving in a car to get coffee and engaging in comedic banter is “subject to copyright protection because it consists of nothing but ‘common stock ideas’ and unoriginal *scènes à faire* that do not rise to the level of original protectable expression.” *Williams*, 122 F. Supp. 3d at 163 (finding “Plaintiff does not own an enforceable copyright in the general idea of a reality show about arranged marriages or marriage between strangers”); *see also McDonald*, 138 F. Supp. 3d at 457 (“[A] theme of ‘referencing significant Americans’ is an uncopyrightable idea”). Plaintiff stakes his copyright claim on the “concept treatment” he allegedly developed for the Show,

(Compl. ¶ 11), which formed the basis for his copyright registration. Ex. C.<sup>8</sup> Plaintiff’s “concept treatment,” however, is not subject to copyright protection because “the ‘everyday life’ activities listed in the Treatment as potential elements of the show do not extend the nature of the element of the treatment beyond mere *scènes à faire* associated with any [] television show that purports to document a person’s everyday life, such as grocery shopping,” or in our case—getting coffee. *Williams*, 122 F. Supp. 3d at 164.

Dozens of similar or copycat shows have emerged after *Comedians in Cars Getting Coffee* first aired. See, e.g., *Carpool Karaoke*; *Jay Leno’s Garage*; *Too Many Comedians In Cars Getting Coffee*; *Comedians on Bikes Getting Soup*; *Comedians Walking & Getting Mani-Pedis*; *Cougars in Cars Getting Cosmos*. Even though all of these shows unapologetically copied (or paid tribute to) *Comedians in Cars Getting Coffee*, Mr. Seinfeld has not sued them for infringement—nor could he—because there is nothing original about their shared underlying concept of making a show based on people traveling together and engaging in comedic banter. For example, when the Show first premiered, British newspapers called it a “rip off” of *Carpool*, the British web series created by Robert Llewellyn. In a news interview at the time, Mr. Llewellyn responded that “while it’s clearly exactly the *same* idea, shot in an almost *identical* way, it’s hard to suggest it’s a rip off. . . . The lawyers confirmed that *we couldn’t sue them* and I wouldn’t want to.”<sup>9</sup> Mr. Llewellyn’s statement mirrors hornbook law: you cannot “rip off” or state a valid copyright ownership claim over a show based on people driving in a car to get coffee. The existence of these shows is proof

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<sup>8</sup> The Complaint explicitly references Plaintiff’s purported copyright registration for the Show (Compl. ¶ 1) and the Court may take judicial notice of documents “incorporated by reference” in the Complaint. *McDonald*, 138 F. Supp. 3d at 453. The Court may also take judicial notice of the contents of federal copyright registrations. *Ace Arts, LLC*, 56 F. Supp. at 441.

<sup>9</sup> Soraya Roberts, *Jerry Seinfeld’s “Comedians in Cars” Web Series Ruffles U.K. Feathers With Similarity to British “Carpool,”* THE DAILY BEAST, Aug. 2, 2012, available at <https://www.thedailybeast.com/jerry-seinfelds-comedians-in-cars-web-series-ruffles-uk-feathers-with-similarity-to-british-carpool> (emphasis added).

enough that the banal idea behind the Show belongs to the world and is not subject to copyright protection.<sup>10</sup>

**E. Plaintiff’s Copyright Registration Was Fraudulently Obtained And Is Invalid As A Matter of Law.**

Plaintiff mistakenly cites to his copyright registration to substantiate his ownership claim. Compl. ¶ 1. Although a “Copyright Office certificate of registration ‘constitute[s] prima facie evidence of the validity of the copyright,’” “[a] challenge to the presumption may be made through a showing ‘that there has been a fraud upon the copyright office.’” *We Shall Overcome Found. v. Richmond Org., Inc. (TRO Inc.)*, 221 F. Supp. 3d 396, 407 (S.D.N.Y. 2016) (citations omitted). “The presumption of validity may only be overcome . . . by proof of deliberate misrepresentation” and “[i]f fraud is proven, that showing can invalidate the copyright.” *Id.* at 407–08.

Although the Show premiered on July 19, 2012, Defendant Comedians In Cars, LLC, an entity controlled by Mr. Seinfeld, obtained a copyright registration for the first episode of the *Comedians in Cars Getting Coffee* on September 8, 2016. Ex. B. *Ten days later*, Plaintiff fraudulently obtained a copyright registration for “COMEDIANS IN CARS **GOING FOR COFFEE**” (with an alternate title: “COMEDIANS IN CARS GETTING COFFEE”), listing himself as the sole author and copyright holder. Ex. C (emphasis added). There can be no doubt the suspicious change in the Show’s title (“going for” as opposed to “getting”) was designed to mislead the Copyright Office into accepting a copyright application that directly conflicted with

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<sup>10</sup> Of course, Mr. Seinfeld’s copyrights for each episode of the *Show* are protected, even if the *Show* was found to be “a compilation of unprotectible elements.” *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1004 (2d Cir. 1995) (citing *Feist*, 499 U.S. at 362). What is protected is “the original way in which the author has ‘selected, coordinated, and arranged’ the elements of his or her work.” *Id.* (quoting *Feist*, 499 U.S. at 358). By contrast, Plaintiff’s “Treatment consists predominately of unprotectable *scènes à faire*”, *Williams*, 122 F. Supp. 3d at 163, and “a director’s contribution to an integrated ‘work of authorship’ such as a [television show] is not itself a ‘work of authorship’ subject to its own copyright protection.” *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 259 (2d Cir. 2015).

the one filed by Mr. Seinfeld. The Court need not look further than the Complaint for *prima facie* evidence of deliberate misrepresentation. Nowhere does Plaintiff allege the true title of the Show is “*Comedians in Cars **Going For Coffee.***” Worse, Plaintiff falsely refers to his copyright registration in the Complaint as, “‘Comedians In Cars Getting Coffee’ (US Copyright Registration #PA 2-055-60),” (Compl. ¶ 1), misleadingly changing the title of his copyright registration to give the Court the mistaken impression that his registration matches the Show’s actual title. His misrepresentation in his copyright application that he was the *sole* author of the Show is further evidence of fraud. *See* Compl. ¶ 24 (describing Mr. Seinfeld as an alleged “creative partner”). Misrepresentations concerning authorship on a copyright application “plausibly allege[] fraud on the Copyright Office.” *We Shall Overcome Found.*, 221 F. Supp. 3d at 407.

## **II. PLAINTIFF DOES NOT STATE A CLAIM FOR BREACH OF IMPLIED CONTRACT.**

Plaintiff alleges in conclusory fashion that “an understanding for compensation existed along with an implied-in-fact contract with backend participation between myself and Seinfeld.” Compl. ¶ 34. Plaintiff’s attempt to repackage his deficient copyright claim as a claim for breach of implied contract against Mr. Seinfeld fails for several distinct reasons.<sup>11</sup>

**Preemption.** Plaintiff’s implied contract claim is squarely preempted by the Copyright Act. “Claims brought pursuant to state law are preempted by the Copyright Act where the following conditions exist: ‘(1) the subject matter of the state-law right falls within the subject matter of the copyright laws; and (2) the state-law right asserted is equivalent to the exclusive rights protected by federal copyright law.’” *Smith v. New Line Cinema*, 2004 WL 2049232, at \*4 (S.D.N.Y. Sept. 13, 2004) (citation omitted). Plaintiff’s “claim for breach of implied contract is

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<sup>11</sup> New York law applies to Plaintiff’s state law claims, as nearly all of the significant events alleged in the Complaint take place in New York. *See, e.g., Tri-State Emp’t Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 261 (2d Cir. 2002).

based on the same allegations underlying his copyright claim: [D]efendants’ failure to compensate and credit him for the alleged unauthorized use of his original [concept treatment].” *Id.*; *see also We Shall Overcome Found.*, 221 F. Supp. 3d at 413. Indeed, Plaintiff’s implied contract claim for “backend participation” (Compl. ¶ 34) is equivalent to his copyright claim for “creative contribution and backend participation.” *Id.* ¶ 23. “[O]nce a district court determines that a state law claim has been completely preempted and thereby assumes jurisdiction over it, the court must then dismiss the claim for failing to state a cause of action.” *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 309 (2d Cir. 2004).

**No Novelty.** Plaintiff’s breach of implied contract and misappropriation claims must be dismissed because the concept of comedians driving in a car to get coffee is not a novel idea. “[I]n order to recover under either [implied contract or misappropriation], the plaintiff must establish the existence of a genuine issue as to the novelty and originality of the allegedly misappropriated ideas. . . . [I]deas which are not novel are in the public domain and may freely be used by anyone with impunity. Lack of novelty in an idea is fatal to any cause of action for its unlawful use.” *Lapine v. Seinfeld*, 31 Misc. 3d 736, 743–44 (Sup. Ct. 2011). “The test for novelty is rather stringent [and] the idea must show true invention and not a mere adaptation of existing knowledge.” *Broughel v. Battery Conservancy*, 2010 WL 1028171, at \*4 (S.D.N.Y. Mar. 16, 2010). On a motion to dismiss, a court may find that a complaint does not allege a novel idea if it is “simply a variation on a theme that already existed.” *Zikakis v. Staubach Retail Servs., Inc.*, 2005 WL 2347852, at \*3 (S.D.N.Y. Sept. 26, 2005).

As described in detail above, Plaintiff admits that the Show’s concept is simply a variation on a theme that already existed, explaining that the “work and development on the concept began in 2000 *in response to* filming *Seinfeld*’s. . . cross-country road trip he had taken in a ’67

Volkswagen Beetle with a friend.” Compl. ¶ 5 (emphasis added). Through this allegation, Plaintiff has again pleaded himself out of a claim, as the pilot episode of the Show—directed by Plaintiff—also features Mr. Seinfeld driving in a small car with a friend. *See Marraccini v. Bertelsmann Music Grp. Inc.*, 221 A.D.2d 95, 98 (1996) (“[T]he concept for a music video cable television channel . . . was an idea preexisting in the public domain prior to 1992 and that plaintiff’s proposal was a creative variation on this theme.”).

**No Assent and Undefined Compensation.** The breach of implied contract claim must also be dismissed because the complaint “does not contain any factual allegations of conduct by [Mr. Seinfeld] showing that [he] assented to a contract with plaintiff” and “does not allege the amount of compensation plaintiff claims she is owed.” *Lapine*, 31 Misc. 3d at 742. As in *Lapine*, Plaintiff’s “complaint does not contain any factual allegations of conduct by [Mr. Seinfeld] showing that [he] assented to a contract with [P]laintiff.” *Id.* In fact, Plaintiff admits that Mr. Seinfeld expressly and vocally rejected Plaintiff’s demands for an ownership interest in the Show on at least two occasions *before* it publicly launched. *See* Compl. ¶¶ 23, 24. In addition, “although price is an essential element of a contract, the [C]omplaint does not allege the amount of compensation [P]laintiff claims [he] is owed.” *Lapine*, 31 Misc. 3d at 742. Instead, Plaintiff implausibly claims there was an “understanding for compensation” because—nearly ten years before filming the Show’s pilot in 2011—Mr. Seinfeld offered Plaintiff “a 50/50 split of profits” on a documentary film released in 2002. Compl. ¶¶ 6, 13, 34. Plaintiff does not allege that Mr. Seinfeld promised him a 50/50 split on *this* particular project and even admits that he and Mr. Seinfeld never resolved their disagreement on the nature of Plaintiff’s compensation. *Id.* ¶ 24; *see Marraccini*, 221 A.D.2d at 97 (finding an “undefined equity stake” unenforceable).

### **III. PLAINTIFF DOES NOT STATE A CLAIM FOR “UNFAIR COMPETITION (MISAPPROPRIATION/BAD FAITH/UNCONSCIONABILITY)” OR “QUANTUM MERUIT.”**

Plaintiff’s misappropriation and quantum meruit claims are preempted by the Copyright Act and must be dismissed as a matter of law. “It is well settled that misappropriation claims grounded solely in the use of a plaintiff’s protected expression are preempted by the Copyright Act.” *Lapine*, 31 Misc. 3d at 751; *see also Wnet v. Aereo, Inc.*, 871 F. Supp. 2d 281, 292 (S.D.N.Y. 2012) (Nathan, J.) (“[T]he Second Circuit has broadly precluded unfair competition claims involving misappropriation of a plaintiff’s creative works. . . .”). In addition, as with his implied contract claim, the misappropriation claim must be dismissed because the Show’s concept is, “at best, a creative variation on preexisting ideas” and “lack[s] the novelty in general necessary to support a cause of action for misappropriation.” *Lapine*, 31 Misc. 3d at 746.

Courts treat “quantum meruit and unjust enrichment claims as a single quasi-contract claim.” *Zikakis*, 2005 WL 2347852, at \*5. “The Second Circuit has . . . held that unjust enrichment claims related to the unauthorized use of copyrighted works are not ‘qualitatively different’ than copyright claims.” *Wnet*, 871 F. Supp. 2d at 291; *see also Briarpatch Ltd., L.P.*, 373 F.3d at 309. Here, Plaintiff alleges nothing to distinguish quantum meruit from his copyright claim that Defendants “exploited [his] work . . . without appropriate payment.” Compl. ¶ 39.

### **IV. PLAINTIFF DOES NOT STATE A CLAIM FOR HIS MISCELLANEOUS REMAINING STATE LAW CAUSES OF ACTION.**

Plaintiff’s remaining throw-away state law claims also fail as a matter of law. To the extent the following claims are not preempted or time-barred, there are no allegations—conclusory or otherwise—that come close to satisfying Fed. R. Civ. P. 8, which “requires, at a minimum, that a complaint give each defendant ‘fair notice of what the plaintiff’s claim is and the ground upon which it rests.’ By lumping all the [D]efendants together in each claim and providing no factual

basis to distinguish their conduct, [Plaintiff's] [C]omplaint failed to satisfy this minimum standard.” *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (citations omitted).

**A. Plaintiff Fails To State A Claim For “Tortious Interference With Prospective Business Relations.”**

Plaintiff's “claims for tortious interference [] are based on allegations of unauthorized exploitation of copyrighted material [and] are preempted by federal copyright law.” *Netzer*, 963 F. Supp. at 1322–23. Plaintiff also fails to plead a “sufficiently particular allegation of interference with a specific . . . business relationship,” *16 Casa Duse, LLC*, 791 F.3d at 262 (citation omitted), or “any factual allegations plausibly showing [Defendants acted] solely out of malice.” *Ace Arts, LLC*, 56 F. Supp. 3d at 453. And, “although the exact date of the injury is not alleged, it must have [occurred in ‘2011-2012,’ (Compl. ¶ 28), or at least three years before this lawsuit], rendering the claims time-barred.” *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY.3d 132, 141 (2009).

**B. Plaintiff Fails To State A Claim For “Breach of Implied Covenant of Good Faith And Fair Dealing.”**

“There can be no breach of contract, or the implied covenant of good faith and fair dealing, without a governing valid contract.” *Garrett v. Music Pub. Co. of Am., LLC*, 740 F. Supp. 2d 457, 463 (S.D.N.Y. 2010). Plaintiff's failure to state a claim for implied contract requires dismissal of this implied covenant cause of action. *See Netzer*, 963 F. Supp. at 1322.

**C. Plaintiff Fails To State A Claim For “Negligent Infliction Of Emotional Distress.”**

Plaintiff's decision to add an objectively unreasonable and unsupported claim for negligent infliction of emotional distress is evidence of his malicious motivation for bringing this lawsuit. Unsurprisingly, Plaintiff “has failed to allege that the [] Defendants engaged in extreme and outrageous conduct,” mandating dismissal of this claim. *Guan N. v. NYC Dep't of Educ.*, 2013 WL 67604, at \*26 (S.D.N.Y. Jan. 7, 2013) (Nathan, J.). This claim is also time-barred, as any

purported injury would have occurred “from 2011-2012,” (Compl. ¶ 28), at least three years before Plaintiff filed suit. *See Baker v. Bank of Am., N.A.*, 2016 WL 9409022, at \*3 (S.D.N.Y. Oct. 31, 2016), *aff’d*, 706 F. App’x 43 (2d Cir. 2017).

**D. Plaintiff Fails To State A Claim For “Negligent Misrepresentation.”**

Plaintiff fails to allege a single misrepresentation, let alone one that he reasonably relied upon. *See Frederick v. Capital One Bank (USA), N.A.*, 2015 WL 5521769, at \*11 (S.D.N.Y. Sept. 17, 2015) (Nathan, J.). Nor does he plead any facts to show his work on the pilot episode or arm’s length negotiations over compensation gave rise to a privity-like relationship. Compl. ¶¶ 11, 22–24. “[T]he relationship between employer (or prospective employer) and employee is not fiduciary in nature and thus does not constitute a ‘special relationship’ for purposes of a negligent misrepresentation claim.” *Cohen v. Avande, Inc.*, 874 F. Supp. 2d 315, 327 (S.D.N.Y. 2012).

**E. Plaintiff Fails To State A Claim For “Fraudulent Misrepresentation.”**

There are no allegations to support a claim for fraudulent misrepresentation, which must be pled with particularity. *See Fed. R. Civ. P. 9(b)*. Plaintiff “do[es] not adequately allege a cause of action for fraud; not only [has he] failed to identify the specific time when or place where the alleged misrepresentations were made, but [he] have failed to identify the [D]efendant who made the allegedly material misrepresentations.” *Sampson v. MediSys Health Network, Inc.*, 2012 WL 3027838, at \*10 (E.D.N.Y. July 24, 2012). Alleging an objectively unreasonable and inflammatory fraud claim is further evidence of Plaintiff’s intent to smear Defendants.

**F. Plaintiff Fails To State A Claim For “Breach Of Confidence.”**

Aside from failing to allege any *breach* of confidence, Plaintiff’s own allegations concerning the heated arm’s length negotiations with Mr. Seinfeld over compensation (*id.* ¶¶ 22–24) defeat this claim as a matter of law. “[N]o confidential relationship can exist between [p]arties dealing at arm’s length, each seeking for himself the best advantage to be derived from a

transaction.”” *Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 543 (D. Md. 2000) (quoting *Sachs v. Cluett Peabody & Co.*, 39 N.Y.S.2d 853, 856 (N.Y. App. Div. 1943)); *see also* *Schenkman v. New York Coll. of Health Professionals*, 29 AD.3d 671, 672 (2d Dept. 2006). In any event, this claim is time-barred, as any purported breach would have occurred “from 2011-2012,” (Compl. ¶ 28), and the statute of limitations for a breach of fiduciary duty cause of action—such as this—is three years. *Scott v. Fields*, 85 A.D.3d 756, 759 (2d Dept. 2011).

### CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice and grant such further relief as appropriate.

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Respectfully Submitted,

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