UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAN BROWN and RANDOM HOUSE, INC., Plaintiffs, against LEWIS PERDUE, Defendant.	**Civil Action No. Index No. 04 CV. 7417 (GBD)** **ECF CASE**
LEWIS PERDUE, Counterclaim-Plaintiff, against DAN BROWN, RANDOM HOUSE, INC., COLUMBIA PICTURES INDUSTRIES, INC., SONY PICTURES ENTERTAINMENT INC., SONY PICTURES RELEASING CORPORATION, and IMAGINE FILMS ENTERTAINMENT, LLC, Counterclaim-Defendants.	

DEFENDANT AND COUNTERCLAIM PLAINTIFF LEWIS PERDUE'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF/COUNTERCLAIM DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS

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PRELIMINARY STATEMENT

Defendant Lewis Perdue ("Perdue") respectfully submits this memorandum in opposition Plaintiffs' motion for attorneys' fees pursuant to the Copyright Act, 17 U.S.C. § 505 and for costs pursuant to Fed. R. Civ. Proc. 54(d). As demonstrated below Perdue, who was not even the Plaintiff in this action, but who was instead sued by Dan Brown ("Brown") and Random House, asserted legal and factual positions that were all objectively reasonable, notwithstanding the Memorandum Order and Opinion of the Court dated August 4, 2005. Furthermore, because, supported by email observations of his readers and by an expert report of forensic linguist John Gabriel Olsson, Perdue reasonably believed that his copyrighted intellectual property had been wrongfully appropriated, he had every right to speak out by telling the world about the wrongs done to him by the Plaintiffs. Indeed, one of the most basic principles of the Copyright Act would be demolished if an author can be penalized in the absolutely outrageous sum of over $300,000 for doing nothing more than protesting the misappropriation of his intellectual property. As an American citizen, Perdue had a constitutionally protected right to say what he thought and his motives for exercising that right cannot be impugned in the speculative and unsupported manner Plaintiffs are now employing.

In determining whether the legal and factual positions asserted by Perdue were objectively reasonable, fairness requires the Court to look, once again, at the legal and factual arguments made by Perdue in opposing Plaintiffs' motion for summary judgment.[1] How Plaintiffs describe those positions is simply not relevant. Only the legal and factual positions actually taken by Perdue in this action are relevant in determining the objective reasonableness of his position.

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[1] In its Memorandum Opinion and Order, the Court incorrectly stated that Perdue had moved for summary judgment on his counterclaims. Perdue never made such a motion.

STATEMENT OF FACTS

A. Perdue Did Demonstrate Similarity of Expression

It is not true that Perdue did not show the substantial similarity of the *expression* used by him and Brown in their respective novels. While it may be true that much of what the two authors wrote about involved historical facts, ideas and scenes a faire, Perdue *did not rely* solely upon the similar use of the same historical facts, ideas and scenes a faire in arguing that Brown had illegally usurped portions of *Daughter of God* ("Daughter"). That can be shown from the Declaration of Lewis Perdue (Exhibit "A" to the Declaration of Kenneth G. Schwarz, dated September 19, 2005, submitted in opposition to Plaintiff's motion for attorneys' fees and costs ("Schwarz Decl.") and his memorandum of law submitted in opposition to Plaintiffs' motion for summary judgment (Schwarz Decl., Exhibit "B").

In his Declaration, Perdue talked about the Gnostic Gospels. He said that the religious views expressed in Daughter cannot be found in any single Gnostic writing. He said what he expressed in Daughter was his own personal synthesis of religious views. He said that the Gnostic Gospels are by no means unanimous in accepting the existence of a Divine Feminine. He also said that Brown copied that personal synthesis in writing *The Da Vinci Code* ("Code). Most to the point was the following statement made by Perdue in paragraphs 55 and 56 of his Declaration:

> That unique system of theology and history is a mixture of the following elements:
>
> The evolution of Goddess worship and the causally linked cultural transitions of women in society,
>
> The reasons human visions of God changed from female to male and the fact that by the time of the birth of Jesus, Goddess worship had been nearly stamped out and women were little better than slaves,

> Life became "out of balance" when women and the Goddess were dominated by men, and
>
> The books then begin a reformist theme that calls for a return of Christianity to its true roots with a curious combination of history and Gnostic opinion that posit the following:
>
> Jesus believed men and women were equal,
>
> Mary Magdalene was supposed to lead the church, not Peter,
>
> Power struggles resulted in the ouster of Mary and other women but diverse factions of Christianity retained her and fought with each other,
>
> Constantine, a pagan, grew tired of Christian squabbling, ended it at the Nicean conference, but in the process created an awesome secret the Church has spent 1,800 years killing to keep secret, and
>
> Church scriptures are cynically twisted works misconstrued to support the personal power trips of those at the top.
>
> There is no source for this complete and systematic structure other than my works. The only credible explanation for this complete system's presence in *Code* is that of plagiarism.[2]

However, Perdue did much more than to merely present his personal synthesis. Perdue went to considerable lengths to locate experts in the field to determine whether independent third-parties would find that infringement had occurred. Indeed, even if the Court did not find expert testimony appropriate in this case, Perdue's considerable effort to take this beyond his personal opinion is evidence that his intentions were reasonable, objective and well-founded.

In his memorandum of law, Perdue gave numerous examples of how Brown misappropriated that personal synthesis. The examples were accompanied by actual quotations (i.e. "expression") from both Daughter and Code. Those examples not only showed that Brown had actually misappropriated Perdue's personal synthesis, but also show the indisputable similarity of expression in the novels. Those side-by-side examples of similarity of expression

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[2] On his website, Dan Brown said: "Two thousand years ago, we lived in a world of Gods and Goddesses. Today, we live in a world solely of Gods. Women in most cultures have been stripped of their spiritual power. The novel touches on questions of how and why this shift occurred...and on what lessons we might learn from it regarding our future."

are presented on pages eight through twenty-seven of Perdue's memorandum of law. Those twenty pages detail the similarity of expression between Daughter and Code. The examples of similarity of expression also show that Brown unquestionably misappropriated Perdue's personal religious synthesis by expressing it in the same way that Perdue had expressed it.

B. The Plot Similarities

It would be beyond the bounds of legitimate advocacy to argue that there are not differences in the plots found in Daughter and Code. Nevertheless, and as the Court expressly recognized at oral argument of the summary judgment motion, "it is immaterial that the vast majority of material in defendants' book is not similar to plaintiff's book." *Churchill Livingston, Inc. v. Williams & Wilkins*, 949 F.Supp. 1045, 1055 (S.D.N.Y. 1996). It is well settled that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). *See also United Feature Syndicate, Inc. v. Koons*, 817 F.Supp. 370, 377 (S.D.N.Y. 1993). "If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line." *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231 (2d Cir. 1983).

While Perdue relied upon similarities in expression, he did not rely solely upon similarity of expression. First, he demonstrated that his personal synthesis, which was misappropriated by Brown, is what drives the plot on both novels and is, indeed, their *raison d'etre*. He gave many examples. One of those is an almost identical plot sequence, which he calls the "Gold Key Sequence." That sequence, appearing on pages 25 and 26 of his memorandum:

> In *Da Vinci Code* and *Daughter of God,* the following sequence of events takes place precisely as presented in BOTH books and are identical in events, pacing, tone and sequence in both books:
>
> A slain curator of art leaves a gold key,

Concealed in a work of art,

Painted on wood.

That work of art is named for the divine feminine at the center of the book.

The gold key is not a traditional key that opens a tumbler. Indeed, owing to gold's softness and malleability, a key made of it is patently impractical and, for that reason, not employed by banks, Swiss or otherwise.

This unique gold key is left (with no instruction) for the book's heroine

Who is, herself, a symbol of and related to the divine feminine.

The gold key allows access (but does not turn a lock) to a safe deposit box in a Zurich bank.

At the Zurich bank, the Protagonists are met by an elderly old world Banker and taken to a viewing room that is identical in appearance and appointments in both banks..

While at the bank, the Protagonists make an error in behavior that could tip-off the bank officials they are not legitimate. But the moment passes.

Finally, in a unique scene, seen in no other thriller, the Protagonists must break OUT of a bank

The contents of the container holds additional clues to finding the object of their search that send the hero and heroine to a foreign country.

The object of their search is a set of physical evidence and documents relating to the divine feminine at the heart of the book.

Throughout this litigation, Plaintiffs have abstracted individual elements of the *raison d'etre* and the sequence. After looking at each element under a microscope, and disregarding how each element was used to construct the plots of the stories, Plaintiffs wrongfully concluded that each element viewed on its own was either an historical fact, an idea or a scene a faire. For example, a Zurich bank might actually be a scene a faire in a mystery novel. The same might be true for works of art, slain curators, elderly old-world bankers or escapes. It may also be true that the notion of a divine feminine, the suppression of the notion of the divine feminine, or the willingness of the Church to suppress that notion, all are ideas when viewed in isolation of each

other. It is also true that the Emperor Constantine or the Council of Nicea might be historical facts. However, to view these scenes a faire, these ideas and historical facts in isolation of each other and to fail to see how each of these elements was used to formulate the "guts" of each novel is to turn a blind eye to the substantial similarities that are common to both novels. It is like looking at flowers in a garden without being able to see the garden as a whole. It is the interrelationship of the flowers and shrubs that make the garden unique, not the individual flowers and shrubs.[3]

The approach taken by Plaintiffs in isolating the elements from each other was rejected in *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003):

> Essentially, the total-concept-and-feel locution functions as a reminder that, while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, infringement analysis *is not simply a matter of ascertaining similarity between components viewed in isolation.* For the defendant may infringe on the plaintiff's work, not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in plaintiff's work of art – the excerpting, modifying, and arranging of public domain compositions, if any, together with the development of wholly new motifs ...(emphasis added)

The practical reason for the rule is self-evident. Distilled to their most basic elements, almost every aspect of every creative work is unprotected. The melody of a song uses notes, which are not protected. Yet, there cannot be a melody without notes. In a written work, neither the letters of the alphabet nor the words of the language are protected. But without them, there could be no story. Without them almost nothing could be copyrighted "because original works

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[3] "A collection of protectible elements may seem substantially similar primarily through the overall impression created by those protectible elements taken together." *Matthews v. Freedman*, 157 F.3d 25, 28 (1st Cir. 1998).

broken down into their component parts would usually be little more than basic unprotectible elements like letters, colors and symbols." *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

To varying degrees, all printed works have elements that are not protected. In some cases, such as fact compilations, the vast majority of the work is not protected. However, even telephone books may be entitled to some protection. "The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data, so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws." *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 499 U.S. 340, 348, 111 S.Ct. 1282, 1289 (1991). "What is protectible then is the author's original contributions, the original way in which the author has selected, coordinated and arranged the elements of his or her work." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995)(citations and quotations omitted). In the case of novels, copyright protects "plaintiff's development of the plot, of characters, of sequences of scenes and incidents, and of the interplay of characters". *Breffort v. I Had a Ball Co.*, 271 F.Supp. 623 (S.D.N.Y. 1967).[4]

C. Summary

In order to determine objective reasonableness, the Court must look to the arguments regarding similarity that were actually made by Perdue and not merely by Plaintiffs' incorrect arguments as to his position. After presenting his personal synthesis, Perdue then presented twenty pages of quotes (i.e. "expression") from Daughter and Code to show not only that Brown

[4] Although the foregoing argument was made by Perdue in opposing the motion for summary judgment, the Memorandum Order and Opinion make no reference to that argument.

had copied Perdue's personal synthesis, but also that Brown had copied Perdue's expression. The evidence for the foregoing is in black and white and can be found in Perdue's Declaration and his memorandum of law in opposition to Plaintiffs' motion for summary judgment. It is only by ignoring the materials submitted by Perdue that one can reach the false conclusion that his similarities involved only historical facts, ideas and scenes a faire and did not also dwell on the substantial similarities of expression.

POINT I

PERDUE'S CLAIMS WERE OBJECTIVELY REASONABLE

The Copyright Act does not authorize the automatic awarding of attorneys' fees to the successful party in copyright litigation. "While plaintiff failed to sustain its position, not all unsuccessful litigated claims are objectively unreasonable. The infirmity of the claim, while falling short of branding it as frivolous or harassing, must nonetheless be pronounced [to justify an award of attorneys' fees]." *CK Co. v. Burger King Corp.*, No. 92 Civ. 1488 (CSH), 1995 WL 29488 (S.D.N.Y. Jan. 26, 1995). *See also Ann Howard Designs, L.P. v. Southern Frills, Inc.*, 7 F.Supp. 388, 390 (1998, S.D.N.Y.) ("an unsuccessful claim does not necessarily equate with an objectively unreasonable claim");[5] *Boisson v. Banian, Ltd.*, 280 F.Supp.2d 10, 16 (E.D.N.Y. 2003) ("Prevailing party status does not require an award of fees.");[6] *Chere Amie, Inc. v. Windstar Apparel, Corp.*, No. 01 Civ. 0040 (WHP), 2003 WL 22056935 *5 (S.D.N.Y. Sept. 4, 2003) (same). Granting summary judgment in favor of one party in a copyright infringement action is not the equivalent of finding that party's claims are objectively unreasonable. *Leibovitz*

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[5] In *Ann Howard Designs, L.P. v. Southern Frills, Inc.*, the court denied the motion for attorneys' fees where the copyrighted items were substantially similar, although the similarity ran to nonprotectible elements rather than the exact designs that had been copyrighted.

[6] Attorneys' fees are not appropriate when "[b]oth parties had a good-faith belief in the merits of their cases, and the litigation was simply an effort to assert those beliefs." *Boisson v. Banian, Ltd.*, 280 F.Supp.2d 10, 20 (E.D.N.Y. 2003).

v. Paramount Pictures Corp., No. 94 Civ. 9144 (LAP), 2000 WL 1010830 at *2, fn. 1 (S.D.N.Y. July 21, 2000).

Indeed, the very purpose of our copyright laws is to protect authors from the wrongful infringement of their copyrighted intellectual property. It is intimidating enough to put an author into the unenviable position of having to face the almost unlimited resources of a publishing behemoth like Random House, something that in and of itself creates a significant chilling effect. To freely grant awards of attorneys' fees to the unsuccessful infringement claimant would bring the chilling effect down to an almost absolute zero and might cause authors to abandon their infringement claims for fear of such an award. Were that to happen, the protections afforded by the Copyright Act would be eviscerated.

> Each case must be viewed on its own factual circumstances. I find an award inappropriate in this case for a number of reasons, but particularly because an award here could have a chilling effect on future plaintiffs seeking to protect their copyrights. *They would have to choose between losing their rights or risking that a court might disagree with them as to infringement and award substantial fees.*

Great Importations, Inc. v. Caffco Int'l, Inc., No. 95 Civ. 0514 (MBM)(SEG), 1997 WL 603410 at *1 (S.D.N.Y. Sept. 30, 1997) (emphasis added).

In its Memorandum Opinion and Order, the Court did not find that there were no similarities between Daughter and Code; indeed the Court found many such similarities. Page 13 of the Memorandum Opinion and Order is devoted exclusively to outlining the similarities between the two novels. However, the Court granted summary judgment to Plaintiffs because it found that "[a]ll of these similarities, however, are unprotected ideas, historical facts and general themes that do not represent any original elements of Perdue's work."[7] Regarding Perdue's

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[7] Memorandum Order and Opinion, p. 14.

personal synthesis, the Court held that Perdue "has made no factual allegations, however, to support a finding that Brown copied his *expression* of those ideas."[8] Because, as demonstrated in the Statement of Facts in this Memorandum, that is incorrect, Perdue asks the Court to consider the points he actually made in his submission to the Court in determining this motion for attorneys' fees and costs.

Code has proved to be one of the most, if not the most, successful novels of all time. Indeed, after the Court's Memorandum Order and Opinion was released, Code returned to number one on the New York Times best seller list for fiction. Code has spawned a large number of non-fictional books, as well as television shows. As someone has commented, Code has created a cottage industry of commentary. At the heart of this commentary is not the story itself, but rather the main theme of the story, which is the existence of the Divine Feminine and the Church's attempts to suppress such notions. Not coincidentally, that was also the main theme of Daughter. Like it or not, the two novels share a common theme and it was inevitable that the great interest in Code would make readers who hadn't done so already want to read Perdue's novels.

The great similarities between the novels were not lost on aficionados of the genre. While the Court may disagree with their contents, prior to the commencement of this action, Perdue received many email messages from readers commenting upon the substantial similarities between the novels. Some of those messages are annexed as Exhibit "E" to the Perdue Declaration. Excerpts from those email messages are as follows:

> My husband read it first, and then passed it over to me. (He rarely gets to read a book first.) We were laying in bed, both reading, and he asked me what I thought. I was puzzled and said 'I think I've read this before...' Basically, the books were enough similar

[8] Memorandum Order and Opinion, p. 16.

that ten years after having read your book, I felt 'déjà vu' reading Brown's book...His book, as I recalled on my own, before even remembering your name, is essentially a rewrite of yours—Katherine Coble.

DaVinci Code is not the only book that Dan Brown used your ideas for—Margaret Rainstein

It now appears to me Brown and Kaufman lifted directly from you..."—Craig Dirgo[9]

I traded with a friend who had Code. Déjà Vu!! I felt like I was reading parts of the same book over again. That's when I checked the date on yours & realized yours was WAY first. I mean I've seen some similarity in romance, but how many boy-girl scenarios can you have? This was beyond the acceptable coincidence. I love to read, but I can't write, so I respect the work authors put into their novels. I really think you are justified in your claim of plagiarism...Anyway, I just wanted to say a few words in support of you & let you know that there are people out there who know that YOU are the original.—Gretchen Uchello

After reading Daughter, Legacy & Code, I can't see how anyone could miss the blatant similarities between your books and Code. It's a meld of elements from both your works, but, in this case, the total is less than the parts. I've heard that imitation is the sincerest form of flattery – unless you're a writer!!—Gretchen Uchello

I read it [Daughter of God] before I read The DaVinci Code, and as I was reading Dan Brown's book, I kept feeling as though it was very similar to yours.—Ruth Borkowski

I was reading your book Daughter of God and before I even finished half, I was checking the publication dates between your book and the DaVinci Code. I didn't know anything of the controversy beforehand...Unfortunately, I think the promotion of "The Code" is so widespread, it is beyond recall no matter what you can prove. You have my complete sympathy. There is nothing worse than being the victim of someone else's lack of integrity. Were I Dan Brown, I would feel the proceeds of the book to be ill gotten dirty money...I will show my support for your original work by promoting it to my book club along with your other publications. It's not much, but at least you know there are some common folk out there who understand that it's right to honor intellectual property and ideas.—Melinda Robino

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[9] Jason Kaufman is Brown's editor and Craig Dirgo is the author of mystery novels.

If the positions taken by Perdue in this action were objectively unreasonable, then so must have been the comments of readers who gratuitously noted the great similarity between Daughter, Code and Perdue's other novels.

Of equal importance is the report of forensic linguist John Gabriel Olsson (part of Exhibit "C" to the Perdue Declaration). That report concluded that Brown, in Code, had plagiarized Perdue's earlier novels. While the Court refused to consider the Olsson report in deciding the motion for summary judgment, it is important to note that Perdue did not simply rush forward by making reckless charges of plagiarism. Instead, his claims were supported by the email observations of readers as well as the conclusions reached by an expert witness. Stated differently, while the Court may have concluded that Code was not substantially similar to Perdue's novels, that does not mean that there was not substantial independent support for the opposite conclusion that they were substantially similarities. Given that independent support, it is impossible to contend that Perdue did not have a reasonable basis for his claims of plagiarism.

Finally, in their reply memorandum in support of their motion for summary judgment, Plaintiffs indicated that the books were "two complex novels." (Reply brief, p. 3).[10] Furthermore, in its Memorandum Opinion and Order, the Court noted that "[t]he distinction between and idea and its expression is an elusive one." *Williams v. Crichton*, 84 F.3d 581, 587-88 (2d Cir. 1996). Here, given the acknowledged similarities that exist between the novels, given the complexity of the novels, given the email messages of readers, given the expert report of John Gabriel Olsson, and given the elusive nature of distinguishing between an idea and the expression of an idea, it cannot be said that Perdue acted in an objectively unreasonable way in

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10 "Among the factors that may justify the denial of fees to a prevailing plaintiff is the presence or a complex or novel issue of law that the defendants litigate vigorously and in good faith." *Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344 (LLS), 1994 WL 263482 at *2 (S.D.N.Y. June 10, 1994), *aff'd.* 68 F.3d 621 (2d Cir. 1995)

defending against the claims that had been brought against him by Plaintiffs. Perdue had ample basis for believing that Brown had stolen his intellectual property and he had ample basis for defending the case that had been brought against him by Plaintiffs.

POINT II

PERDUE HAS ACTED IN GOOD FAITH

Plaintiffs contend that even if Perdue's legal and factual position had been objectively reasonable, an award of attorney's fees is still justified based upon Perdue's "motivations." While cases in *dicta* say that such a result is possible, in no case cited by Plaintiffs did a court award attorneys' fees after finding the party's legal and factual position to be objectively reasonable.

Furthermore, because Plaintiffs were the ones who commenced this lawsuit for a declaration of non-infringement, they mount their allegations of bad faith primarily upon things that Perdue did and said prior to the commencement of this lawsuit by Random House. Under such circumstances, a claim for attorneys' fees is unusual, if not unprecedented. The cited cases all involved situations where the plaintiff sued in connection with the alleged copyright infringement of a defendant. The case was adjudicated, and the successful party sought to recover attorneys' fees. In such cases, courts have held that the time to consider the reasonableness of plaintiff's position is at the time of the initiation of the litigation. *Brewer-Giorgio v. Bergman*, 985 F.Supp. 1478, 1483 (N.D.Ga. 1997). Additionally, courts have also held that, as in the present case, dismissal of a copyright infringement claim early in the proceeding, before any discovery has occurred, is a factor to be considered in denying attorneys' fees. *See NXIVM Corp. v. Ross Institute*, Nos. 1:03CV0976, 1:03CV1051 (GLS), 2005 WL 1843275 at * 5 (S.D.N.Y. Aug. 2, 2005).

The fact that once Random House sued him, Perdue counterclaimed for copyright infringement, is not a sign of bad faith. Because of the actions of Random House, Perdue had no choice. Perdue's counterclaims are mirror images of the declaratory judgment claim of Random House. Pursuant to the mandatory counterclaim rule of Fed. R. Civ. Proc. 13(a), a pleading must state as a counterclaim any claim that arises out of the "transaction or occurrence that is the subject matter of the opposing party's claim." Had Perdue not asserted his counterclaims, he would have been forever barred from doing so. *See Scott v. Long Island Savings Bank*, 937 F.2d 738, 742 (2d Cir. 1991); *Harris v. Steinem*, 571 F.2d 119, 122 (2d Cir. 1978); *Hickory Pine Assoc. Limited Partnership v. Purchase Environmental Protection Ass'n, Inc.*, 02 CIV. 1414 (TPG), 1995 WL 231311 at *2 (S.D.N.Y. April 19, 1995) ("a compulsory counterclaim must be pleaded or it will be barred").

The upshot of the failure of Perdue to counterclaim would have been to hand victory to Random House on a silver platter. Once Perdue was forever barred from asserting an infringement claim, the declaratory judgment claim of Random House would become virtually moot because there would have been nothing Perdue could have done even if the Court had found the existence of a substantial similarity. Failure to counterclaim would have been the equivalent of a default by Perdue. Surely, it is not a sign of bad faith for a party to seek to avoid defaulting in an action brought by another. Hence, while Perdue's actions evidence a desire to avoid litigation, when Random House thrust a lawsuit upon him, Perdue had no choice but to counterclaim.

Because Perdue did not commence this action, Random House objects to Perdue's accusations of plagiarism that appeared on Perdue's various web sites before this action was commenced and upon statements he made to the press. Without evidence of any kind, they also

accuse him of having profited from the greater sale of his books after he began making his accusations of plagiarism, and they contend that his real motive for those accusations was to increase the sales of his own books, not to prevail in litigation. Random House contends that if Perdue really thought he had a valid claim, he should have immediately commenced a lawsuit. According to Random House, the fact that Perdue never commenced a lawsuit proves that his motives were bad.

The logic of Random House is twisted. In the usual case, it is the rush to commence frivolous litigation, not the desire to avoid litigation, that establishes bad faith. The logic is also twisted, because Perdue's conduct demonstrates an attempt to first seek information (without legal representation or any thought of litigation) and then later to settle, which attempts were rebuffed with great hostility by Random House. The logic is twisted by the inability of Random House to recognize that its resources far exceed those of Perdue, and that Perdue would be grossly overmatched in any litigation with Random House. All we need to do is to look at the numbers given by Random House. It claims that fees of over $300,000 were incurred even though there has been no discovery in this action and that only one motion was made prior to this motion for attorneys' fees and costs. Had the summary judgment motion been denied, the costs of the litigation could have been upwards of $2.0 million. No author, with the possible exception of Dan Brown, could afford such litigation. It is arrogant for Random House not to recognize the impossible burden a party would assume in deciding to litigate against Random House. In the usual case, parties who try to settle are viewed with favor. Here, because it was Random House, the desire to settle is equated with bad faith. The logic is twisted.

Random House also argues, without any evidence whatsoever, that Perdue acted in bad faith because he allegedly sought to achieve commercial success for himself by claiming that

Brown plagiarized him. However, commercial motivation, even if true, does not equal bad faith. In *Proctor & Gamble Co. v. Colgate-Palmolive Co.*, No. 96 Civ. 9123 (RPP), 1999 WL 504909 (S.D.N.Y. July 15, 1999), the prevailing party in a copyright infringement action similarly moved for attorneys' fees. While there were substantial similarities between the two commercials, the court had held those similarities involved unprotected material. The Court stated:

> The existence of commercial implications surrounding a copyright claim does not render that claim improperly motivated.

Proctor & Gamble Co., 1999 WL 504909 at *4.

Random House also alleges that evidence of Perdue's bad faith was that he counterclaimed against the Sony Defendants. Notably, Brown and Random House had licensed the Sony Defendants to make of a movie of Code. Because Perdue believes that Code plagiarized his earlier works, he sued the Sony Defendants to prevent them from distributing a movie of Code, which may have constituted a further infringement of Perdue's works. Ignoring the fact that the adjudication of claims against the Sony Defendants would have actually promoted judicial efficiency by having all claims decided in one action, Random House now contends that the inclusion of the Sony Defendants was a further sign of bad faith. Notably, however, the Sony Defendants never moved to dismiss on the ground that they were improperly joined as parties. The facts of this case are similar to those in *Proctor & Gamble Co. v. Colgate-Palmolive Co., supra*, where the court held at *4:

> Neither of these parties ever argued prior to judgment that they were improper parties. Contrary to defendants' suggestion, it is not relevant in this case that plaintiff could have received full relief solely from Colgate. A copyright action seeking joint and several liability amongst multiple defendants, including the relevant advertising agencies, is neither unusual ... nor improper. (citations omitted).

The disparate financial conditions of the parties also should be considered on this motion. Perdue has stated that an award of over $300,000 in attorneys' fees will bankrupt him. It will probably put his charity, Books 'n Blues, out of business. Surely, Random House has sufficient economic resources to bear its own fees and expenses. *See, Nicholls v. Tufenkian Import/Export Ventures, Inc., supra* at * 4. When awarding prevailing party attorneys' fees, the district court may consider financial disparity of the parties. *See Littel v. Twentieth Century-Fox Film Corp.*, No. 89 Civ. 8526 (DLC), 1996 WL 18819 at *3 (S.D.N.Y. Jan. 18, 1996). ("Defendants are major corporate entities while plaintiffs are, according to their counsel, 'struggling artists' who are likely to become bankrupt if ordered to pay the attorneys fees and costs sought in this motion."). Perdue has submitted proof that the award, as demanded by Plaintiffs, would lead to his financial ruin. *See* Declaration of Lewis Perdue in opposition to Plaintiffs' motion for attorneys' fees and costs, dated September 16, 2005, ¶¶ 10, 53; Exhibit "H." *See also Agee v. Paramount Communications, Inc.*, 869 F. Supp. 209, 212 (S.D.N.Y. 1995) ("the financial condition of the losing party can be considered in awarding attorneys' fees to the prevailing party") (citations omitted).

POINT III

THE FEES SOUGHT BY RANDOM HOUSE ARE EXCESSIVE

"The calculation of reasonable attorneys' fees is a factual issue whose resolution is committed to the discretion of the district court." *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 145 (2d Cir. 1993). "In determining the proper amount of attorneys' fees a district court must multiply all *reasonable* hours expended by a *reasonable* hourly rate." *Id.* (citation omitted) (emphasis added). *See also Bleecker Charles Co. v. 350 Bleecker St. Apt. Corp.*, 212 F.Supp.2d 226, 229 (S.D.N.Y. 2002) ("the appropriateness of the fees sought must be determined by looking at the reasonableness of the time spent and the rate charged in this case."). In

applying this formula, also known as the "lodestar amount," the Court must be sure that the fees awarded, if any, do not amount to a windfall for Plaintiffs. *See Crescent Publ'g Group, Inc. v. Playboy Enterprises, Inc.*, 246 F.3d 142, 151 (2d Cir. 2001). *See also New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983) (attorneys' fees are to be awarded "with an eye to moderation, seeking to avoid either the reality or the appearance of awarding windfall fees").

When determining the amount of attorneys' fees or costs that should be awarded, if any, amounts that are "excessive, redundant, or otherwise unnecessary" should be excluded. *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998). In dealing with excessive amounts, "the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application." *Id.* (citations omitted). Moreover, attorneys' fees should not be awarded for legal services which are duplicative. *See New York State Ass'n for Retarded Children, Inc.*, 711 F.2d at 1142 (within court's discretion to make percentage deductions due to duplicative hours in fee application). Here, Plaintiffs' application for attorneys' fees is unreasonable because it is excessive and duplicative, and, as such the fee award should be denied or, in the alternative, the Court should significantly reduce the fees and costs requested.

Plaintiffs allege, in their moving memorandum, that the issues raised by Perdue were not complex legal issues.[11] However, in commencing the action, preparing a motion to dismiss, replying to and arguing that motion, and preparing this fee application Plaintiffs have spent a

[11] *See* Plaintiffs' memorandum of law in support of their motion for prevailing party attorneys' fees and costs, dated September 2, 2005, at p. 7.

cumulative total of approximately seven hundred and ninety (790) attorney hours,[12] equaling the exorbitant sum of three hundred ten thousand three hundred twenty-four dollars and eleven cents ($310,324.11). In light of Plaintiffs' allegations that the issues litigated were not that complex, how can they justify the excessive amount of hours spent researching and litigating this action? It is evident that either the issues were complex, leading to the conclusion that Perdue's litigation positions were objectively reasonable and no attorneys' fees or costs should be awarded at all, as discussed *supra*, or that the amount fees sought to be recovered through this motion are unreasonable. If the Court is to award any fees, the amount requested by Plaintiffs must be reduced considerably to an amount that is reasonable.

For example, Plaintiffs' counsel billed for the time it took each attorney to read the novels in question. On September 13, 2004, Linda Steinman spent 9.9 hours reading Daughter. *See* McNamara Aff., Exhibit "R." Between December 22, 2004 and December 27, 2005, Elizabeth McNamara billed 7.1 hours representing the time it took to read Daughter, while James Rosenfeld billed 13.2 hours to read the same novel between January 13, 2005 and January 18, 2005.[13] *Id.* Similarly, in September of 2004, Ms. Steinman billed 13.3 hours for reading Code and 6.5 hours for reading *Da Vinci Legacy* ("Legacy"), while Mr. Rosenfeld also billed 5.2 hours attributed to reading Code, in September, and 12.7 hours for Legacy, in December of 2004 after Plaintiffs' declaratory judgment action was commenced. *Id.* Notably, Charles Ortner did not

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[12] This total includes hours from both the Davis Wright Tremaine and Proskauer Rose law firms. In total, approximately four hundred and sixty (460) partner hours and three hundred and thirty associate (330) hours were spent during this litigation, which was dismissed prior to the commencement of any discovery. *See* Affidavit of Elizabeth A. McNamara in support of motion for prevailing party attorneys' fees and costs, sworn to on September 2, 2005 ("McNamara Aff."), Exhibits "R" and "S"; Affidavit of Charles B. Ortner, sworn to on September 1, 2005 ("Ortner Aff."), Exs. "A" and "C."

[13] It should be noted that Ms. McNamara and Mr. Rosenfeld were able to prepare and file the complaint well in advance of reading either of Perdue's novels.

appear to bill any time dedicated to the reading of these novels. *See* Ortner Aff., Ex. A. While the novels are central to the issues raised in this action, it is not reasonable to award fees for duplicative tasks, especially when the time records reveal that certain novels were not read by counsel until well after the lawsuit began. Likewise, billing entries that represent the time spent by each attorney preparing for and attending the May 6, 2005 oral argument on Plaintiffs' motion to dismiss is entirely duplicative, and should be reduced accordingly to a reasonable amount.

Further, Plaintiffs expended approximately ten thousand dollars ($10,000.00) between May 6, 2005, the date of oral argument on the motion to dismiss, and August 4, 2005, the date of the Memorandum Opinion and Order. *See* McNamara Aff., Exhibits "R" and "S." The majority of these time entries concern issues dealing with the German publisher of Legacy, the duplication and retention of documents, and attending to and reviewing a "collection of books from Dan Brown." *See id.*[14] These entries do not reasonably relate to the litigation and, therefore, should not form part of the any attorneys' fee award. *See Kirsch*, 148 F.3d at 172 (entries in a billing statement that are ambiguous or vague will not be considered compensable).

Simply put, an award of attorneys' fees of three hundred ten thousand three hundred twenty-four dollars and eleven cents ($310,324.11), with recoverable costs of two hundred fifty-six dollars and thirteen cents ($256.13), represents a windfall for Plaintiffs and is improper.

POINT IV

IF THE COURT DOES NOT DENY THE MOTION AN AWARD OF ATTORNEYS' FEES SHOULD BE STAYED PENDING APPEAL

Perdue has appealed to the Second Circuit from the Memorandum Order and Opinion of the Court (Schwarz Decl., Exhibit "C"). If the Court does not deny this motion, an award of

[14] Invoices dated July 27, 2005 and August 29, 2005, form a part of Exhibit "R" to the McNamara Aff., and include the aforementioned time entries, as does the pro forma submitted by Plaintiffs' counsel as Exhibit "S" to the McNamara Aff.

attorneys' fees should be stayed pending the determination of that appeal. *Agee v. Paramount Communications, Inc.*, 869 F.Supp. 209, 210 (S.D.N.Y. 1995).

CONCLUSION

This motion for attorneys' fees and costs should be denied. The legal and factual positions taken by Perdue were reasonable. Not only did Perdue show a substantial similarity of expression between Code and his novels, but the opinions of Perdue were shared by numerous readers in their email messages and in the expert opinion of John Gabriel Olsson. Furthermore, there is no evidence that Perdue acted in bad faith. In determining this motion, the Court should also consider the income disparity between Perdue and Random House. Additionally, Plaintiffs' application for attorneys' fees is unreasonable because it is excessive and duplicative, and, as such the fee award should be denied or, in the alternative, the Court should significantly reduce the fees and costs requested. Finally, if the Court does not deny the motion, it should stay an award of attorneys' fees pending Perdue's appeal to the Second Circuit.

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September 20, 2005

Respectfully submitted,

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