

1 LOEB & LOEB LLP
MICHAEL ANDERSON (State Bar No. 143168)
2 manderson@loeb.com
DONALD A. MILLER (State Bar No. 228753)
3 dmiller@loeb.com
LOEB & LOEB LLP
4 10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067-4120
5 Telephone: 310-282-2000
Facsimile: 310-282-2200

6 Attorneys for Defendant
7 WILLIAM PAUL YOUNG

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 WAYNE JACOBSEN, an individual;
BRAD CUMMINGS, an individual,
13 Plaintiffs,
14

15 v.

16 WILLIAM PAUL YOUNG, an
individual; and DOES 1-10, inclusive
17 Defendants.
18

Case No. CV 10-3246 JFW (JCx)
Assigned to the Hon. John F. Walter

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT YOUNG’S MOTION
TO DISMISS PLAINTIFFS’ FIRST
CLAIM FOR RELIEF FOR
DECLARATORY RELIEF AND
DISMISS OR STAY THE SECOND
CLAIM FOR RELIEF FOR
BREACH OF CONTRACT**

*[Notice of Motion and Motion; Request
for Judicial Notice; Declaration of
Michael T. Anderson]*

Date: August 9, 2010
Time: 1:30 p.m.
Courtroom: 16

28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant William Paul Young is the author of *The New York Times*
4 bestselling Christian novel *The Shack*. In November 2009, Mr. Young filed a
5 Complaint in California state court (the “State Court Action”) against its publishers
6 Windblown Media, Inc. (“Windblown”) and Hachette Book Group, Inc.
7 (“Hachette”) for failing to properly account and pay to him his contractual royalty
8 and share of net profits for the novel. After losing three related motions in the State
9 Court Action, Windblown filed a Cross-Complaint against Mr. Young alleging that
10 he has refused to dispose of the motion picture rights in the work pursuant to a May
11 1, 2008 Letter of Understanding.

12 Now, Windblown’s principals, Plaintiffs Brad Cummings and Wayne
13 Jacobsen (“Plaintiffs”), have filed this federal court action alleging two claims
14 against Mr. Young: (1) a declaratory relief claim in which Plaintiffs belatedly seek
15 co-authorship credit for *The Shack* (the “Book”), despite signing at least three
16 agreements (attached to Plaintiffs’ first amended complaint) that recognize Mr.
17 Young as the sole author of the Book, registering the Book with the Copyright
18 office in Mr. Young’s name alone, and publishing the Book in Mr. Young’s name
19 for over three years; and (2) a claim for breach of the Letter of Understanding,
20 which is nearly identical to the claim alleged by Windblown in the State Court
21 Action. Neither claim belongs in federal court and both should be dismissed.

22 First, Plaintiffs’ first cause of action for declaratory relief under the Copyright
23 Act, seeking a declaration that they are the co-authors of the Book, fails to state a
24 claim upon which relief can be granted. In determining a claim of joint authorship
25 in a work under the Copyright Act, “[a] contract evidencing intent to be or not to be
26 coauthors is dispositive.” Richlin v. Metro-Goldwyn Mayer Pictures, Inc., 531 F.3d
27 962, 969 (9th Cir. 2008); Aalmuhammed v. Lee, 202 F.3d 1227, 1233, 1235 (9th
28

1 Cir. 2000) (“the best objective manifestation of a shared intent, of course, is a
2 contract saying that the parties intend to be or not to be co-authors”).

3 Plaintiffs’ inconsistent allegations in their first amended complaint (“FAC”)
4 notwithstanding,¹ Plaintiffs repeatedly agreed – in the three different contracts
5 attached to the FAC – that Mr. Young is the sole author of the Book:

6 • Plaintiffs admit in the May 10, 2008 Publishing Contract that Mr.
7 Young is the sole author. FAC, Ex. A at Recital (“William P. Young, 1857
8 SW 35th Street, Gresham Oregon 97080 (the “Author”)), ¶ 10 (“The Publisher
9 agrees to submit an application for registration of the copyright in the Work in
10 the name of the Author . . . William P. Young”), p.*11 (signature line:
11 “Author: William Paul Young”).

12 • Plaintiffs admit in the May 1, 2008 Letter of Understanding that
13 Mr. Young is the author. FAC, Ex. B (“This letter is to memorialize our
14 understanding . . . with regards to the motion picture rights to the literary
15 work entitled THE SHACK . . . written by William P. Young.”).

16 • Plaintiffs admit in the May 13, 2008 Publishing Co-Venture
17 Agreement that Mr. Young is the sole author. FAC, Ex. C at p.*1
18 (“WHEREAS, WINDBLOWN has published an important literary work
19 entitled The Shack by William P. Young”).

20 Additionally, Plaintiffs admit they themselves filed a Copyright Registration
21 (“CR”) (also attached to the FAC) listing Mr. Young as the sole author of the Book.
22 FAC ¶ 16 (Plaintiff “Cummings submitted a copyright registration . . . which
23 identified Young as the author of the book.”); see also FAC, Ex. D at pp.*3-4.
24 Under the Copyright Act, the CR “constitutes prima facie evidence of the validity of
25 the copyright *and of the facts stated in the certificate.*” 17 U.S.C. § 410(c)

26 _____
27 ¹ Thompson v. Illinois Dept. of Prof. Reg., 300 F.3d 750, 754 (7th Cir. 2002)
28 (“when a written instrument contradicts allegations in a complaint to which it is
attached, *the exhibit trumps the allegations.*”) (emphasis original).

1 (emphasis added). Because Plaintiffs admit throughout the FAC that they agreed
2 Mr. Young is the sole author of the Book, their claim for a declaration that they are
3 now co-authors fails to state a claim and should be dismissed with prejudice.²

4 Second, the Court should dismiss or stay the second claim for relief –
5 pursuant to the Younger abstention doctrine or the Colorado River doctrine –
6 because Plaintiffs’ breach of contract claim is identical to and duplicative of
7 Windblown’s breach of contract action in the State Court Action. Most of the
8 language in Windblown’s Cross-Complaint in the State Court Action is identical to
9 that in the FAC in the instant case. Most significantly, the agreement that Plaintiffs
10 allege in the FAC that Young supposedly breached – the so-called Letter of
11 Understanding (see FAC ¶ 47) – is already in issue in the State Court Action.
12 Anderson Decl., ¶ 4, Ex. 3 [Cross-Compl. ¶ 21(d)]; FAC ¶ 28(d). Plaintiffs allege –
13 in both the State Court Action and in this case – that Young breached the Letter of
14 Understanding. Cross-Compl. ¶ 30; FAC ¶ 37. Not surprisingly, Plaintiffs’ claim
15 for damages in the instant case and in the State Court Action in connection with
16 Young’s alleged breach of the Letter of Understanding is exactly the same. Cross-
17 Compl. ¶ 39; FAC ¶ 49.

18 The Court should stay the breach of contract claim pursuant to the Younger
19 abstention doctrine, because the State Court Action (1) was already pending for
20 months before Plaintiffs filed the Complaint; (2) provides Plaintiffs an adequate
21 opportunity to raise any claims; and (3) serves an important state interest, namely,
22 the ability of a state court to adjudicate claims without federal court interference.
23 Middlesex County Ethics Committee v. Garden State Bar Ass’n, 457 U.S. 423, 431

24
25
26 ² Plaintiffs’ apparent claim is that because Mr. Young allegedly breached his
27 agreement to dispose of the motion picture rights to the work pursuant to the
28 partially executed May 1, 2008, Letter of Understanding, they now want to tear up
their agreements regarding authorship and rewrite three years of publishing history.
FAC ¶¶ 37, 40.

1 (1982). Similarly, and alternatively, pursuant to the Colorado River doctrine, the
2 Court, in an exercise of “wise judicial administration,” should stay the second claim
3 for relief since it is substantially similar to the claims in the State Court Action and
4 would lead to inconsistent, piecemeal litigation in two forums. Colorado River
5 Water Conservation Dist. v. United States, 424 U.S. 800, 815 (1976).

6 For all of these reasons, Plaintiffs’ Complaint should be dismissed.

7 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

8 Mr. Young is the author of *The New York Times* bestseller *The Shack*, a
9 Christian novel which explores a father’s coming to terms with the murder of his
10 daughter and his reawakened relationship with God. Plaintiffs Brad Cummings and
11 Wayne Jacobsen reside in Ventura County and are the sole owners of Windblown.
12 FAC ¶ 2-3; ¶ 24 (“Windblown’s principals, Jacobsen and Cummings”). “[I]n 2007,
13 Cummings and Jacobsen formed [Windblown], a small Christian publishing house,
14 for the purpose of publishing the Book and new works they intended to pursue.” Id.
15 ¶ 13. Until May 2008, Windblown published and distributed the Book pursuant to
16 an oral agreement with Young. Id. ¶ 14.

17 **A. In the Publishing Contract Between Windblown and Young,** 18 **Plaintiffs Admit Young is the Author and Copyright Owner of the** 19 **Book.**

20 In May 2008, Plaintiffs (through Windblown) and Young memorialized their
21 oral publishing agreement in a written “Publishing Contract with Windblown
22 Media” (the “Publishing Contract”). FAC ¶ 24, Ex. A. The Publishing Contract
23 unambiguously provides throughout that Young is the sole author of the Book. See
24 e.g., Ex. A at Recital (“William P. Young . . . (the ‘Author’)”); p.*11 (signature line:
25 “Author: William Paul Young”).

26 In addition, the Publishing Contract provided that the copyright would be
27 registered *solely* in the name of William P. Young. Id. at ¶ 10(a) (Windblown
28 “agrees to submit an application for registration of the copyright in the Work in the

1 name of the Author . . . William P. Young”; Windblown “shall include the following
2 copyright notice in each of its editions of the Work: Copyright © [year] by William
3 P. Young”).

4 The Publishing Contract also sets forth Young’s share of revenues from the
5 distribution of the Book. For example, it provides that for copies sold in the United
6 States, Young is to receive “a fixed rate of \$0.50 (fifty cents) per book sold for
7 paperback books and \$1.00 for hardback books, plus one-third of the net profits of
8 all activity generated by *The Shack* for Windblown Media.” Publishing Contract
9 ¶ 3(a). Moreover, pursuant to the Publishing Contract, Young “specifically retains
10 the motion picture and theatrical rights and agrees to act in concern [sic] with
11 Windblown Media in the disposition of those rights. Revenue generated by their
12 sale will be split 60% to Author [Young], 20% to Brad Cummings, and 20% to
13 Wayne Jacobsen.” Publishing Contract ¶ 5(b); see FAC ¶ 28(d).

14 **B. In the Copyright Registration Filed by Plaintiff Brad Cummings**
15 **on Behalf of Windblown, Plaintiffs Admit Young is the Author and**
16 **Copyright Owner of the Book.**

17 Plaintiff Brad Cummings completed a Copyright Registration (“CR”) listing
18 the “copyright claimant” and the “name of author” as “William P. Young.” FAC,
19 Ex. D at p.*3. Cummings then signed the CR on behalf of Windblown and filed it
20 with the U.S. Copyright Office. FAC ¶ 20 (“Cummings submitted a copyright
21 registration to the United States Copyright Office, Copyright No. TX0006578498,
22 which identified Young as the author of the Book.”). By signing the CR, Cummings
23 stated, “I certify that the statements made by me in this application are correct to the
24 best of my knowledge.*” See FAC, Ex. D at p.*3. The asterisk (*) in the previous
25 sentence is original; the certification statement is footnoted with the following
26 warning: “17 U.S.C. § 506(e): Any person who knowingly makes a false
27 representation of a material fact in the application for copyright registration
28

1 provided for by section 409, or in any written statement filed in connection with the
2 application, shall be fined not more than \$2,500.” Id; see also 17 U.S.C. § 506(e).

3 **C. In the Letter of Understanding, Plaintiffs Admit Young is the**
4 **Author and Copyright Owner of the Book.**

5 Plaintiffs allege that “[a]t the same time Young, Jacobsen and Cummings
6 drafted and negotiated the Windblown-Young Agreement, they also entered into a
7 written Letter of Understanding, pursuant to which they agreed that the motion
8 picture rights to the Book would be assigned to a limited liability company to be
9 formed by Young, Jacobsen, Cummings and [non-party] Downes for the purpose of
10 producing a motion picture based on the Book.” FAC ¶ 25. In the Letter of
11 Understanding, Plaintiffs Jacobsen and Cummings once again agree that Young is
12 the author of the Book. FAC, Ex. B (“This letter is to memorialize our
13 understanding . . . with regards to the motion picture rights to the literary work
14 entitled THE SHACK . . . *written by* William P. Young.” (emphasis added)).
15 Moreover, Plaintiffs recognize that because Mr. Young is the sole owner of the
16 copyright in the Book, only he could assign the rights to create a derivative work
17 based on the Book. Compare FAC, Ex. A., ¶ 5(b) (“The Author specifically retains
18 the motion picture and theatrical rights and agrees to act in concern [sic] with
19 Windblown Media in the distribution of those right.”) with FAC, Ex. B (“The
20 motion picture rights will be held by William P. Young until an LLC is formed by
21 the undersigned to produce the movie.”).

22 **D. In the Co-Venture Agreement with Hachette, Plaintiffs Admit**
23 **Young is the Author and Copyright Owner of the Book.**

24 The Book “became an instant hit,” and “[a]s sales of the Book approached
25 one million copies, Windblown struggled to keep up with the demand.” FAC ¶ 23.
26 In response, Windblown entered into a partnership and joint venture agreement (the
27 “Co-Venture Agreement”) with non-party Hachette Book Group, Inc. (“Hachette”),
28 whereby Windblown transferred all of its titles, including the Book, to Hachette for

1 distribution worldwide. FAC ¶ 33; Co-Venture Agreement [FAC, Ex. C] ¶¶ 1(a),
2 1(c). In the Co-Venture Agreement, signed by Plaintiff Brad Cummings on behalf
3 of Windblown, Plaintiffs, again, recognize Young as the sole author of the Book.
4 Co-Venture Agreement at p.*1 (“WHEREAS, WINDBLOWN has published an
5 important literary work entitled *The Shack* by William P. Young”). Thereafter, “the
6 Book made it to *The New York Times* bestseller list, where it has remained for
7 almost 100 consecutive weeks.” FAC ¶ 34.

8 **E. Young Files the State Court Action**

9 In November 2009, Mr. Young filed a complaint against Windblown and
10 Hachette in California Superior Court, Ventura County, Case No. 56-2009-
11 00362329 (the “Young Complaint”). Request for Judicial Notice (“RJN”) ¶ 1, Ex.
12 1; see also, Declaration of Michael T. Anderson (“Anderson Decl.”) ¶ 2, Ex. 1. In
13 the Young Complaint, Mr. Young alleged that Defendants had engaged in a variety
14 of improper accounting practices designed to reduce his per-book royalty and share
15 of net profits, including, but not limited to: (i) excluding nearly 40% of all sales
16 from the calculation of Mr. Young’s share of profits and per book royalty by
17 designating the sales “high discount sales;” (ii) paying themselves a 10%
18 distribution fee nowhere authorized by the Publishing Contract, (iii) refusing to pay
19 Mr. Young a share of profits earned by Hachette, (iv) deducting an inflated return
20 reserve of \$4.2 million despite the work’s low 1.2% return history, and (v)
21 deducting the per book royalty paid by Mr. Young before calculating net profits.
22 Young Complaint ¶¶ 16-20. Mr. Young claimed that defendants’ accounting
23 improprieties have deprived him of over \$8 million through December 2008 alone.
24 Id. ¶ 2.

25 **F. Defendants in the State Court Action Unsuccessfully Demur and** 26 **Move to Strike Mr. Young’s Complaint.**

27 Both Windblown and Hachette each filed a demurrer and motion to strike the
28 Young Complaint. The Court, noting that “Publishers Windblown/Hachette,

1 melodramatically arguing on demurrer and MTS that the author’s complaint seeking
2 only compensatory damages and an accounting is ‘a shocking display of greed,
3 overreaching and ingratitude,’” analogized Defendants’ accounting practices to
4 “Hollywood bookkeeping,” found that the Complaint “was very specifically
5 pleaded,” and denied all of the Defendants’ Motions. RJN ¶ 2, Ex. 2, Ruling; see
6 also Anderson Decl. ¶ 3 Ex. 2.

7 **G. Windblown Files Its Cross-Complaint in the State Court Action.**

8 In March 2010, Defendant Windblown then filed its Cross-Complaint in the
9 State Court Action against Mr. Young. Windblown alleged that Mr. Young has
10 breached its obligation to it by “failing to act in concert with Windblown in
11 connection with the disposition of the motion picture rights to the Book,” refusing
12 “to assign the motion picture rights to the Book to The Shack Movie, LLC,” and
13 requested damages “in excess of Five Million Dollars.” RJN ¶ 3, Ex. 3, Cross-
14 Compl. ¶¶ 37, 39; see also, Anderson Decl. ¶ 4, Ex. 3, ¶¶ 37, 39.

15 Defendants Windblown and Hachette have also served substantial discovery
16 on Mr. Young, requiring him to respond to numerous interrogatories and to produce
17 over 1,800 pages of documents, and noticed his deposition on several occasions.
18 Mr. Young, in turn, is actively involved in document discovery now with
19 Windblown and Hachette. Anderson Decl. ¶ 5.

20 **H. Plaintiffs File the Federal Court Action Containing the Same**
21 **Allegations as Those in the Cross-Complaint**

22 A month after filing the Cross-Complaint, Plaintiffs, on April 29, 2010, filed
23 the Complaint in this Court, and, after Mr. Young filed a motion to dismiss the
24 original complaint, Plaintiffs filed the FAC on or about June 23, 2010.³ The
25 allegations in the Cross-Complaint and the FAC are virtually identical. In the
26 Cross-Compliant, as in the FAC, Windblown alleged that in December 2005, Young
27

28 ³ Plaintiffs served the FAC by mail.

1 sent Plaintiff Jacobsen a copy of an “Unpublished Manuscript” of what ultimately
2 became the Book. Cross-Compl. ¶¶ 8-13 and FAC ¶¶ 7-12. According to Plaintiffs,
3 a few months later, in March 2006, Plaintiffs and Young (along with non-party
4 Bobby Downes) met at Jacobsen’s home to discuss the Book. Cross-Compl. ¶ 10
5 and FAC ¶ 9. “At that meeting,” Plaintiffs allege, “Jacobsen and Cummings agreed
6 to collaborate with Young and work with him to rewrite the Unpublished
7 Manuscript. Jacobsen, Cummings, Young and Downes further agreed that once
8 rewritten, the four of them would collaborate to produce a motion picture based on
9 the rewritten manuscript.” Id.

10 Plaintiffs claim that Young and Plaintiffs “entered into a written Letter of
11 Understanding, pursuant to which they agreed that Young would assign the motion
12 picture rights to the Book to a limited liability company to be formed by Young,
13 Jacobsen, Cumming and Downes for the purpose of producing a motion picture
14 based on the Book.” FAC ¶ 25 (emphasis added). Thereafter, according to
15 Plaintiffs, the parties formed The Shack Movie, LLC pursuant to the Letter of
16 Understanding for the propose of producing a motion picture based on the Book.
17 FAC ¶ 27; *see also* Cross-Compl. ¶ 21(d).

18 According to Plaintiffs, in both the FAC and Cross-Complaint, Young
19 breached the Letter of Understanding. FAC ¶ 37 (“Young subsequently refused to
20 execute a literary option and purchase agreement with The Shack Movie, LLC for
21 the motion picture rights in the Book.”); see Cross-Compl. ¶ 30 (same).⁴

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⁴ The Letter of Understanding, dated May 1, 2008, is in conflict with and, indeed,
appears to have been superseded by the Publishing Contract, which is dated May 10,
2008. For example, pursuant to the Letter of Understanding, “if the motion picture
rights are sold prior to the LLC being formed . . . the receipts from that sale will be
split evenly amongst the four – i.e., Young, Jacobsen, Cummings, and Downes.
Letter of Understanding (emphasis added). However, in the later-dated Publishing
Contract, “[r]evenue generated by the[] sale [of the motion picture and theatrical
rights] will be split 60% to Author, 20% to Brad Cummings, and 20% to Wayne

1 **III. DISCUSSION**

2 **A. Because Plaintiffs Agreed Mr. Young is the Author of the Book,**
3 **Plaintiffs' First Claim Fails to State a Claim as a Matter of Law.**

4 In their first claim for relief, Plaintiffs claim the Book is a “joint work” and
5 they are co-authors of the work (*i.e.*, the Book). FAC ¶ 43. Pursuant to Ninth
6 Circuit authority, “several factors suggest themselves as among the criteria for joint
7 authorship, *in the absence of contract.*” Aalmuhammed v. Lee, 202 F. 3d 1227,
8 1234 (9th Cir. 2000) (emphasis added). Among the several factors is whether
9 “putative coauthors make objective manifestations of a shared intent to be
10 coauthors, as by denoting the authorship of *The Pirates of Penzance* as ‘Gilbert and
11 Sullivan.’” *Id.* “The best objective manifestation of a shared intent, of course, *is a*
12 *contract saying that the parties intend to be or not to be co-authors.* In the absence
13 of a contract, the inquiry must of necessity focus on the facts.” *Id.* at 1235
14 (emphasis added). *See also Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991)
15 (“In many instances, a useful test will be whether, in the absence of contractual
16 agreements concerning listed authorship, each participant intended that all would be
17 identified as co-authors.”) Where a contract exists, the inquiry ends – “[a] contract
18 evidencing intent to be or no to be coauthors is dispositive.” Richlin v. Metro-
19 Goldwyn Mayer Pictures, Inc., 531 F.3d 962, 969 (9th Cir. 2008); Aalmuhammed,
20 202 F.3d at 1235 (“The best objective manifestation of a shared intend, of course, is
21 a contract saying that the parties intend to be or not to be co-authors. In the absence
22 of a contract, the inquiry must of necessity focus on the facts.”).

23 Here, the inquiry stops at the facts alleged in the FAC and incorporated by
24 reference from the documents attached to the FAC. American Title Ins. Co. v.
25 Lacelaw Corp., 861 F.2d 224, 226 (9th Cir.1988) (allegations in a complaint are
26

27
28 Jacobsen.” Publishing Contract ¶ 5(b) (emphasis added). There is no mention of
Downes in the Publishing Contract.

1 considered judicial admissions); Fed. R. Civ. Proc. 10(c) (“A copy of a written
2 instrument that is an exhibit to a pleading is a part of the pleading for all
3 purposes.”); Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,
4 1555 n. 19 (9th Cir.1990). “[W]here a plaintiff attaches documents and relies upon
5 the documents to form the basis for a claim or part of a claim, dismissal is
6 appropriate if the document negates the claim.” Thompson v. Illinois Dep’t of
7 Professional Regulation, 300 F.3d 750, 754 (7th Cir. 2002) (applying the “well-
8 settled rule that when a written instrument contradicts allegations in a complaint to
9 which it is attached, the exhibit trumps the allegation” (citing Northern Indiana Gun
10 & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 454 (7th Cir.1998);
11 Woods v. Asset Resources, CV 06-398 SMS, 2006 WL 3782704, *2 (E.D.Cal. Dec.
12 21, 2006) (“When a written instrument or subject of judicial notice contradicts
13 allegations in a complaint to which it is attached, the Court need not accept the
14 allegations of the complaint as true”) (citing Durning v. First Boston Corp., 815 F.2d
15 1265, 1267 (9th Cir.1987)); Saunders v. Knight, CV 04-5924 REC LJO, 2006 WL
16 224426, *3 (E.D.Cal. Jan. 25, 2006) (citing Thompson); Luna v. Kemira Specialty,
17 Inc., 575 F.Supp.2d 1166, 1175-76 (C.D. Cal. 2008) (same).

18 While Plaintiffs allege that Mr. Young agreed that Plaintiffs were co-authors
19 of the Book, *the written instruments attached to the FAC contradict and therefore*
20 *trump Plaintiffs’ inconsistent allegations.* Thompson, 300 F.3d at 754 (“when a
21 written instrument contradicts allegations in a complaint to which it is attached, *the*
22 *exhibit trumps the allegations.*”) (emphasis original)); Saunders, 2006 WL 224426
23 at p.*3 (“Where a plaintiff attaches documents and relies on their contents to form
24 the basis of a claim, dismissal is appropriate if the document negates the claim.”).

25 Indeed, all four exhibits attached to the FAC evidence Plaintiffs’ agreement
26 that Mr. Young is the sole author of the Book and the only copyright owner of the
27 Book. First, in the Windblown-Young Agreement (FAC, Ex. A), Plaintiffs agreed
28 Mr. Young is the sole author. Id. at Recital (“William P. Young, 1857 SW 35th

1 Street, Gresham Oregon 97080 (the “Author”) (emphasis added); ¶ 10 (“The
2 Publisher agrees to submit an application for registration of the copyright in the
3 Work in the name of the Author”); p.*11 (signature line: “Author: William Paul
4 Young”).

5 Second, in the Letter of Understanding (FAC, Ex. B), Plaintiffs agree that the
6 Book was “written by William P. Young.” Id. (“This letter is to memorialize our
7 understanding . . . with regards to the motion picture rights to the literary work
8 entitled THE SHACK . . . written by William P. Young.”). In addition, as implied
9 in the document and admitted in the FAC, Plaintiffs recognize that only Mr. Young
10 has the rights as copyright owner of the Book to assign the rights to create a
11 derivative work – a motion picture based on the Book. 17 U.S.C. § 106(2) (“the
12 owner of copyright under this title has the exclusive rights to do and to authorize
13 any of the following: . . . to prepare derivative works based upon the copyrighted
14 work”); FAC ¶ 25.

15 Third, in Co-Venture Agreement (FAC, Ex. C), Plaintiffs agreed that Mr.
16 Young is the sole author of the Book. Id. at p.*1 (“WHEREAS, WINDBLOWN has
17 published an important literary work entitled The Shack by William P. Young”).

18 Fourth, in the CR – completed, signed and filed by Plaintiff Cummings (FAC,
19 Ex. D) – Plaintiffs admit that Mr. Young is the sole author of the Book and the sole
20 owner of the Copyright. Id. at pp.*3-4; FAC ¶ 16 (Plaintiff “Cummings submitted a
21 copyright registration . . . which identified Young as the author of the book.”). By
22 signing the CR, Cummings “certified that the statements made by [him] in th[e]
23 application [were] correct to the best of [his] knowledge.*” See FAC, Ex. D at p.*3.
24 Moreover, on the copyright application, Cummings was reminded of the law: “Any
25 person who knowingly makes a false representation of a material fact in the
26 application for copyright registration provided for by section 409, or in any written
27 statement filed in connection with the application, shall be fined not more than
28 \$2,500.” Id.; 17 U.S.C. § 506(e).

1 Under the Copyright Act, the CR “constitutes prima facie evidence of the
2 validity of the copyright *and of the facts stated in the certificate.*” 17 U.S.C. §
3 410(c) (emphasis added); Eisenman Chemical Co. v. NL Industries, Inc., 595
4 F.Supp. 141, 145 (D.C. Nev. 1984) (citing Novelty Textile Mills, Inc. v. Joan
5 Fabrics Corp., 558 F.2d 1090, 1092 n. 1 (2nd Cir. 1977). Here, the very person now
6 disputing “the facts stated in the certificate” – Plaintiff Cummings – is the same
7 person who provided them, and did so under the threat of criminal penalties. Not
8 only are Plaintiffs’ allegations not credible, they are inconsistent with documents
9 attached to their FAC.

10 Thus, the existence of the agreements alleged by Plaintiffs and the CR
11 completed, signed, and filed by Plaintiffs, ends the inquiry as to the authorship of
12 the Book. In all of the documents attached to the FAC, Plaintiffs admit that Mr.
13 Young is the sole author of the Book and the only owner of the copyright in the
14 Book. Plaintiffs’ inconsistent allegations in the FAC are irrelevant; they are
15 trumped by the instruments attached to the FAC. Thompson, 300 F.3d at 754. In
16 light of the documents attached to the FAC, Plaintiffs cannot possibly establish that
17 Young intended to share ownership with Jacobsen and Cummings, a prerequisite to
18 co-authorship. See Aalmuhammed, 202 F. 3d at 1236. Therefore, because by their
19 own admissions Plaintiffs cannot state a claim for co-authorship of the Book, their
20 claim for a declaration for co-ownership in the copyright should be dismissed
21 pursuant to Federal Rules of Civil Procedure Rule 12(b)(6).

22 **B. The Court Should Dismiss or Stay the Second State Law Claim**
23 **Because it is Duplicative of Issues Currently Pending in the State**
24 **Court Action**

25 Even if the Court does not dismiss the first claim for relief, the Court should
26 still dismiss or stay the second claim for relief for breach of contract pursuant to
27 well-established principles of abstention.

28

1 **1. The Court Should Stay the Second Claim Pursuant to the**
2 **Younger Abstention Doctrine**

3 Younger abstention, originating from Younger v. Harris, 401 U.S. 37, 49-53
4 (1971), is a doctrine of equitable judicial restraint, not a jurisdictional limitation.
5 William W. Schwarzer, et al., Cal. Practice Guide: Fed. Civ. Pro. Before Trial
6 § 2:1291.1a (The Rutter Group 2009). The court’s discretion to abstain from
7 hearing a claim under Younger “does not arise from lack of jurisdiction in the
8 District Court, but from strong policies counseling against the exercise of such
9 jurisdiction where particular kinds of state proceedings have already been
10 commenced.” Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc. v.
11 Nelson, 477 U.S. 619, 626 (1986).

12 Federal courts may abstain from hearing a claim where a state court
13 proceeding (1) is pending when the federal action is filed; (2) implicates important
14 state interests; and (3) provides adequate opportunity to raise the claims alleged.
15 Middlesex County Ethics Committee v. Garden State Bar Ass’n, 457 U.S. 423, 431
16 (1982). If these three Younger requirements are satisfied, federal court abstention is
17 required, absent extraordinary circumstances such as bad faith, harassment, or a
18 patently unconstitutional state statute. Middlesex County Ethics Comm., 457 U.S.
19 at 435, 437; Younger, 401 U.S. at 53-54. As to Plaintiffs’ second claim for relief for
20 breach of contract, each of these elements are satisfied, justifying the Court’s
21 exercise of abstention.

22 First, the State Court Action – Young v. Windblown Media, Inc., et al. – was
23 pending when Plaintiffs filed their federal action. Young filed his complaint in the
24 State Court Action on November 19, 2009. Plaintiffs, after losing their demurrer to
25 Young’s complaint, filed their Cross-Complaint in the State Court Action on March
26 22, 2010. Then, a month after filing their Cross-Complaint, Plaintiffs filed their
27 Complaint in the instance case. The State Court Action is still pending.
28 Defendants have served extensive discovery requests to Mr. Young and third party

1 witnesses, Mr. Young has produced over 1,800 pages of documents in response, and
2 Defendants have noticed the deposition of Mr. Young.

3 Second, the State Court Action implicates important state interests. For
4 purposes of Younger abstention, a wide variety of state interests qualify as
5 “important.” Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc. v.
6 Nelson, 477 U.S. 619, 626 (1986); Mission Oaks Mobile Home Park v. City of
7 Hollister, 989 F.2d 359, 361 (9th Cir. 1993). For example, an important state
8 interest includes the ability of state courts to adjudicate and enforce their orders.
9 See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 13-14 (1987) (Younger abstention
10 proper based on important state interest in enforcing state court orders and
11 judgments including orders forcing persons to transfer property). Indeed, both this
12 Circuit and the U.S. Supreme Court have held that the state’s interest in
13 administering cases brought before its courts is at the heart of the comity principle
14 underlying Younger abstention:

15 the Court distilled the comity principles that animate abstention – that
16 the state’s interest in administration of its judicial system is important,
17 that federal court interference would be an offense to the state’s
18 interest, and that such interference would both unduly interfere with the
19 legitimate activities of the state and readily be interpreted as reflecting
20 negatively upon the state court’s ability

21 Gilbertson v. Albright, 381 F.3d 965, 972 (9th Cir. 2004) (citing Juidice v. Vail 430
22 U.S. 327 (1977)); see also Gilbertson, 381 F.3d at 970 (“the Court observed that
23 Congress over the years has manifested an intent to permit state courts to try state
24 cases free of federal interference.”). Referencing Middlesex and Dayton Christian
25 Schools, the Supreme Court noted that “judicial proceedings or disciplinary
26 proceedings which are judicial in nature are the type of proceeding that does
27 implicate an important state interest.” Gilbertson, 381 F.3d at 977 (citing New
28

1 Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 370 (1989);
 2 Middlesex, 457 U.S. at 433-434; and Dayton Christian Schools, 477 U.S. at 627.

3 Third, the State Court Action provides an adequate opportunity for Plaintiffs
 4 to raise their contract claims. Indeed, as detailed above, Plaintiffs have already
 5 raised the identical claims through the Cross-Complaint in the State Court Action.
 6 Moreover, because the party in the State Court Action is Plaintiffs' publishing
 7 company, Windblown Media, Plaintiffs could easily intervene personally, assuming
 8 that would even be necessary given the fact that virtually identical issues are already
 9 being litigated in the State Court Action. See Delta Dental Plan of California v.
 10 Mendoza, 139 F.3d 1289, 1297 (9th Cir. 1998) (ability to intervene in state court
 11 action sufficient); Green v. City of Tucson, 255 F.3d 1086, 1102-03 (9th Cir.
 12 2001).⁵

13 2. The Court Should Stay the Second Claim Pursuant to the 14 *Colorado River Doctrine*

15 In the interest of "wise judicial administration," federal courts may stay a case
 16 involving a question of federal law where a concurrent state action is pending in
 17 which the identical issues are raised. William W. Schwarzer, et al., Cal. Practice
 18 Guide: Fed. Civ. Pro. Before Trial § 2:687.1 (The Rutter Group 2009) (citing
 19 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815

20
 21 _____
 22 ⁵ The Court in Green criticized Mendoza in its applicability of the intervention rule
 23 (and the Green district court for applying Mendoza), because the Mendoza Court
 24 would have had the plaintiffs intervene in a state court action to which he was a
 25 *stranger*. Green, 255 F.3d at 1102. The court in Green clarified the rule: "absent a
 26 relationship with a party to a state proceeding . . . a federal plaintiff has no
 27 obligation to intervene in state court litigation raising issues similar to those that the
 28 plaintiff wishes to raise in federal court." Id. at 1102-03. The instant case falls
 squarely within the rule as clarified by Green. The party in the State Court Action –
 Windblown Media – is not only the Plaintiffs' publishing company, but as is
 apparent from the Complaint, it is also bound by the same agreements to which
 Plaintiffs are bound.

1 (1976)). The Colorado River doctrine “give[s] regard to conservation of judicial
2 resources.” Colorado River, 424 U.S. at 817.

3 The decision to abstain rests on a “careful balancing” of several factors as
4 they apply in a given case. Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,
5 460 U.S. 1, 16 (1983). For example, in Colorado River the Court examined four
6 factors to determine whether staying proceedings was appropriate: (1) whether
7 either court has assumed jurisdiction over a res; (2) the relative convenience of the
8 forums; (3) the desirability of avoiding piecemeal litigation to prevent, for example,
9 conflicting results; and (4) the order in which the forums obtained jurisdiction. See
10 424 U.S. at 818. In Moses Cone, the Court articulated two more considerations;
11 (5) whether state or federal law controls; and (6) whether the state proceeding is
12 adequate to protect the parties’ rights. See 460 U.S. at 25-26, 103 S.Ct. at 941-42.
13 In addition, courts have recognized an additional factor: (7) whether the state and
14 federal suits are substantially similar. Nakash v. Marciano, 882 F.2d 1411, 1416
15 (9th Cir. 1989). Finally, in Fireman’s Fund Ins. Co. v. Quackenbush, 87 F.3d 290
16 (9th Cir. 1996), the court recognized that (8) evidence of forum-shopping can justify
17 Colorado River abstention. “These factors are to be applied in a pragmatic and
18 flexible way, as part of a balancing process rather than as a ‘mechanical checklist.’”
19 American Int’l Underwriters, (Phillipines), Inc. v. Continental Ins. Co., 843 F.2d
20 1253, 1257 (9th Cir.1988) (quoting Moses Cone, 460 U.S. at 16).

21 In this case, the vast majority of factors weighs in favor of abstention. First,
22 the state court forum obtained jurisdiction first, in November 2009, when Young
23 filed his complaint. Plaintiffs (through Windblown) filed their cross-complaint in
24 March 2010. A month later, in April 2010, Plaintiffs filed the Complaint in this
25 action.⁶

26
27
28 ⁶ The existence of a res and the convenience of the forum are neutral or non-
applicable factors.

1 Second, the state and federal cases are substantially similar. Plaintiffs’
2 federal court complaint is virtually identical to their state court cross-complaint.
3 Indeed, in both the federal case and state case, for example, the Letter of
4 Understanding and Young’s alleged obligation to assign the movie rights to the
5 Book to an LLC controlled by Young, Jacobsen, and Cummings, are in issue.

6 Third, there is a substantial risk of conflicting result if piecemeal litigation is
7 not avoided, the paramount concern of Colorado River abstention doctrine. See
8 Romine v. Compuserve Corporation, 160 F.3d 337, 341 (6th Cir.1998) (“In *Moses*
9 *H. Cone*, the Supreme Court noted ‘the consideration that was paramount in
10 *Colorado River* itself – the danger of piecemeal litigation.’ 460 U.S. at 19”) (federal
11 court security class action stayed pending resolution of parallel state class action).
12 The state court may find no alleged breach of any duty to transfer the motion picture
13 rights – the federal court may find the opposite. The state court may find that the
14 May 10, 2008, Publishing Contract, which states only that the parties agree “to act
15 in concert [concert]” and the split of revenues is to be 60%/20%/20% to Young,
16 Cummings and Jacobsen applies – the federal court may find that the motion picture
17 rights are to be disposed of pursuant to the May 1, 2008 Letter of Understanding in
18 which the revenues are allegedly split four ways 25% each to Young, Cummings,
19 Jacobsen and Downes. Compare FAC, Ex. A at ¶ 5(b) with Ex. B. The same
20 witnesses, facts and chronology would have to be tried in both courtrooms, perhaps
21 at the same time. Plaintiffs’ procedural approach to the dispute regarding the
22 disposition of the motion picture rights invites disaster. This Court should avoid it.

23 Fourth, there is evidence of forum shopping. Plaintiffs Jacobsen and
24 Cummings are clearly trying to restart their litigation, and avoid adverse rulings
25 already made by the court in the State Court Action.

26 Fifth, the resolution of the claim involves the application of California
27 contract law, not federal law. The May 10, 2008, Publishing Contract contains a
28 California choice of law clause. FAC, Ex. A, ¶ 23.

1 Sixth, the State Court Action is adequate to protect Plaintiffs' rights.
2 Plaintiffs can intervene to assert any claim for breach in connection with the
3 disposition of the motion picture rights in state court.

4 Thus, in order to avoid the consequences of duplicative litigation proceeding
5 in both state court and federal court on similar claims at the same time, this Court
6 should stay the second claim for relief for breach of contract pursuant to the
7 Colorado River doctrine.

8 **IV. CONCLUSION**

9 For all of the reasons discussed above, Plaintiffs' first claim for relief should
10 be dismissed for failure to state a claim. Regardless of whether the Court dismisses
11 the first claim for relief, Plaintiffs' second for relief for breach of contract should be
12 dismissed, or, at the very least, stayed until the California Superior Court Action is
13 completed.

14
15 Dated: July 9, 2010

LOEB & LOEB LLP
MICHAEL T. ANDERSON
DONALD A. MILLER

17
18 By: /s/ Michael T. Anderson
Michael T. Anderson
Attorneys for Defendant
William Paul Young

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