

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

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PLATFORM ARCHITECTURE & DESIGN,
PLLC,

Plaintiff,

v.

JAMES L. ESCOBAR; MARLA CARSON;
NEUDESIGN ARCHITECTURE, LLC;
TYLER ROBERTS; HOLLEY DRYDEN;
INFINITY & ROBERTS, LLC;
JONATHAN KLUTNICK; JAMES J.
KLUTNICK; DOES 1-5; and ABC
COMPANIES 1-5,

Defendants.

No. 1:20-cv-00012-WBS

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION TO DISMISS

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Plaintiff Platform Architecture & Design PLLC

("Platform") filed this action against defendants James L. Escobar, Marla Carson, neUdesign Architecture, LLC, Tyler Roberts, Holley Dryden, Infinity & Roberts, LLC, Jonathan Klutnick, James J. Klutnick, Does 1 through 5, and ABC Companies 1 through 5, arising from defendants' alleged unlawful copying

1 and use of plaintiff's architectural design plans. Before the
2 court is defendants' motion to dismiss plaintiff's Second Amended
3 Complaint. (Docket No. 40)

4 I. Relevant Allegations

5 A. Plaintiff's Design Plans

6 Plaintiff Platform is an active Idaho professional
7 limited liability company. (Second Amended Complaint ("SAC") ¶ 1
8 (Docket No. 38).) Catherine M. Sewell ("Sewell") is Platform's
9 sole employee, principal, manager, and owner of all membership
10 interest in the company. (Id.) In or around late 2015 and early
11 2016, Sewell met with Platform's client to discuss the creation
12 of original plans for a proposed multifamily residential
13 development to be located at 6230 W. State Street, in Boise,
14 Idaho, real property then-owned by Platform's client (the
15 "Property"). (Id. ¶ 90.)

16 The property was a blank slate -- a trapezoidal lot 150
17 feet wide, 553 feet long at the eastern boundary and 533 feet
18 long at the western boundary, with wide variation of street
19 access available. (Id. ¶ 92; see also id. Ex. H.) The
20 applicable zoning regulations allow up to 80 residential units on
21 the property. (Id. ¶ 93.) Under the applicable zoning code, the
22 property may be used for a variety of commercial or residential
23 purposes. (Id. ¶ 95.)

24 The starting point for creation of the plan drawings
25 was the concept of a multi-unit residential development that
26 would foster community among residents while including a mix of
27 different unit types. (Id. ¶ 97.) In or around February 2016,
28 Sewell provided Platform's client with several rough sketches of

1 different possible concepts. (Id. ¶ 98-99; id., Ex. G.) Each of
2 the concept sketches was created to fit the specific size and
3 shape of the property. (Id. ¶ 100.) In drafting the plan
4 drawings, plaintiff considered desirable shapes, sizes, geometric
5 configurations, the numerous options regarding configuration and
6 number of units, number of buildings, number of parking spaces,
7 and shared spaces, the desire to foster community, and other
8 elements. (Id. ¶ 91.) Platform's client settled on Concept 'B'
9 (id. ¶ 104), which included a unique configuration of buildings,
10 landscaped spaces, and parking spaces, with parking on the east
11 side of the property and between groupings of buildings, open
12 space between the grouped buildings, and a total of 54-63
13 potential units (id. ¶ 102). Concept 'B' also included an
14 unusual configuration of residential units in the three-story
15 buildings: the ground floors of the buildings would comprise
16 smaller units, while the second and third floors together would
17 comprise larger, two-story apartment units. (Id. ¶ 103.)

18 Without use of any previously existing designs (id. ¶
19 107), Sewell drafted the plan drawings (id. ¶ 14). These are
20 copyrighted visual material under registration no. VAu001379620.
21 (Id. ¶ 15.) Platform submitted the plan drawings to the City of
22 Boise ("City") Planning & Development Services Department as part
23 of a request for a conditional use permit obtained for a client.
24 (Id. ¶ 18.) After the City approved the permit, Platform's
25 client decided to sell the Property rather than proceed with the
26 development. (Id. ¶ 29.)

27 B. Defendants' Alleged Copying of Plaintiff's Design Plans

28 At the end of 2016, Idaho real estate agent Tyler

1 Roberts ("Roberts") contacted Sewell, stated that he was a real
2 estate agent looking into the Property for a purchaser, and asked
3 for information about the planned project, including specific
4 questions regarding the possibility of increasing parking and
5 trash enclosures. (Id. ¶ 34.) In response to requests from
6 Roberts, Sewell provided copies of the plan drawings and other
7 documents to Roberts. (Id. ¶ 35.) On January 31, 2017, Sewell
8 sent an email to Roberts mentioning the documents Sewell sent,
9 expressing that Sewell had not seen progress on the project on
10 the Property, and reminding Roberts that the entitlement plans
11 Sewell sent "cannot be used further for this project without
12 [Sewell's] or Platform Architecture Design's authorization." (Id.
13 ¶ 36.)

14 Approximately two weeks after Sewell emailed Roberts,
15 Platform's client sold the Property to defendant Dryden. (Id. ¶¶
16 41, 42.) Plaintiff believes that Dryden is a close personal
17 associate of Roberts and was a straw buyer. (Id. ¶ 43.) After
18 the purchase, Dryden and Roberts worked in coordination with
19 defendants James Escobar, Marla Carson, and neUdesign to proceed
20 with the development plans. (Id. ¶ 44.) Escobar and Carson
21 created and submitted architectural drawings based on Platform's
22 plan drawings. (Id. ¶ 49.) Indeed, in a telephone conversation
23 with Sewell, Escobar admitted to Sewell that Platform's plan
24 drawings had been used by neUdesign as the basis for its plans.
25 (Id. ¶ 56.) neUdesign's drawings were thus copies of Platform's
26 plan drawings, with only minor revisions. (Id. ¶ 50.) By
27 copying Platform's plan drawings, defendants avoided the expense
28 of commencing new plans or paying Platform for a license to use

1 its copyrighted work. (Id. ¶ 51.)

2 C. The Klutnick Defendants

3 On October 22, 2018, defendant Dryden executed a deed
4 granting ownership of the Property to Infinity & Roberts, LLC.
5 (Id. ¶ 61.) Roberts is one of the two members of Infinity &
6 Roberts, LLC. (Id. ¶ 62.) On October 24, 2018, two days after
7 its transfer to Infinity & Roberts, LLC, Roberts listed the
8 property for sale and marketed it online using neUdesign's plans.
9 (Id. ¶¶ 63-64.) On January 15, 2019, after less than three
10 months on the market, Infinity & Roberts, LLC sold the Property
11 to a new purchaser, whom plaintiff believes to be a limited
12 liability company formed at the direction of and on behalf of
13 defendants Jonathan Klutnick and James Klutnick (collectively,
14 the "Klutnick defendants"). (Id. ¶ 65-66.) Klutnick has worked
15 in concert with neUdesign, Carson, and Escobar to proceed with
16 and to expand the project. (Id. ¶ 68.) Plaintiff believes
17 Klutnick continues to use neUdesign's plans despite knowing of
18 plaintiff's copyright claims. (Id. ¶ 69.)

19 In July 2019, defendant neUdesign, acting on behalf of
20 defendant Jonathan Klutnick, wrote to the City of Boise
21 requesting approval "to construct a phase II of a multifamily
22 project" on the Property. (Id. ¶ 72-74.) The phase II site plan
23 was submitted to the City that same month. (Id. ¶ 77.) The
24 phase II plans incorporated and included the phase I designs
25 based on plaintiff's plan drawings and are therefore the result
26 of the neUdesign defendants and their client, Jonathan Klutnick,
27 copying plaintiff's plan drawings. (Id. ¶ 79-82.)

28 Plaintiff believes the foregoing acts were done at the

1 express direction and approval of the Klutnick defendants, as
2 they supervised the neUdesign defendants' work. (Id. ¶¶ 83, 88.)

3 D. Procedural Posture

4 Plaintiff filed this action alleging one claim for
5 copyright infringement, pursuant to 17 U.S.C. §§ 101, et seq.
6 The governing complaint is plaintiff's Second Amended Complaint.
7 Defendant now moves to dismiss for failure to state a claim under
8 Federal Rule of Civil Procedure 12(b)(6).

9 II. Legal Standard

10 On a Rule 12(b)(6) motion, the inquiry before the court
11 is whether, accepting the well-pleaded allegations in the
12 complaint as true and drawing all reasonable inferences in the
13 plaintiff's favor, the plaintiff has stated a claim to relief
14 that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S.
15 662, 678 (2009). The court, however, is "not required to accept
16 as true allegations . . . that are merely conclusory, unwarranted
17 deductions of fact, or unreasonable inferences." Seven Arts
18 Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251,
19 1254 (9th Cir. 2013). "The plausibility standard is not akin to
20 a 'probability requirement,' but it asks for more than a sheer
21 possibility that a defendant has acted unlawfully." Id.

22 III. Discussion

23 To state a claim for copyright infringement, plaintiff
24 must allege: (1) "that he owns a valid copyright" in his
25 architectural design, and (2) that defendant "copied protected
26 aspects" of plaintiff's expression of the design. Rentmeester v.
27 Nike, Inc., 883 F.3d 1111, 1116-17 (9th Cir. 2018) (citing Feist
28 Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991);

1 Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990)).

2 The second element has two distinct components:
3 "copying" and "unlawful appropriation." Id. at 1117 (citing Sid
4 & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562
5 F.2d 1157, 1164-65 (9th Cir. 1977)). "Proof of copying by the
6 defendant is necessary because independent creation is a complete
7 defense to copyright infringement." Id. Further, "[p]roof of
8 unlawful appropriation -- that is, illicit copying -- is
9 necessary because copyright law does not forbid all copying."
10 Id.

11 A defendant is liable where the copying of plaintiff's
12 protected expression rendered the two works "substantially
13 similar." Id. The term means different things under the
14 "copying" and "unlawful appropriation" components of the second
15 element. Id. "To prove copying, the similarities between the
16 two works need not be extensive, and they need not involve
17 protected elements of the plaintiff's work. They just need to be
18 similarities one would not expect to arise if the two works had
19 been created independently." Id. By contrast, to prove
20 unlawful appropriation, "the similarities between the two works
21 must be 'substantial' and they must involve protected elements of
22 the plaintiff's work." Id.

23 Defendants do not contest that plaintiff owns a valid
24 patent, but contest both components of the second element. They
25 argue, first, that plaintiff cannot allege unlawful appropriation
26 because the designs are not substantially similar as a matter of
27 law, and, second, that the complaint fails to allege that the
28 Klutnick defendants copied plaintiff's design. Defendants do not

1 dispute that the complaint sufficiently alleges that all other
2 defendants copied plaintiff's design. The court addresses each
3 argument in turn.

4 A. Unlawful Appropriation

5 To determine whether works are substantially similar,
6 the court applies a two-part analysis consisting of an "extrinsic
7 test" and an "intrinsic test." Rentmeester, 883 F.3d at 1118.
8 "The extrinsic test assesses the objective similarities of the
9 two works, focusing only on the protectable elements of the
10 plaintiff's expression." Id. (citing Cavalier v. Random House,
11 Inc., 297 F.3d 815, 822 (9th Cir. 2002)). "The intrinsic test
12 requires a more holistic, subjective comparison of the works to
13 determine whether they are substantially similar in 'total
14 concept and feel.'" Id. Although a plaintiff must prove
15 substantial similarity under both tests to prevail, "only the
16 extrinsic test's application may be decided by the court as a
17 matter of law." Id.; see also Williams v. Gaye, 895 F.3d 1106,
18 1119 (9th Cir. 2018) ("[T]he intrinsic test is reserved
19 exclusively for the trier of fact."). The parties do not dispute
20 that such a determination is appropriate on a motion to dismiss.
21 See Rentmeester, 883 F.3d at 1123 (quoting Christianson v. West
22 Publishing Co., 149 F.2d 202, 203 (9th Cir. 1945); see also Peter
23 F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64
24 (2d Cir. 2010) ("If . . . the district court determines that the
25 two works are 'not substantially similar as a matter of law,' the
26 district court can properly conclude that the plaintiff's
27 complaint, together with the works incorporated therein, do not
28 'plausibly give rise to an entitlement to relief.'"). The court

1 therefore evaluates the works under the extrinsic test only.

2 To apply the extrinsic test, first, "the copyright
3 holder must identify the concrete elements which are similar."
4 Express, LLC v. Fetish Grp., Inc., 424 F. Supp. 2d 1211, 1228
5 (C.D. Cal. 2006) (citing Apple Comput., Inc. v. Microsoft Corp.,
6 35 F.3d 1435, 1443 (9th Cir. 1994)). "Second, the court must
7 determine whether the allegedly similar elements are protected by
8 copyright." Id.; see also Rentmeester, 883 F.3d at 1118 ("[T]he
9 court must 'filter out' the unprotectable elements of the
10 plaintiff's work."). "Third, the court must define the scope of
11 the plaintiff's copyright--i.e., whether it is entitled to broad
12 or thin protection," id., in order to establish the degree of
13 overlap necessary to deem the works substantially similar.

14 1. Similar Elements Identified

15 Plaintiff alleges that the following features in the
16 neUdesign defendants' work are identical or nearly identical to
17 those in Platform's architectural work:

18 (1) The spacing and composition of the buildings, parking,
19 and open space;

20 (2) The angle and slopes of the roofs, the proportions of
21 vertical and horizontal elements, the trapezoidal shapes of
22 interior walkways and landscape areas, and overall arrangement of
23 spaces and structures;

24 (3) The number of units, orientation of units, and
25 arrangement of structures, open spaces' parking and other
26 amenities is nearly identical;

27 (4) The use, location, proportion and spacing of balconies
28 and other elements;

(5) The configuration of the mix of units, with smaller ground floor units, and larger two-story units on the combined second and third floors.

(Id. ¶ 110.)

2. Identification of Protectable Elements

a. Legal Standard

The Copyright Act ("the Act") grants copyright protection to architectural works. 17 U.S.C. § 101. An "architectural work" is "the design of a building . . . including a building, architectural plans, or drawings." 17 U.S.C. § 101. "The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features," id., such as "common windows, doors, and other staple building components," H.R.Rep. No. 101-735, at 6949 (1990). "The phrase 'arrangement and composition of spaces and elements' recognizes that: (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole; (2) an architect may incorporate new, protectible design elements into otherwise standard, unprotectible building features; and (3) interior architecture may be protected." Id.; see also id. (The Act does not intend to protect "pragmatic, constructional, and technical requirements."). "Accordingly, while individual standard features and architectural elements classifiable as ideas or concepts are not themselves copyrightable, an architect's original combination or arrangement of such elements may be." Thomson v. HMC Grp., No. CV 13-3273 DMG (VBKx), 2015 WL 11256775,

at *10 (C.D. Cal. Oct. 29, 2015) (quoting Intervest Const., Inc. v. Canterbury Estate Homes, Inc., 554 F.3d 914, 919 (11th Cir. 2008)).

“Constraints on protectable expression in architectural works include the merger doctrine, market demands, building codes and zoning requirements, functional demands, the physical site and environment, budgetary constraints and available technology.” Id. (quoting Dream Custom Homes, Inc. v. Modern Day Const., Inc., 773 F. Supp. 2d 1288, 1300 (M.D. Fla. 2011), aff’d, 476 F. App’x 190 (11th Cir. 2012)). Further, other courts have found that unprotectible elements of architectural works include, but are not limited to:

(1) Standard configurations of spaces; (2) individual standard features, such as windows, doors, and other staple building components; (3) market expectations; (4) any design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity; (5) generalized notions of where to place functional elements, how to route the flow of traffic, and methods of construction; (6) design parameters, described as “constraints placed on an architect by the way her client plans to use the building”; and (7) features that are essential or common to the architectural style within which the builder designed the structure[.]

Id. at *10 (quoting Buttner v. RD Palmer Enters., Inc., No. 5:13-CV-0342 LEK/ATB, 2015 WL 1472084, at *7 (N.D.N.Y. Mar. 31, 2015)).

The “ideas” and “concepts” used in plaintiff’s work are also not protectible. Rentmeester, 883 F.3d at 1117. To infringe, a defendant must instead copy “plaintiff’s expression of those ideas or concepts.” Id.

b. Application

Defendants argue that the features plaintiff identifies

1 are common and generalized concepts and ideas that are not
2 protectable under the Act. (Mot. at 9.) For that proposition,
3 defendants cite Attia v. Society of New York Hospital, 201 F.3d
4 50, 52 (2d Cir. 1999), and Peter F. Gaito Architecture, LLC v.
5 Simone Development Corp., 602 F.3d 57, 66 (2d Cir. 2010). For
6 the following reasons, the court finds these cases inapplicable
7 and instead concludes that the features defendant allegedly
8 copied jointly constitute the kind of “overall form as well as
9 the arrangement and composition of spaces and elements in the
10 design” that the Act intended to protect.

11 In Attia, hospital officials sought to expand and
12 modernize the hospital’s facilities, which are located at the
13 edge of the East River in Manhattan. 201 F.3d 50, 52. The
14 hospital retained plaintiff to devise a plan for the
15 modernization, and plaintiff submitted “architectural drawings
16 and sketches” of plaintiff’s concept, which the hospital liked.
17 Id. After the relationship between plaintiff and the hospital
18 soured, the hospital initiated a competition to select the
19 architect for its modernization plan. Id. The semi-finalists
20 “were instructed by the Hospital to submit modernization
21 proposals tailored to a ‘[m]ajor new construction on air rights
22 over the F.D.R. Drive with connections to renovated existing
23 facilities.’” Id. Upon seeing the winning design, plaintiff
24 filed suit for copyright infringement. Id. The Attia plaintiff
25 alleged that the following features were unlawfully copied by the
26 defendant: the placement of a new structure on the F.D.R. Drive,
27 use of a 3-story high truss to transfer the weight of the new
28 building, integration of the new structure with pre-existing

1 facilities by aligning the floor heights and corridors, insertion
2 of a connecting roadway to make a continuous traffic loop through
3 the hospital complex, and proposed new placements for various
4 hospital services and functions. The court found that these
5 features were not protectible because "these [were] no more than
6 rough ideas of general nature [and were] barely a first step
7 toward the realization of a plan." Id.

8 Attia is distinguishable, however. The crux of the
9 Attia court's decision was the fact that plaintiff's drawings
10 were "preliminary" and "conceptual." Id. at 56. The Attia
11 plaintiff himself stated that his report "[was] not meant to
12 suggest a specific configuration or functional plan" and instead
13 merely "suggest[ed] an idea." Id. Plaintiff here, by contrast,
14 is suing defendant for the copying of "final Plan Drawings."
15 (SAC ¶ 108.) Indeed, the Attia court distinguished the facts in
16 front of it from those in cases, like the present matter,
17 involving "drawings that were sufficiently detailed to enable
18 construction." Id. at 56.

19 Further, although the Attia court does not explicitly
20 discuss the constraints on protectable expression in
21 architectural works listed above, several of those constraints
22 make a finding of unprotectibility appropriate in Attia and
23 inappropriate here. First, the hospital's specific demands
24 limited the creativity and originality of plaintiff's designs.
25 The hospital explicitly prescribed the location of the new
26 building. "Constraints placed on an architect by the way her
27 client plans to use the building do not originate with the
28 architect." Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95,

1 106 (2d Cir. 2014). "Any design choices made at the client's
2 express request therefore cannot be considered an architect's
3 original or creative design." Thomson, 2015 WL 11256775, at *11.
4 By contrast, here, the two design plans were allegedly created
5 for different clients and it does not appear from the allegations
6 of the SAC that the architects were subject to common
7 instructions. Plaintiff's design therefore was plausibly a
8 product of the architect's creativity and imagination as
9 plaintiff alleges (id. ¶ 107), rather than the pure functional
10 demand of the project.

11 Second, the Attia architects had to meet specific
12 functional demands: the expansion and modernization of an
13 existent hospital. Ideas, concepts, or plans to connect the
14 existing hospital building to the new hospital building hardly
15 constitute creativity since "expansion" denotes a relationship to
16 the older building. Here, on the other hand, based on the
17 allegations, the pictures of the site, and defendants' silence on
18 the issue, the court cannot infer more than a general instruction
19 on the clients' part to build a multifamily residential
20 development. Such a general instruction renders unprotectible
21 only "features that are essential or common" to a multifamily
22 residential development.

23 Third, in Attia, related to the natural inclination to
24 connect the two buildings, it was necessary that the architects
25 use the physical site and environment in a way that made that
26 connection possible. The choice to place the building over the
27 F.D.R. Drive therefore approaches the "pragmatic, constructional,
28 and technical requirements" that the Act does not intend to

1 protect. See H.R. Rep. No. 101-735, at 6949 (1990).

2 Here, the features defendant allegedly copied are
3 geared more toward the feel and "overall form" of the complex,
4 and not the pragmatic requirements of the project. Indeed, the
5 whole purpose of plaintiff's specific layout was to "foster
6 community." (SAC ¶ 97.) With no additional constraints by
7 plaintiff's client and no relevant zoning restrictions, plaintiff
8 chose the spacing and composition of the buildings, parking, and
9 open space, the look of the roofs and trapezoidal shapes, the
10 number of units and arrangement of the structures, the use,
11 location, proportion and spacing of balconies, and the
12 configuration that placed small units on the ground floor and
13 larger two-story units on the combined second and third floors,
14 which plaintiff specifically describes as "unusual" (id. ¶ 102)
15 and which does not appear "essential or common" to a multifamily
16 residential development based on the information available to
17 this court.

18 Next, defendants cite Gaito for the proposition that
19 plaintiff's work constitutes "generalized notions of where to
20 place functional elements" and therefore do not merit copyright
21 protection. (Mot. at 9.) The similarities alleged by the Gaito
22 plaintiff included, among many others, "the placement of a new
23 park, parking garage, public plaza," "the flexibility for a
24 potential single larger tenant," "architecture that was light,
25 airy, transparent, made of glass with hints of traditional
26 materials," and a tower with a "slender profile." Id. The Gaito
27 court noted that its inquiry depended "on the level of
28 abstraction or generalization of the works being compared." Id.

1 The features in Gaito, the court found, were too general and
2 abstract to warrant protection. Id.

3 The features Platform attempts to protect here are
4 materially distinct from the generalized concepts the Gaito court
5 found unprotectible. Indeed, it is unclear what constitutes
6 "light, airy, transparent" architecture. Here, by contrast, it
7 is relatively clear what "smaller ground floor units, and larger
8 two-story units on the combined second and third floors" entails
9 and what the placement of each of the features looks like based
10 on the drawings. Unlike in Gaito, the features plaintiff seeks
11 to protect are concrete and fixed. Cf. Eales v. Envtl.
12 Lifestyles, Inc., 958 F.2d 876, 880 (9th Cir. 1992)

13 ("[Plaintiff's] plans laid out the location and sizes of numerous
14 features of model home # 3, and thus her ideas were 'fixed' in
15 tangible form. That is all the copyright code requires."). As
16 such, plaintiff's "detailed plans and drawings of the specific
17 building[s]" suffice to find that the allegedly copied features
18 are not generalized design concepts and are therefore
19 protectible. See Nucor Corp. v. Tenn. Forging Steel Serv., Inc.,
20 476 F.2d 386, 390 (8th Cir. 1973) ("While the concept of a T-
21 shaped building is not entitled to copyright protection, detailed
22 plans and drawings of a specific building are.").

23 3. Scope of Protection

24 "[T]he degree of overlap in original expression that is
25 required for the similarity to be substantial is determined by
26 the range of possible protectable expression." Skidmore as Tr.
27 for Randy Craig Wolfe Tr. v. Zeppelin, 952 F.3d 1051, 1076 n.13
28 (9th Cir. 2020). "If there's a wide range of expression,"

1 copyright protection is said to be "broad." Mattel, 616 F.3d at
2 913-14. Under broad protection, "a work will infringe if it's
3 'substantially similar' to the copyrighted work." Id. On the
4 other hand, [i]f there's only a narrow range of expression," then
5 copyright protection is "thin" and a work must be "virtually
6 identical" to infringe. Id. "Which end of the continuum a
7 particular work falls on is a call that must be made case by
8 case." Apple Comput., 35 F.3d at 1447.

9 Defendants contend that plaintiff's work is entitled
10 only to a thin copyright. While defendants' motion does not
11 clearly articulate a reason, defendants appear to argue that
12 because both works are multifamily residential complexes, the
13 type-of-building requirement limits the range of expression.
14 (See Mot. at 11, 23.) For the following reasons, in the context
15 of this motion to dismiss, the court disagrees with defendant and
16 finds the allegations of the SAC sufficient to support the
17 inference that plaintiff's work is entitled to broad copyright
18 protection.

19 To illustrate the protection "continuum," the Ninth
20 Circuit has contrasted the "narrow range of expression" available
21 "to paint a red bouncy ball on blank canvas" with the "wide range
22 of expression" found in the "gazillions of ways to make an
23 aliens-attack movie." Mattel, 616 F.3d 904, 914. Other
24 decisions in this circuit are instructive here. The Ninth
25 Circuit found that a glass-in-glass jellyfish sculpture is
26 entitled to thin protection because "clear glass, oblong shroud,
27 bright colors, proportion, vertical orientation, and stereotyped
28 jellyfish form" "are so commonplace in glass-in-glass sculpture

1 and so typical of jellyfish physiology.” Satava v. Lowry, 323
2 F.3d 805, 812 (9th Cir. 2003); see also Feist, 499 U.S. at 363
3 (noting that the alphabetical “coordination and arrangement” of
4 phone numbers in a directory “is not only unoriginal, it is
5 practically inevitable”). Further, another district court found
6 that a tunic with lace accents is entitled to thin protection
7 because, although “lace along the hemline, upper back, bodice
8 area, and moustache area” were commonplace, the lace depiction of
9 stems and leaves on the tunic established “some small amount of
10 creativity beyond the standard combination of standard elements.”
11 Express, LLC v. Fetish Grp., Inc., 424 F. Supp. 2d 1211, 1227
12 (C.D. Cal. 2006).

13 On the “broad” side of the spectrum, the Ninth Circuit
14 found a Marvin Gaye song was “not limited to only thin copyright
15 protection” because, unlike glass-in-glass jellyfish sculptures,
16 “[m]usic . . . is not capable of ready classification into only
17 five or six constituent elements,” but is instead “comprised of a
18 large array of elements, some combination of which is protectable
19 by copyright.” Williams, 895 F.3d at 1120. Similarly, the Ninth
20 Circuit found that a photographer’s picture of a basketball
21 player attempting to dunk a basketball was entitled to “broad”
22 protection because the photographer’s “creative choices . . .
23 resulted in a photo with many non-standard elements.”
24 Rentmeester, 883 F.3d at 1121.

25 Here, at least as it appears from the allegations of
26 the SAC, the range of expression is broad. Plaintiff has alleged
27 that the Property was “a blank slate” and, as discussed above,
28 the court cannot infer that the clients requested anything beyond

1 a multifamily residential complex. Plaintiff submitted to this
2 court four other concept sketches that drastically vary the
3 placement and number of buildings, parking spaces, number of
4 units, and the configuration of rooms within the buildings. (See
5 Mot. at 13-14.) These features, along with the angles of the
6 roof and the shapes of walkways and landscape areas, appear to
7 give the architects a broad possibility of expression.

8 Defendant is correct that the particular architectural
9 type can substantially limit a range of expression. See Howard
10 v. Sterchi, 974 F.2d 1272, 1276 (11th Cir. 1992) (evaluating
11 "country style frame houses and . . . houses built with logs," a
12 style that requires "that only square angles be used" such that
13 "similarities in the general layout of rooms can easily occur
14 innocently"). The court cannot assume, however, that all cases
15 involving a certain architectural type give rise to only thin
16 copyright protection, and defendants cite no authority for that
17 proposition. Notably, the cases defendants rely on decided
18 motions for summary judgment, not motions to dismiss, so
19 defendants in those cases substantiated their arguments with
20 evidence. See id.; Logan Developers, Inc. v. Heritage Bldgs.,
21 Inc., No. 7:12-CV-323-F, 2014 WL 2547085, at *4 (E.D.N.C. June 5,
22 2014). In Logan Developers, for example, defendants had compiled
23 examples of the allegedly copied features being used extensively
24 in other architectural models. Id. at *7. Based on those
25 compilations, the court concluded that certain features were
26 "standard." Id. Further, the court had either previously found,
27 or assumed, that plaintiff "employ[ed] a standard architectural
28 style used by architects and builders throughout the country."

1 Id. This court is not privy to similar information and cannot
2 reasonably conclude that any given feature allegedly copied is a
3 standard feature in multifamily residential complexes, and
4 therefore unprotectable, as a matter of law.

5 Given the minimal restrictions on expression and
6 plaintiff's alternative concept sketches showing that many, if
7 not all, of the allegedly copied features are optional,
8 adjustable, and/or the result of the architect's creative
9 choices, it appears from the information available to this court
10 that plaintiff's work is more like a creatively arranged
11 photograph than a glass-in-glass jellyfish structure, and is
12 therefore entitled to broad protection.

13 4. Whether the Works are Substantially Similar

14 The court now turns to whether plaintiff has plausibly
15 alleged that its plan drawings are substantially similar to
16 defendants' under the extrinsic test. The Ninth Circuit does
17 "not have a well-defined standard for assessing when similarity
18 in selection and arrangement becomes 'substantial,' and . . . no
19 hard-and-fast rule could be devised to guide determinations that
20 will necessarily turn on the unique facts of each case."

21 Rentmeester, 883 F.3d at 1121. The court thus evaluates whether
22 the elements at issue are "similar enough that 'the ordinary
23 observer, unless he set out to detect the disparities, would be
24 disposed to overlook them.'" Id.

25 The court concludes that the complaint plausibly
26 alleges that the plan drawings are substantially similar. Judges
27 are not trained architects. Without the benefit of some expert
28 testimony, on motions to dismiss, courts must rely on the

1 impressions a layperson would draw from comparing the allegedly
2 protected drawings with the allegedly infringing ones. Defense
3 counsel's arguments at the hearing in many respects presumed a
4 knowledge of architecture which a judge cannot be expected to
5 have, and indeed, which would be improper for a judge to draw
6 upon if he did have that knowledge. Comparing images from both
7 parties, the court agrees with plaintiff that the overall form
8 and proportion of the buildings appear identical, as does the
9 arrangement and composition of spaces and elements. The size and
10 shape of the open areas and the trapezoidal shapes of the
11 walkways also appear identical. (See Opp'n at 20 (Docket No.
12 41).) While defendants are correct that the façades of the
13 buildings are not identical, from the side and front elevation of
14 the buildings, the roof angles, as well as the placement of
15 balconies, staircases, and some of the windows, appear, as
16 plaintiff alleges, largely indistinguishable. (See Reply at 4
17 (Docket No. 42).)

18 In sum, although evidence developed in later stages,
19 including expert evidence on the qualitative weight of the
20 alleged similarities, could lead the court to a contrary
21 conclusion, it is plausible at this stage of the proceeding that
22 defendant did not produce a design "unmistakably different from
23 [plaintiff's plan drawings] in material details." See
24 Rentmeester, 883 F.3d at 1122. An ordinary observer, for
25 example, could overlook the different colors or placement of some
26 of the windows, when the layout of the entire complex and
27 significant portions of the buildings, including most of the
28 façade and the interior distribution of units is virtually

1 identical to those created by plaintiff. Cf. Zindel as Tr. for
2 David Zindel Tr. v. Fox Searchlight Pictures, Inc., No. 18-56087,
3 2020 WL 3412252, at *2 (9th Cir. June 22, 2020) (denying motion
4 to dismiss where "additional evidence, including expert
5 testimony, would aid in the objective literary analysis needed to
6 determine the extent and qualitative importance of the
7 similarities that [plaintiff] identified"). Plaintiff has
8 therefore plausibly alleged substantial similarity under the
9 extrinsic test and is "entitled to offer evidence" in support of
10 his claims. See Gaito, 602 F.3d 57, 65 (2d Cir. 2010).

11 B. Copying by the Klutnick Defendants

12 Defendant argues that plaintiff fails to allege
13 infringement by the Klutnick defendants because all allegations
14 related to the Klutnick defendants are about the phase II plan
15 drawings. Because plaintiff's argument on infringement relates
16 only to the phase I plan drawings, defendants continue, plaintiff
17 has not properly pleaded substantial similarity between the phase
18 II plans and plaintiff's plans.

19 The court agrees with defendants. As previously
20 discussed, plaintiff has the burden to identify which concrete
21 elements are similar. Express, 424 F. Supp. 2d at 1228.
22 Plaintiff alleges only that "[t]he phase two plans incorporated
23 and included the phase one designs based on plaintiff's Plan
24 Drawings." (SAC ¶ 82.) Based solely on this allegation, the
25 degree of incorporation -- including the specific elements the
26 Klutnick defendants allegedly copied -- is not evident from the
27 face of the complaint. Indeed, upon comparison of the parties'
28 plan drawings, the court cannot properly compare the images

1 because phase I appears greyed-out or not even illustrated on the
2 phase II plans. (See Mot. at 18.) The alleged similarities
3 between the two designs need not be extensive to establish the
4 copying component. Rentmeester, 883 F.3d at 1117. The court,
5 however, cannot simply infer similarities where the SAC lacks a
6 description and explanation of the phase II plans.

7 Further, defendants allege that the phase II plans include a mix
8 of 5-plex and 10-plex units. (Id. at 17.) These changes could
9 affect the "overall form" of the complex and whether the designs
10 are substantially similar. Accordingly, because all allegations
11 relating to the Klutnick defendants concern phase II, and because
12 plaintiff has not identified the features allegedly copied in the
13 phase II designs, plaintiff has failed to properly plead
14 copyright infringement against the Klutnick defendants.

15 IT IS THEREFORE ORDERED that defendants' motion to
16 dismiss (Docket No. 40) be, and the same hereby is, GRANTED as to
17 defendants Jonathan Klutnick and James Klutnick.

18 IT IS FURTHER ORDERED that defendants' motion to
19 dismiss (Docket No. 40) be, and the same hereby is, DENIED as to
20 all other defendants.

21 Plaintiff is given 20 days from the date this Order is
22 filed to file a Third Amended Complaint, if it can do so
23 consistent with this Order.

24 Dated: August 18, 2020

25 

26 WILLIAM B. SHUBB
27 UNITED STATES DISTRICT JUDGE
28