05-4840-cv

United States Court of Appeals

for the

Second Circuit

DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs-Counter-Defendants-Appellees,

IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Counter-Defendants-Appellees,

– v. –

LEWIS PERDUE,

Defendant-Counterclaimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES and COUNTER-DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellees Random House, Inc., Imagine Entertainment (improperly sued herein as Imagine Films Entertainment, LLC), Sony Pictures Releasing Corporation, Sony Pictures Entertainment Inc. and Columbia Pictures Industries, Inc., by and through their undersigned counsel, hereby certify that:

Random House, Inc., a New York corporation, is a wholly owned subsidiary of Bertelsmann Publishing Group, Inc., a privately held corporation, which is in turn a wholly owned subsidiary of Bertelsmann, Inc., a privately held corporation. Bertelsmann, Inc. is a wholly owned subsidiary of Bertelsmann AG. The majority interest in Bertelsmann AG is privately owned; Group Bruxelles Lambert S.A., a publicly traded company, owns a minority interest in Bertelsmann AG.

Sony Pictures Entertainment Inc. is an indirect wholly-owned subsidiary of Sony Corporation, a publicly-traded Japanese company.

Sony Pictures Releasing Corporation and Columbia Pictures Industries, Inc. are indirect wholly-owned subsidiaries of Sony Pictures Entertainment Inc.

Imagine Entertainment is a privately held company.

Dated: New York, New York
January 20, 2006

Davis Wright Tremaine LLP

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Plaintiffs/Appellees Dan Brown ("Brown") and Random House, Inc. ("Random House") – the author and publisher of the bestselling thriller *The Da Vinci Code* ("*Da Vinci Code*") – and Counterclaim Defendants/Appellees Imagine Films Entertainment, LLC, Sony Pictures Releasing Corporation, Sony Pictures Entertainment Inc. and Columbia Pictures Industries, Inc. (collectively, the "Movie Counterclaim Defendants") – creators of the soon-to-be-released *Da Vinci Code* motion picture – respectfully submit that the District Court's Memorandum Opinion and Order, dated August 4, 2005 (the "Order"), granting their summary judgment motion should be affirmed by this Court.

PRELIMINARY STATEMENT

The extraordinary bestseller *Da Vinci Code* is an "erudite suspense novel"[1] built on complex puzzle clues, several of them connected to Leonardo Da Vinci's art, eventually leading to the revelation that Jesus and Mary Magdalene were married and had descendants, a secret long kept by the Priory of Sion. Lewis Perdue's *Daughter of God* – whether considered in terms of plot, characters, setting, themes, tone or style – is a strikingly dissimilar novel. It is a "shoot-'em-up" thriller, involving Nazis and Russian mafia, where husband and wife protagonists battle an ultranationalist Russian leader and a Cardinal seeking to depose the Pope to uncover the fanciful secret that a second Messiah named Sophia

[1] Janet Maslin, "Spinning a Thriller From A Gallery at the Louvre," *New York Times*, March 17, 2003. (A-120-21).

was born and arose in Anatolia in the Fourth Century.

In a thorough decision applying settled law, the District Court separated out the elements unprotected by the copyright law and "inquire[d] only whether the protectible elements, standing alone, are substantially similar." *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996). After acknowledging that, "Courts are to determine whether the fundamental essence and structure of the novels are substantially similar" (SPA-20-21), the Court below properly compared the works at issue in "such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting," a methodology dictated by this Circuit in *Williams*. *Id.* Applying this methodology, the Court had no trouble concluding that "*Da Vinci Code* is simply a different story than that told by *Daughter of God*" (SPA-21); that there is "no substantial similarity between *any* of the characters" (SPA-22) (emphasis added); that the expression of the respective themes "differ markedly" (SPA-18) and that the time sequence and settings of the works differ "considerably" and are not "substantially similar" (SPA-23-24).

On appeal, Defendant/Counterclaimant/Appellant Lewis Perdue ("Perdue") does not contest these conclusions, thereby forgoing any attempt to compare the works as a whole in "such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting." He fails to do so for one simple reason: such an approach dooms his case. As can be seen by any reader of the two works, and

most certainly the "discerning ordinary observer," the two novels are radically different in every element. Perdue's utter failure even to engage in this analysis – let alone establish that the works are substantially similar in characters, plot, sequence and the like – alone warrants affirmance of the decision below.

Instead, Perdue's appeal rests entirely on his contention that *Daughter* and *Da Vinci Code* share a "back story" about "the divine feminine, the suppression of the divine feminine and the role played by Constantine and the Council of Nicaea in suppressing the divine feminine." (Perdue Mem. at 5) Of course, this religious "back story" is found in only a few brief sections of *Da Vinci Code*. Further, as the Court below properly concluded, Perdue again fails to establish any similarity in the actual *expression* of these supposedly similar "back stories" in the two novels. And, recognizing as he must that the historical facts and theories that form the basis of this "back story" cannot ground an assertion of substantial similarity under long-standing copyright principles, Perdue proffers three equally meritless arguments on appeal.

First, Perdue attempts to stretch the "selection and arrangement" doctrine beyond recognition to create an argument that his particular selection of unprotected facts and historical theories has been appropriated by Brown. Yet, the selection and arrangement doctrine, usually invoked for compilations such as phone books or rug designs and the like, provides no help to Perdue. The U.S.

Supreme Court and this Circuit offer only extremely thin protection to the original, actual selection and arrangement of unprotected material – the arrangement must be virtually identical to be actionable – and never in the underlying facts or public domain elements themselves. "The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991). Here, far from virtually identical arrangements, the parties' books take scores of different historical facts and theories and express and interweave them entirely differently into intricate and markedly distinct stories.

Next, Perdue's argument that his use of these historical facts or theories are sufficiently novel to be somehow protectible likewise fails. The use of historical theories, regardless of how novel or obscure, is of course not protected by copyright law. As this Court made clear in *Hoehling v. Universal City Studios, Inc.*, where it dismissed a copyright claim based on the fictional use of the plaintiff's unusual hypothesis explaining the Hindenburg explosion, "such an historical interpretation, whether or not it originated with [plaintiff], is not protected by his copyright and can be freely used by subsequent authors. . . .In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the

expression of another." 618 F.2d 972, 979-80 (2d Cir. 1980). Instead of "bodily appropriation," as the Court below correctly found, Perdue's argument founders because he fails to show how the expression of these facts and theories that constitute his "back story" are in any way duplicated in *Da Vinci Code*.

Finally, Perdue's contention that the Court below had no basis to conclude that *Daughter*'s discussion concerning Emperor Constantine, the Council of Nicaea or the divine feminine was grounded in historical fact and theory, or that other elements in the works were broad ideas or classic *scenes à faire,* is baseless. To conclude that Perdue's religious "back story" was predicated on historical facts or theories the Court below needed to look no further than Perdue's own author's note and pleadings where he expressly affirmed that *Daughter* was a "work of fiction based on fact" (EX-884) and that the history in *Daughter* "is largely adapted from modern interpretations of the relationship between Gnosticism and Christianity." (A-65). Much of what Perdue now labels "faux-history" supposedly shared by the parties' works is found in well-known books on the Gnostic Gospels submitted as part of the record below. In short, Perdue presented his material as historical fact or theory and its subject matter is historical fact and theory, and thus under *Hoehling,* it is simply not protectible.

Likewise, Perdue's concern that the District Court did not have a sufficient evidentiary predicate to conclude that thrillers often begin with murders or involve

Swiss banks, or that warring factions within the Catholic Church follows from the idea of a religious thriller defies common sense. Finally, the district court properly rejected the need for expert testimony on the issue of substantial similarity. In case after case, particularly when considering literary works such as *Daughter* and *Da Vinci Code*, this Court and others have rejected the use of expert testimony on the issue of substantial similarity.

For all these reasons, Appellees respectfully request that this Court affirm the District Court's decision granting their motion for a declaratory judgment and dismissing Perdue's counterclaims. As the Second Circuit repeatedly has emphasized, courts "have an important responsibility . . . to monitor the outer limits within which juries may determine" the issue of substantial similarity. *Warner Bros. Inc. v. American Broadcasting Cos. Inc.*, 720 F.2d 231, 245 (2d Cir. 1983). The bestselling book and the upcoming movie of *Da Vinci Code* are two extremely valuable works, and Perdue's specious claims of copyright infringement should be put to rest promptly.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the District Court properly conclude that the works were not substantially similar as a whole in their plot, characters, themes, setting, pace and "total concept and feel"?

(2) Did the District Court properly conclude that Perdue's "synthesis" of unprotected historical material was not protected under the "selection and arrangement" doctrine, since the expression of this material in Brown's work differs greatly?

(3) Did the District Court have an adequate basis to determine that certain elements in Perdue's book were unprotectible facts, historical theories, ideas and *scenes à faire*, as courts routinely do in similar procedural contexts?

(4) Was it a clear abuse of discretion for the District Court to hold that Perdue's proffered "expert opinions" were unnecessary to its determination of whether the works were substantially similar?

STATEMENT OF CASE

Perdue instigated this dispute by launching a campaign in the press and on the internet that *Da Vinci Code* copied his own books, *Daughter of God* ("*Daughter*") and *The Da Vinci Legacy* ("*Legacy*"). When his campaign escalated to threats to sue over alleged copyright infringement, Brown and Random House commenced a declaratory judgment action for a declaration of non-infringement. Perdue counterclaimed against the plaintiffs and, without any separate allegations concerning the movie beyond the fact that it is derivative of the book, Perdue added the Movie Counterclaim Defendants. Asserting copyright infringement and related claims, Perdue sought $150 million in damages and an injunction.

After receiving the Answer and Counterclaims, Brown and Random House moved for judgment on the pleadings or in the alternative for summary judgment on the declaratory judgment claim. Brown, Random House and the Movie Counterclaim Defendants also moved to dismiss the counterclaims under Rule 12(b)(6) for failure to state a claim or in the alternative for summary judgment under Rule 56. Plaintiffs and Counterclaim Defendants conceded access *solely* for purposes of the motions and argued that the case should be disposed of on the ground that there was no substantial similarity of protected expression, as is required to show unlawful appropriation – a posture frequently adopted to secure the early dismissal of copyright infringement cases.

In a thorough decision, the United States District Court for the Southern District of New York (Daniels, J.) rejected Perdue's claims. The Court granted summary judgment for Brown, Random House and the Movie Counterclaim Defendants, issuing a declaratory judgment that "plaintiffs' authorship, publication and exploitation of rights in and to *The Da Vinci Code* do not infringe any copyrights owned by defendant" and dismissed all of Perdue's counterclaims. (A-26).[2] Perdue appeals.

[2] In a harmless error, the District Court also mistakenly indicated that Perdue moved for summary judgment.

STATEMENT OF FACTS

The District Court appropriately based its decision on a close comparison of Brown's *Da Vinci Code* and Perdue's *Daughter*,[3] and it is the story lines, characters and other expressive aspects of the two books themselves that are the most important facts comprising the record. Glaringly absent from Perdue's appellate brief is any summary of the respective novels – a silence that speaks volumes since even a brief review of the two novels demonstrates that they are dramatically different.

A. The Books

1. *The Da Vinci Code*

Da Vinci Code (Ex-1 to Ex-460) begins with the murder in the Louvre Museum of its curator, Jacques Saunière. Saunière has been killed by an albino monk seeking the Holy Grail. The monk is an agent of Opus Dei, a devout Catholic sect (that actually exists), and is in turn acting at the behest of a

[3] Perdue asserts on appeal that *Da Vinci Code* infringed his rights in "primarily *Daughter* and, to a lesser extent, *Legacy*". (Perdue Mem. at 4). However, he presents no argument and does not seriously contest the District Court's ruling with respect to *Legacy*. (SPA-9, n.4) *The Da Vinci Legacy* is so dramatically far removed from *Da Vinci Code* – it involves a quest to find the pages of Da Vinci's notebooks depicting a charged-particle beam weapon before the forces of evil can make the weapon – that it bears no similarity whatsoever beyond the unprotectible fact that both books refer to works by Da Vinci, and the most commonplace of thriller conventions. For the Court's further reference, the book appears at EX-892 *et seq.* (Exhibit Vol. 3), and a concise summary, in Plaintiffs' Rule 56.1 Statement, appears at A-132-135.

mysterious figure originally known to the reader only as the "Teacher." In a dying effort to send a message to his estranged granddaughter, Sophie Neveu, Saunière leaves behind an array of mysterious clues, which lead Neveu, a police cryptologist, to Robert Langdon, a Harvard professor of religious symbology (and Brown's hero in his previously published novel *Angels and Demons*).

Bezu Fache, captain of the French judicial police, suspects Langdon of the murder and pursues him. Langdon and Neveu, joining forces, follow clues including coded and invisible messages, anagrams, numerical sequences, and other brain-teasing puzzles. Combined with Neveu's childhood recollections, the clues reveal that Saunière was the Grand Master of an ancient secret society named the Priory of Sion, whose members included Da Vinci and Sir Isaac Newton. In the novel, the Priory "believes that [Emperor] Constantine and his male successors successfully converted the world from matriarchal paganism to patriarchal Christianity by waging a campaign of propaganda that demonized the sacred feminine, obliterating the goddess from modern religion forever." (Ex-130). Most critically, Langdon and Neveu later learn the Priory has for centuries kept secret startling historical information and documents long suppressed by the Church – namely that Jesus was married to Mary Magdalene; they had a female child; and their descendants still live in France. The "Holy Grail" is in fact not an object, but the secret of Mary Magdalene's identity.

Neveu follows Saunière's clues to a key with the symbol of the Priory of Sion, hidden in the frame of a Da Vinci painting at the Louvre. After escaping the museum, Langdon and Neveu go to the Paris branch of a Swiss bank, where they are presented with yet more riddles. They figure out the account number for Saunière's deposit box, in which they discover a carved wooden box with a cryptex – a stone cylinder invented by Da Vinci to store objects, which can only be opened by twisting five disks to spell a password. They are convinced the cryptex will lead them to the documents exposing Mary Magdalene's true identity.

A bank guard recognizes Langdon and Neveu as fugitives, but they are saved by the bank president, an old friend of Saunière's. Langdon and Neveu escape to the home of Langdon's friend, Sir Leigh Teabing, a wealthy, eccentric royal historian and eminent authority on the Holy Grail. It is here that Teabing provides a tutorial on the legend of the Grail, the evidence that Jesus and Mary Magdalene were married and had a child, and the clues to Magdalene's role in Da Vinci's artwork.[4]

Both the French police and the albino monk trail the heroes to Teabing's estate, but Teabing saves them from the monk's attack and spirits them away to London on his jet. However, it eventually becomes clear that Teabing is the

[4] The scattered information from these few chapters in *Da Vinci Code* concerning the relationship of Jesus and Mary Magdalene and the divine feminine forms the primary basis of Perdue's claims. (*See*, EX-236-45, 248-56, 259-65).

villainous "Teacher," and that he has deceived the Opus Dei monk into murdering Saunière and the other Priory masters because he is obsessed with finding and publicizing the information about Mary Magdalene. Fache arrests Teabing, and Langdon and Neveu finally crack the code for the cryptex.

In the end, the clues lead them to the Rosslyn Chapel in Edinburgh, Scotland, where Sophie Neveu is reunited with her long-lost grandmother and brother. She learns from her family that she is a descendant of Jesus and Mary. Langdon suspects the documents concerning Mary Magdalene are housed underground in an inverted pyramid at the Louvre, although Sophie's grandmother makes it clear that the belief in their possibility is more important than their actual existence. The book closes with Neveu and Langdon expressing the beginnings of some romantic interest in each other. (EX-454-55).

2. *Daughter of God*

Instead of a few days of intellectual intrigue in Paris, London and Scotland, *Daughter*'s story extends over several months with most of the action occurring in Zurich, Los Angeles and the Austrian salt mines. At the beginning of *Daughter* (Ex-461 to Ex 891), two Americans, Zoe Ridgeway, an art assessor and broker, and her husband Seth Ridgeway, an ex-police officer turned professor of philosophy and comparative religion, are invited to Zurich by Willi Max, an elderly former Nazi. Near death, Max belatedly wishes to return his vast collection

of art stolen during the war to its rightful owners, and asks Zoe to assist. After their meeting, Max sends over to Zoe's hotel a small painting by a German artist friendly with Hitler named Frederick Stahl and a document which is apparently from the lost writings of Emperor Constantine's biographer.

In the book's opening chapters, the religious "back story" is revealed. In stark contrast to theories concerning the religious historical figures Jesus and Mary Magdalene, *Daughter*'s plot revolves around the entirely fictional existence of a second Messiah named Sophia, who lived in a small, remote village in what is now Turkey during the fourth century. The reader learns that Sophia was an illegitimate child who was raised in isolation until age 13, when she began healing people with her touch. When the reports of Sophia's miracles reached Rome, the Church, fearful of the growing worship of her, sent a scribe to record her miracles and then massacred her entire village and buried the inhabitants in shrouds. Sophie's body disappeared from her shroud, leaving her image imprinted on it. (Ex-541-44, 546-49). Centuries later, Hitler gained possession of the sacred shroud, the Passion of Sophia (the story of this Messiah's life) and other documents testifying to her godliness, and bribed the Vatican into silence regarding the Nazis' atrocities by agreeing to keep these artifacts secret. Church leaders bought into this Faustian bargain in order to uphold Christian teachings and the Church's authority. Hitler hid this evidence of the second Messiah in salt

mines in Austria.

Against this backdrop, the novel's action turns on powerful groups around the globe vying to be the ones to find the Sophia materials. KGB officials, working in cahoots with the Russian mafia, steal Willi Max's art, burn down Max's house, thereby killing him, and kidnap Zoe. They seek the Sophia shroud and Passion in order to blackmail the Russian Orthodox Church and give them great power. Meanwhile, Cardinal Braun, a former archbishop of Vienna and head of a secretive, powerful Vatican intelligence force called the Congregation for the Doctrine of the Faith ("CDF") (an actual organization), tells an unnamed American about the second Messiah, and asks the American's assistance in obtaining the materials.

With his wife's inexplicable disappearance, Seth retreats to California, where he falls into utter despondency and is about to lose his job. Suddenly, a mysterious woman arrives at his boat in Marina del Rey. She reveals that the Stahl painting Max had sent to their Zurich hotel may help to explain his wife's capture. Before anything can happen, they are attacked by unknown assailants, and the woman dies in one of the novel's many gunfights. As Seth flees, he is assisted by George Stratton, purportedly of the United States National Security Agency. Seth realizes that the Stahl painting should be in his unopened mail at UCLA. He throws off the NSA tail, goes to his office, retrieves the painting and discovers his

department head, apparently murdered by the same unknown assailants looking for the Stahl painting. Seth leaves for Europe.

Meanwhile, Zoe is incarcerated by the Russians in a European warehouse, interrogated about the painting and forced to help the Russians value their stolen art. A fellow prisoner teaches her about the history of the "Great Goddess," and the presence of divine feminine elements in the world's religions and art. In his quest to find his wife, Seth rushes through Amsterdam and Zurich, engaging in multiple gunfights with mysterious assailants. Ultimately, Zoe escapes from the Russians with a divinely inspired plan, and the NSA's Stratton shuttles her to safety at a luxury hotel in Zurich. The couple reunite at the hotel.

Zoe and Seth bring the Stahl painting to a bank in Zurich where bank officials use turpentine to remove the paint, revealing not a gold key, but an embedded gold ingot with Herman Goering's account number and a plain safe deposit key hidden underneath. In Goering's safe deposit box are documents leading to the Sophia cache and instructions on how to dismantle the traps in the salt mine where the treasure is located.

After nearly being gunned down at the bank, Seth and Zoe, along with Stratton, go to a small Austrian town, where they join forces with a priest named Father Hans Morgen and his supporters. Morgen, one of the book's heroes, was active in the Nazi resistance and is now a zealous Church reformer determined to

reveal the truth concerning Sophia. Zoe, Seth, Stratton and Father Morgen crawl through mineshafts to the heavily fortified salt mine, and find the shroud and Passion of Sophia in a jeweled box deep within the mine. Stratton – who we now realize was the American who had promised to help Cardinal Braun recover the shroud – then turns on Zoe, Seth and Morgen, and escapes with the priceless box and its contents. He brings it to Cardinal Braun, a megalomaniac who intends to use it to blackmail the Pope into appointing Braun as his successor.

Just as Cardinal Braun is preparing to head to Rome, Seth, Zoe and Father Morgen land on the roof of his chalet in Innsbruck and attack him. Father Morgen reveals to Cardinal Braun that Braun is his illegitimate son. However, Braun only cares about maintaining possession of the Shroud and dies after leaping into a fire in an attempt to save it. Zoe tells Seth that God has been good to them – she has had a spiritual reawakening since learning about the "Great Goddess" – and that he should renew his lapsed faith. The book ends with Braun's entire retreat destroyed by fire except, miraculously, for a patch of flooring in the shape of a woman where Sophia's shroud had last been.

B. The Gnostic Gospels and Related Works

With virtually no similarity in plot, characters or the other requisite elements between the works, Perdue looks to isolated historical facts or theories in the "back story" in *Daughter* involving Emperor Constantine, the Council of Nicaea and the

divine feminine to form his arguments on appeal. While this material is expressed entirely differently – the operative and dispositive inquiry – both books include references to the history and theories surrounding the Gnostic Gospels, an ancient collection of religious texts unearthed in Nag Hammadi, Egypt in 1945, but not made accessible to the public until the late 1970s. (A-65-66; A-116; EX-240). The Gnostics were early dissidents from the dominant branch of Christianity and their beliefs were excluded from the New Testament commissioned by Constantine, which bears close relation to the New Testament of today. (A-116, A-378). The groundbreaking discovery of the Gnostic Gospels and their publication in English in 1977 led to a flood of writing on their import, books relied on by Perdue and Brown in fashioning their fictional works. (A-65-66; A-102-17; A-227-88; EX-259). As Perdue himself pled regarding *Da Vinci Code*, "The novel is part of the late twentieth century revival of interest in Gnosticism. Its emphasis on the role of Mary Magdalene comes straight from Gnostic scriptures." (A–65).

While on appeal Perdue disingenuously claims that the historical and religious material that comprised his "back story" are actually his own creation and constitute protected "faux history," he neglects to inform this Court that his Author's Notes in *Daughter* states the exact opposite:

> This is a work of fiction based on fact …. And of course, there was an Emperor Constantine who put an end to spiritual squabbling with bureaucratic decrees enforced by the blade of sword. . . .The sections of the book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and far better documented than any scriptures in the Hebrew or Christian Bible….

(EX-884, 888) (emphasis added).

Indeed, the underlying history in *Daughter*, according to Perdue's own counterclaim, "is largely adapted from modern interpretations of the relationship between Gnosticism and Christianity; the most influential of these is probably *The Gnostic Gospels* by Elaine Pagels." This prominent book, which won the National Book Award – excerpts from which are in the record – contains several of the very religious theories Perdue here proclaims as his original "faux history." (Perdue Mem. at 7). Thus, Pagels established that many of the Gnostic texts conceive of God as embracing both masculine and feminine elements (*i.e.*, the "sacred feminine"), and some texts speak of the female aspect of God by using the Greek feminine term for "wisdom," *Sophia*. Similarly, Pagels traces how in some Gnostic texts, Jesus viewed men and women equally. Pagels reviews the oft-quoted passages where Mary Magdalene is described as the most favored disciple[5] and depicts Mary in a power struggle with Peter. Moreover, Pagels reviews how

[5] As the Gospel of Philip has been translated, "[But Christ loved] her more than [all] the disciples and used to kiss her [often] on her mouth." (A-111).

the Gnostic texts were omitted from the canonical collection and branded heretical by the Christian orthodoxy, and feminine imagery was largely excised from the canon. *See* Pagels, *Gnostic Gospels* at A-103-113.[6] The excerpts from these non-fiction works, Perdue's pleadings and his author's note in *Daughter* – all attesting to the scholarly theories that underpin his "faux history" – were before the Court below on the motions.

SUMMARY OF ARGUMENT

On appeal, Perdue leaves the foundation and edifice of the District Court's opinion in place, chiseling in vain at a few bricks in the façade. He challenges neither the settled copyright law applicable to determinations of whether two works are substantially similar, nor the vast majority of the District Court's well-reasoned application of this law. Instead he musters only three meritless arguments which provide no basis for reversal.

Under well-established Second Circuit law, courts evaluating substantial similarity must initially separate out the unprotected elements of fact (or factual theory), idea and *scenes à faire*, before comparing the protected expressive elements in the works. In comparing two novels, courts must then go through each major protected component, analyzing whether such aspects as the plot, themes,

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[6] Further historical facts and theories concerning Constantine and the Nicaean Conference can be found in other previously published works in the record. (A-379; A-372-78).

characters, setting, sequence, pace and "total concept and feel" of the works are substantially similar. Perdue does not dispute this analytical foundation, and it is precisely this analysis which the district court undertook. However, on appeal, Perdue does not even try to establish substantial similarity through this required analysis, and for this reason alone, his appeal fails. (*See* Point II). Instead, Perdue appeals on surprisingly narrow grounds:

First, he incorrectly argues that the District Court failed to consider his argument that the *arrangement* or "synthesis" of certain unprotected elements in the two works – including various religious beliefs emanating from a third party's book, *Gnostic Gospels* – resulted in original expression that was copyrightable, and that this material was "plagiarized" by Brown. To the contrary, the District Court explicitly rejected this argument, correctly concluding that Perdue had offered "no factual allegations…to support a finding that Brown copied his *expression*" of this synthesis of unprotected elements. (SPA-16). In other words, any incidental common facts, historical theories or themes were interwoven in the novels in an entirely distinct fashion in the context of strikingly different characters, story lines, scenes and plots. These circumstances bear no resemblance to the type of narrow protection this Court has accorded to the actual "selection and arrangement" of unprotected elements, as in telephone books, rug designs and computer programs. (*See* Point III).

Second, Perdue asserts, contrary to the actual record and extensive precedent, that the District Court (a) did not have the factual predicate to determine what constituted historical fact or theory or should have disregarded its own background knowledge and common sense in identifying other elements of fact, idea and stock features and (b) should have relied on expert opinions submitted by Perdue. Perdue's evidentiary arguments are insupportable given the case law and his own admissions. (*See* Point IV).

It is well settled in this Circuit that a court needs nothing more than the books themselves to determine whether they are substantially similar. Courts routinely grant pre-discovery motions to dismiss or for summary judgment based on the lack of substantial similarity of the parties' respective works. All of the purported factual issues which Perdue raises concerning Dan Brown's research and his alleged access to Perdue's books, for example, are simply immaterial. (*See* Point V).

ARGUMENT

I.

Standard Of Review

The Second Circuit reviews a summary judgment of non-infringement *de novo*. *Williams*, 84 F.3d at 582; *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1071-72 (2d Cir. 1992). Evidentiary rulings of the District Court are entitled to

substantial deference and are reviewed only for clear abuse of discretion. Even an erroneous evidentiary ruling will not lead to reversal unless affirmance would be inconsistent with substantial justice. *Medforms, Inc. v. Healthcare Management Solutions, Inc.*, 290 F.3d 90, 110 (2d Cir. 2002).

II.

Appellant Presents No Argument To Disturb The Finding Below That Under The Williams Standard The Works Are Not Substantially Similar

There is no dispute between the parties concerning the fundamental principles governing this case. First, the parties agree that Second Circuit law required the District Court to ask "whether a lay observer would consider the works as a whole substantially similar to one another." *Williams*, 84 F.3d at 590. Courts "must take care to inquire only whether 'the protectible elements, standing alone, are substantially similar.'" *Williams*, 84 F.3d at 588 (quoting *Knitwaves v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). (*See* Perdue Mem. at 16).

Second, in a case not based on allegations of verbatim literal copying but rather on "comprehensive non-literal similarity" (Nimmer, 4 *Nimmer on Copyright*, § 13.03 [A][1] at 13-36), a copyright plaintiff must demonstrate that the defendant author has "appropriated the fundamental essence or structure of plaintiff's work." *Arica Institute, Inc.*, 970 F.2d at 1073.[7] The determination of

[7] On p. 13 of his brief, Perdue alleges that his papers below (A-323-369) contained numerous tables with side-by-side comparisons of actual quotations

substantial similarity turns on "a detailed examination of the works themselves" and in the context of novels, this analysis calls for a detailed comparison of plot, characters, scenes, themes, setting, sequence, pace and "total concept and feel." *Williams*, 84 F.3d at 588.

Third, the parties are in agreement as to what is *not* protected by copyright. It is "universally understood" that facts are not copyrightable. *Feist Publications, Inc.*, 499 U.S. at 344. "[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis." *Hoehling*, 618 F.2d at 974. Courts thus give "broad latitude" to "authors who make use of historical subject matter, including theories or plots." *Id.* at 978. Next, "[i]t is a principle fundamental to copyright law that a copyright does not protect an idea, but only the expression of an idea." *Williams*, 84 F.3d at 587. Finally, the Second Circuit has repeatedly held that stock scenes and themes, termed *scenes à faire*, cannot form the basis of a copyright claim. These are defined as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic," *Hoehling*, 618 F.2d at 979, or as "thematic concepts…which necessarily must follow from certain similar plot situations." *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.

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from the books at issue demonstrating that Brown took actual expression from *Daughter*. His contention is quickly belied by looking at the charts.

1976).

While Perdue accepts these indisputable principles, he utterly fails to apply the operative standard and presents no argument to disturb the decision below, which found fundamental differences in plot, characters, themes, setting and "total concept and feel" between the novels. Indeed, Perdue simply jumps over this analysis – recognizing that even a superficial review of the books reveals how strikingly dissimilar they are in every operative element – and argues instead that each work had an "almost identical back story." (Mem. at 18). In effect, Perdue asks this Court to ignore the entirely distinct stories and characters depicted in *Da Vinci Code* and *Daughter* and to instead focus solely on certain abstract, historical underpinnings and themes involving the divine feminine, the *Gnostic Gospels* and the role of Emperor Constantine. The law does not allow such selective parsing, particularly where, as here, it is grounded in historical fact or theory and, even more important, when the *expression* of the facts or theories are entirely different. "Such a scattershot approach cannot support a finding of substantial similarity because it fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another." *Williams*, 84 F.3d at 590.

Even *if* one looks selectively at the relatively few pages in *Da Vinci Code* that comprise this so-called "back story" and compares it with *Daughter*, their

religious stories could not be more distinct. The Court below paid close attention to Perdue's emphasis on alleged similarities relating to the divine feminine, Sophia, the Gnostic Gospels and related religious themes and subjects – and to Perdue's contention that Brown copied his synthesis of these particular elements. It wholly rejected this contention, holding that Perdue had "made no factual allegations…to support a finding that Brown copied his *expression* of these ideas." (SPA-16). Indeed, *Da Vinci Code* imparts "the history and importance of women and the sacred feminine in early religions" through Sophie Neveu, in Brown's story the descendant of the religious historical figures Jesus and Mary Magdalene. In *Da Vinci Code*, the religious "secret" is the idea that Jesus was married to Mary Magdalene and had descendents – *i.e.*, a bloodline. As the story goes, the Church has tried to suppress this information since, "A child of Jesus would undermine the critical notion of Christ's divinity and therefore the Christian Church." (EX-260). This notion – not some physical cup or chalice – is the Holy Grail, as Teabing explains:

> "Not only was Jesus Christ married, but He was a father. My dear, Mary Magdalene was the Holy Vessel. She was the chalice that bore the royal bloodline of Christ…."
>
> Sophie [asks]: "But how could a secret that big be kept quiet all of those years?
>
> "Heavens!" Teabing said. "It has been anything but quiet. The royal bloodline of Jesus Christ is the source of

> the most enduring legend of all time – the Holy Grail. Magdalene's story has been shouted from the rooftops for centuries in all kinds of metaphors and languages."

(EX-255). Brown's story traces the preservation of the Holy Grail by the Knights Templar and thereafter the Priory of Sion, as well as the clues to Magdalene's story in architecture and art, most particularly in *The Last Supper* by Leonardo Da Vinci, a former Grand Master of the Priory of Sion. (EX-163-70, 240-42, 243-45, 248-251). Brown's story further describes various rituals, including a fertility rite, practiced by the Priory of Sion (EX-313-18) and the current Priory's step-by-step arrangements to perpetuate knowledge of the secret through four Grand Masters (one of whom is Saunière) and a back-up plan involving a nun at St. Sulpice. (EX-133-35, 141-42, 270-71).

That expression of the "divine feminine" is radically distinct from the secret repressed by the Church in *Daughter*, namely, the entirely fictional history of Sophia, a female Messiah who lived in a remote village in Anatolia in the fourth century, was executed along with her entire town by the Church and ascended to heaven leaving her imprint on her shroud, and whose little-known existence has been exploited by Hitler, the Church and the Russian mafia. There is no focus on Jesus, Mary Magdalene, Da Vinci or the Holy Grail. The District Court understandably concluded that the books differ markedly in their expression of any

common plot and thematic material. (SPA-18).[8]

Moving beyond the "back story" to the full plot – as is required – the District Court correctly found that although "[a]t the most general level of abstraction," both stories told tales based on religious and historical people, places and events," "[t]he fundamental essence and structure" of the plots were not substantially similar. (SPA-20). Understandably, Perdue does not dispute this conclusion. Not only is there a fundamental difference in the secret repressed by the Church, (1) there are radical differences in the ultimate *villain*, a key structural element in any thriller (Cardinal Braun, a religiously conservative Cardinal determined to rule the world versus Leigh Teabing, an erudite Royal Historian obsessed with making public the secret of the Holy Grail) (SPA-22-23); (2) there are clear differences in both the opening murder and the initial *quests* of the main characters, both of which are components essential to the structure of a thriller (Seth Ridgeway's quest for the first third of *Daughter* is to find his captured wife and Zoe's mission is to escape her kidnappers, whereas Robert Langdon's primary

[8] Similarly, the religious themes of the works differ. Perdue identified his theme in the Author's Note of *Daughter*: "[T]he truth I have tried to write is the spiritual imperative to question and to search for a relationship with God….Finally, the Golden Rule rests at the spiritual heart of all major religions…." (EX-889). Zoe Ridgeway exemplifies this imperative, moving from contemptuous disbelief to profound spiritual awakening (while Seth's faith is shaken and he ends up "rudderless" as a result). (EX-878-80). While Brown's book takes a secular interest in religious topics, it does not suggest any imperative to search for God or follow the Golden Rule.

mission is to clear his name and Sophie Neveu's mission is to discern the messages sent to her by her beloved but estranged murdered grandfather); (3) *Da Vinci Code* lacks Nazis and Russian mafia, and a moral hero, Hans Morgen, who is a Nazi resister, central components of Perdue's plot structure, (4) there are radical differences in the relationship or interplay of the hero and heroine (a married couple versus two people who have just met and do not become romantically involved until the final pages of *Da Vinci Code*); (5) religion plays a very different role in the main characters' lives and the two books (religion is an important element in Perdue's characters' lives and each takes a personal religious journey, whereas Brown's book and characters are more secular and express no imperative to search for a relationship with God); and (6) *Da Vinci Code* features as a unifying element running throughout the book a detailed history of Da Vinci's art and life, and his link to the Holy Grail and goddess worship, an aspect wholly absent in *Daughter*. As the Court put it, "*The Da Vinci Code* is simply a different story than that told by *Daughter of God*." (SPA-20-21).

On appeal, Perdue likewise does not attempt any comparison of the works' respective characters. As the Court found, *Da Vinci Code*'s Langdon, the "bookish professor of symbology," is "the intellectual wheel that keeps the plot moving," solving most of the major riddles and questions; his physical attributes are not emphasized. By contrast, *Daughter* emphasizes its hero's athletic prowess and

physical attributes, not his intellect. Seth Ridgeway's crisis of faith due to his wife's disappearance also sets him apart from Langdon, who has a purely academic interest in religion. (SPA-22). The District Court likewise found few similarities in the novels female protagonists. *Da Vinci Code*'s Sophie Neveu, "the young French symbologist … raised by her grandfather in a life of privilege," bears no resemblance to *Daughter*'s Zoe Ridgeway, the self-employed art appraiser who grew up in a blue-collar household. (SPA-22). Even more damning is the radical differences in the ultimate villains, noted above.

Nor is there any similarity, as found by the District Court, between the two novels' sequence, pace and setting, or in their respective "total concept and feel." *Daughter* takes place over many months, while *Da Vinci Code* takes place over a matter of days, and *Da Vinci Code* is set in Paris and London, while *Daughter* moves through Southern California, Amsterdam, Italy and the Austrian salt mines. (SPA-23-24). In the end, the "concept and feel" of the two novels is entirely distinct. As found by the Court below, *Daughter* is "action-packed, with several gunfights and violent deaths," involving a "perilous journey through an Austrian salt mine" and numerous sex scenes. (SPA-19). By contrast, *Da Vinci Code* is an "intellectual, complex treasure hunt, focusing more on the codes, number sequences, cryptexes and hidden messages left behind as clues than on any physical adventure." (SPA-20).

Courts in this Circuit have rejected numerous infringement claims involving far more similarities than any that exist here. In *Williams v. Crichton*, 84 F.3d 581, both the plaintiff's stories and Michael Crichton's *Jurassic Park* involved the idea of "an imaginary present day man-made animal park for dinosaurs where ordinary people . . . can, in presumed safety, visit, tour and observe the creatures in a natural but hi-tech controlled habitat." *Id.* at 583. In both works, the child protagonist(s) visit the dinosaur park and are attacked by the dinosaurs, spend the night in the dinosaur zoo, and escape from the dinosaurs by helicopter. Despite the overlap in this rather novel idea and the many plot parallels, the Second Circuit found key differences in the total concept and feel, plot, themes, settings and characters. In brief, *Jurassic Park* was a high-tech horror story whereas the plaintiff's works were adventure stories with a happy ending. *Id.* at 589.

Likewise, in *Hogan v. DC Comics*, 48 F. Supp.2d 298 (S.D.N.Y. 1999), the two works involved a "half-human, half-vampire character named Nicholas Gaunt." *Id.* at 310. Starting with that premise – which is more strikingly similar than any comparison of *Daughter* and *Da Vinci Code* – the plaintiff relied on comparisons like "both characters seek to uncover the truth about their origins and both learn about their origins through flashbacks and memories; both characters are faced with the choice of pursuing good or evil…; [and] both works use similar imagery, such as religious symbolism, biblical allusions and the use of doors to see

into the past." *Id.* Nevertheless, the court had no trouble concluding that these abstractions were nothing more than "unprotectible ideas and themes." *Id.*

Similarly, in the seminal case of *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), Learned Hand compared two comedies about Jewish and Irish families in which the children fall in love despite clashes in religion and culture. In both books, the children secretly marry contrary to the wishes of the parents; the Jewish fathers learn of the marriage and become infuriated; the young couple has a baby; and the families reconcile. Learned Hand found these similarities to be mere unprotected ideas. *See also Walker v. Time Life Films,* 784 F.2d 44, 49 (2d Cir. 1986) ("Both [works] recount the experiences of policemen battling the hostile environment of the 41st precinct. But, in moving to the next level of specificity, differences in plot and structure far outweigh this general likeness."); *Reyher*, 533 F.2d 87 (finding no substantial similarity despite the fact that the central plot in both children's books featured a young girl searching for her mother who she considered the most beautiful woman in the world).

In short, little similarity – let alone the necessary substantial similarity – exists between the two novels when they are considered as a whole and the standard dictated by this Circuit is applied. Perdue makes no effort to rebut this conclusion, and for this reason alone the decision below should be affirmed.

III.

The District Court Correctly Rejected Perdue's Argument That His Arrangement Of Unprotected Elements Was Infringed

On appeal, Perdue's primary argument is that Brown copied his "synthesis" of religious and historical theories, supposedly invented by him, and that the allegedly similar "selection and arrangement" of these materials in *Da Vinci Code* constitutes infringement. He alleges that the District Court ignored his synthesis argument and that it erred in failing to consider these unprotected elements "in relation to one another." Perdue Mem. at 17. Yet, a simple reading of the District Court's opinion reveals that it considered Perdue's "synthesis" theory head on and properly rejected it:

> [Perdue] claims that the material plagiarized in *The Da Vinci Code* consists of an extensive and detailed synthesis of history and multiple schools of theology that Perdue created for *Daughter of God* and based on equally unique work expressed in *Linz Testament* and *Da Vinci Legacy*.
>
> Perdue argues that Brown stole his "synthesis" of differing religious beliefs emanating from the Gnostic Gospels. He has made no factual allegations, however, to support a finding that Brown copied his *expression* of these ideas. Moreover, these ideas and themes find their origin in historical facts, events and figures, as well as pre-existing works.

(SPA-16) (brackets and citations omitted). The District Court was correct to reject the "synthesis" or "selection and arrangement" argument, for several independent reasons.

A. Perdue Misconstrues Second Circuit Law Governing The Copyrightability Of "Selection And Arrangement"

As the District Court recognized (SPA-14-17), Perdue's claim rests heavily on unprotectible facts or factual theories, and ideas. Nonetheless, Perdue argues that the District Court failed to adequately consider how *Daughter* "combined otherwise unprotectible events to create an original story" and that this "selection and arrangement" was protected and allegedly taken by Brown in *Da Vinci Code*. Perdue Mem. at 19-22. Thus, Perdue spends pages on the allegedly "central" role played in each work by the historical figure Roman Emperor Constantine, and the historical event the Nicaean conference, itemizing in detail each novel's reference to either Constantine or the historical integration of pagan practices into Christianity. Perdue Mem. at 5-14, 23-24, 30-31. And he dwells at length on the notion of the "divine feminine," a theological concept explored in the Gnostic Gospels and many other religious texts.[9] Perdue argues that he owns a monopoly on his use and "arrangement" of these historical facts and theories.

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[9] It is of considerable import that the factual material on which Perdue harps, and that comprises the "back story," is found in only a small number of pages of *Da Vinci Code*. For example, Perdue's claim that the facts concerning Emperor Constantine and the changes that flowed from the Nicaean Conference "served as the back bone of the back stories" of both novels is seriously undermined by the fact that this material appears only in a few brief sections of *Da Vinci Code* (*e.g.*, Teabing's middle-of-the-night lecture). (EX-236-45, 248-56, 259-65). While these details may be relevant ones, it grossly overstates their importance to focus on them to the exclusion of the vast majority of plot developments, character traits and interactions, and other major elements in the remaining hundreds of pages of *Da Vinci Code*.

The only legal protection granted to unprotected expression – such as the historical facts and theories underlying Perdue's "back story" – falls under the "selection and arrangement" doctrine articulated by the U.S. Supreme Court in *Feist.* *Feist* and Second Circuit law offer extremely thin copyright protection in the original, actual selection and arrangement of unprotected material, and *never* in the underlying facts or public domain elements themselves. *Feist Publications,* 499 U.S. at 349. This protection is woefully inadequate to support Perdue's "arrangement" theory. Indeed, this protection has been only extended to "compilations" of unprotected elements such as telephone directories, computer programs or designs, and even then, only when the taking is virtually identical. It does not apply here.

This is readily demonstrated by the very case law Perdue cites in support of his selection and arrangement argument. In *Tufenkian Import/Export v. Einstein Moomjy*, 338 F.3d 127 (2d Cir. 2003), the plaintiff took two public domain rugs, combined them, and made several alterations. Most significantly, he took a portion of one of the rug's interiors and made idiosyncratic, un-uniform alterations. "The plaintiff seemed to have engaged in a selective and particularized culling of a leaf here, a complex of leaves and flowers there, and so forth." *Id.* at 136. The defendant "precisely mimic[ked]" these choices, with the end result being that a substantial portion of his rug looked the same as plaintiff's. *Id.* The Second

Circuit found that this non-mechanical adaptation of individually unprotectible elements from the public domain is the type of original selection and arrangement protectible under *Feist*. *Id.* at 136-37. [10]

These cases do not alter any of copyright's bedrock principles. To the contrary, they affirm that in performing a substantial similarity analysis, the court must first "factor [public domain] materials out. For copying is not unlawful if what was copied from the allegedly infringed work was not protected." *Tufenkian*, 338 F.3d at 135. They also re-affirm that, although there is thin protection for the actual "selection and arrangement" *per se*, "The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." *Feist*, 499 U.S. at 349 (quoting Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865,

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[10] In *Softel, Inc. v. Dragon Medical and Scientific Corps., Inc.*, 118 F.3d 955 (2d Cir. 1997), also cited by Perdue, the plaintiff had offered evidence that certain of the parties' respective software programs had "an identical structure" and that defendant used fifteen commands which were "functionally identical" with the commands used in plaintiff's software. *Id*. at 967. The Second Circuit vacated the district court's judgment in defendant's favor (without reaching the merits) because the lower court had *only* analyzed the respective programs' individual elements, and this Court found it "very doubtful" that the district court had even considered the arrangement argument at all. *Id*. at 964, 966-67. Likewise, *Apple Computer, Inc. v. Microsoft Corp.*, 779 F. Supp. 133 (N.D. Cal. 1991), merely stands for the proposition that arrangement can be protectible, without reaching the merits of whether the works in that case were in fact substantially similar.

1868 (1990)). The result of these principles is that cases in which copying of selection and arrangement constitutes infringement are "relatively unusual" and, the *Tufenkian* Court suggested, require "essentially the same" selection and arrangement. 338 F.3d at 136.

Perdue's "selection and arrangement" argument has no application to the novels at issue here. Indeed, the argument ignores the fact that this Court is looking at historical novels – not telephone books, rugs or computer programs. And in the context of historical novels, this Court has been loathe to extend copyright protection to historical facts or theories, even if unusual or novel. Contrary to Perdue's arguments, Second Circuit law does not distinguish between better and lesser known facts, or between established facts and theory; it holds that facts and historical theories are categorically uncopyrightable, giving "broad latitude" to "authors who make use of historical subject matter, including theories or plots." *Hoehling*, 618 F.2d at 978.

In *Hoehling*, plaintiff's book and defendant's fictional film both put forward the unusual hypothesis that one Eric Spehl, influenced by his girlfriend, purposefully destroyed the Hindenburg in 1937 by placing a crude bomb in Gas Cell 4. Like Perdue, Hoehling argued that reliance on his unusual historical hypothesis – what Perdue now calls his "faux history" – constituted infringement. This Court rejected the claim on the ground that, "such an historical interpretation,

whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors." 618 F.2d at 979. The Court emphasized that, "In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another. The principle is justified by the fundamental policy undergirding the copyright laws, the encouragement of contributions to recorded knowledge." *Id.* at 980 (citation omitted). *See also Fuld v. Nat'l Broadcasting Co., Inc.*, 390 F. Supp. 877 (S.D.N.Y. 1975) (holding that, even presuming the plaintiff, author of a screenplay entitled "BUGSY," could claim credit for much of the information conveyed in the defendant's movie about Bugsy Siegel, the material constituted unprotected historical fact).[11]

Thus, Perdue simply has no claim based upon any historical religious facts and theories featured in both books unless the allegedly infringing work is a "*verbatim reproduction"* or *"virtually identical"* to the prior work. *Hoehling*, 618

[11] Perdue turns *Hoehling* on its head through selective quotation. Arguing that courts should rely on unprotected elements in evaluating substantial similarity, he relies on language about the danger of courts' "los[ing] sight of the forest for the trees" by "factoring out" themes, facts and *scènes à faire* and the similarities based on these elements. Perdue Mem. at 18 (quoting *Hoehling*, 618 F.2d at 979-80). Yet the language immediately following this quotation, which Perdue omits, makes clear that courts have permitted authors of historical works to "make significant use of prior work, so long as [they] do[] not bodily appropriate the expression of another." 618 F.2d at 980. In other words, this unprotected material is appropriately "factored out."

F.2d at 979-80 (emphasis added). As the Southern District has held:

> "One cannot build a story around a historical incident and then claim exclusive right to the use of the incident … [T]hen all novels, stories and dramas written about the Civil War, opposing Grant and Lee, might never have been written after the first one because the author of the first one could have claimed exclusive right to the product.

Gardner v. Nizer, 391 F. Supp. 940, 942 (S.D.N.Y. 1975) (quoting *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935)); s*ee also Feist*, 499 U.S. at 353-54 (definitively rejecting the notion that copyright protection could arise from a "sweat of the brow" theory).

Here, it is not as if Brown's book contains a list of Perdue's allegedly copied items and has merely rearranged them; rather, both books take scores of historical facts and theories, and express and interweave them differently into intricate and markedly distinct stories. The religious and historical notions contained in each book are not free-standing items listed in the same manner, order and context in the two books but rather are broad concepts enmeshed in Brown and Perdue's stories (albeit in a very small portion of Brown's), each expressed by means of different characters, story lines, scenes and other aspects.[12] This is far removed from the exact replication of a design where one takes out the very same leaves and flowers,

[12] Perdue has not even demonstrated with citations that the items on his list of historical ideas are all found in both his book or Brown's – and some are unlikely to be found in *Da Vinci Code*.

as in *Tufenkian*, or the creation of a computer program which is structurally identical to another, as in *Softel*. To the extent that Brown incorporates any of the religious facts and ideas contained in Perdue's books, they are "divorced from the context imposed by [Perdue] and restated or reshuffled." *Feist*, 499 U.S. at 349. In sum, despite Perdue's conclusory assertions, there is absolutely no wholesale – or any – usurpation of protected expression in books as different in plot, characters, settings, scenes, themes and time sequence as *Da Vinci Code* and *Daughter of God*.

B. Perdue's Selection And Arrangement Argument Fails Because The Two Authors Express Any Shared Ideas In Vastly Different Ways

Perdue's examples in support of his "selection and arrangement" argument only underscore the completely different ways in which the two authors expressed – *i.e.*, restated or reshuffled – unprotected elements. Indeed, Perdue has selected only a handful of supposed similarities – the selection of which are "inherently subjective and unreliable" – and even with these "scenes that appear similar in their abstract description prove to be quite dissimilar once examined in any detail." *Williams*, 84 F.3d at 590.

1. Swiss Bank Scenes

Central to Perdue's theory that the District Court improperly "filtered out" expression is his contention that the discussion of gold keys and Swiss banks in the

novels are "identical" in events, pacing, tone and sequence in each novel. Perdue Mem. at 21. Yet, Perdue's sweeping claims fall apart when the respective scenes are scrutinized.

The actual expression of the "gold keys" and the bank scenes are entirely distinct. Indeed, Perdue's comparison rests largely on a series of gross distortions. For example, while Perdue makes much of the alleged fact that both books feature gold keys, there is in fact *no* gold key in *Daughter*. Instead, as the District Court noted, a standard key to a safe deposit box, which is not described as gold, is hidden under a gold ingot embossed with Herman Goering's account number (SPA-15, n.7). By contrast, the key in *Da Vinci Code* is itself gold, ornately decorated with symbols of the Priory of Sion and laser-marked. Defendant also argues that the paintings that hide the keys are both painted on wood, but the painting in *Da Vinci Code* is on canvas. (EX-138). Further, the two paintings housing the keys are diametrically different and are not – as Perdue suggests – both named for the "divine feminine at the center of the book" (Perdue Mem. At 22): the painting in *Da Vinci Code* where Saunière hides the key is Da Vinci's "Madonna of the Rocks" which depicts the Virgin Mary, who is *not* the divine feminine entity featured in either book. By contrast, the key in *Daughter* resides physically in a mundane painting of the entrance to the salt mine in the Austrian countryside where the Sophia shroud and Passion have been hidden, painted for

Hitler by an obscure German artist.

The bank scenes are likewise dramatically different in both detail and general effect. *Compare* EX 182-200 *with* EX-771-790. Any similarity in the use of this stock feature in international thrillers ends with the abstract concept "Swiss bank." In *Da Vinci Code*, the bank is located in an out-of-the-way, unglamorous neighborhood in Paris and entry to the bank is down a "cement-lined ramp." A "gold laser-pocked key" is required for entry. (EX-182-83). In *Daughter*, the bank is on the tony *Bahnhofstrasse*, the main shopping street of Zurich, and Seth and Zoe simply walk in. (EX-771-74). In *Da Vinci Code*, access to the safe deposit box is obtained after the protagonists figure out that the password is the famous Fibonacci sequence, while in *Daughter*, access to Goering's safe deposit box is obtained by scraping away paint on Hitler's painting and finding the gold key embedded in its wood. (EX-194-95; EX-780-83). In *Da Vinci Code*, the bank president, an old friend of Sophia's grandfather, helps Langdon and Sophia escape from the bank in an armored truck. In *Daughter*, the bank officials are Nazi sympathizers and a bank Vice President attending to Seth and Zoe is shot dead as assailants attack them in a blazing gunfight. (EX-176, 198-200; EX-771-90). While Perdue proclaims, in typical exaggerated fashion, that Brown has copied his "unique scene, seen in no other thriller" where "the Protagonists must break OUT of a bank" (Perdue Mem. at 22), this conceit is commonplace and can be found, for

example, in the bestselling Robert Ludlum thriller *The Bourne Identity* (1980) in which the protagonist also must escape from, not surprisingly, a Swiss bank.

2. Divine Feminine

As reviewed above, with respect to Mary Magdalene and the "Divine Feminine" concept, the differences are sweeping. The central religious secret in *Da Vinci Code* is that Jesus and Mary Magdalene were married and had a daughter, and their descendants still live in France; the secret in *Daughter* is the existence centuries ago of a second Messiah named Sophia for whom Perdue creates a detailed back-story chronicling her life, miraculous works and sensational death. Sophie Neveu, *Da Vinci Code*'s heroine, turns out to be an actual descendant of Jesus and Mary Magdalene; Zoe Ridgeway, the female protagonist of *Daughter*, is not a descendant of Sophia, the fictional female messiah. (SPA-18). No amount of convoluted analysis can change the fact that each author's "expression" of this religious theory is entirely distinct, as the District Court found.

3. Opus Dei and Congregation For The Doctrine of Faith

Perdue also relies on alleged similarities between two religious organizations, Opus Dei in *Da Vinci Code* and the Congregation for the Doctrine of the Faith ("CDF") in *Daughter*. As the District Court noted, these are real organizations, and, once again, the authors incorporate them into their respective works in totally different ways. In *Daughter*, the CDF, led by the ultimate villain

Cardinal Braun, is "the successor to the Holy Inquisition," a secret and powerful department within the Vatican akin to an internal intelligence agency, with "its own investigators and network of snitches that puts the former East German Stasi to shame." (EX-492-93). In *Da Vinci Code*, Opus Dei is led by Bishop Manuel Aringosa, who is not the ultimate villain, but is a dupe of the ultimate villain and is horrified to discover the murders committed by his aide. *Da Vinci Code* depicts Opus Dei as a devout but disfavored Catholic sect which is relatively powerless within the Church. It has no element of inquisition, no investigators, no snitches. To the contrary it has "residence halls, teaching centers and even universities…in almost every major metropolis." (EX-35).

Aside from these many dissimilarities, even the elements concerning these organizations to which Perdue does point fall apart on inspection. For instance, Perdue states that both groups rely on the aid of a "shapeshifter" (Perdue Mem. at 23), but as the District Court pointed out,

> such a characterization ignores the different roles each [alleged shapeshifter] serves in their respective novels. Teabing is the ultimate villain in *The Da Vinci Code*. His mysterious alter-ego, the "Teacher," is smart, conniving, diligent and well-planned. Stratton, on the other hand, is simply a lackey for Cardinal Braun. Stratton, from physical appearance to mental and intellectual characteristics, shares nothing in common with Teabing.

(SPA-13).

4. Remaining Stock Elements

The remaining stock elements identified by Perdue are nothing more than banal abstract concepts that the Court below correctly disposed of as stock themes in short order:

> As a mystery thriller, common themes of "the wolf in sheep's clothing," or the theme that "history is relative and is controlled by victors, not losers," or the theme that "through [the union of hero and heroine], they become much more than the sum of their parts," are unprotectible stock themes common to the genre.

(SPA-14).[13]

In sum, given the commonplace nature of these themes and the two authors' radically different treatment of any common religious/historical subject matter, it is impossible to see how, even considered together, they bring these vastly different books anywhere near the exacting threshold of substantial similarity.

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[13] Inexplicably, Perdue harps on the fact that "Plaintiff's have, at various times, described both novels as falling within the mystery genre, the thriller genre, the mystery/thriller genre, or even the historical genre." Perdue Mem. at 4-5. Perdue falsely assumes that books must be narrowly pigeon-holed in one specific genre. The two books at issue – as with many others of their ilk – exhibit many aspects characteristic of mysteries, thrillers (which are closely related to mysteries) and historical novels. To the extent that Perdue incorporates the stock themes and literary devices found in these various types of works, he cannot prevent Brown from doing the same. Moreover, irrespective of the exact genre, the *scene à faire* doctrine permits Brown to incorporate elements which naturally follow from the abstract plot idea of his book.

IV.

The District Court Considered The Appropriate Evidence

Perdue argues on appeal that (i) the District Court did not have the knowledge or factual predicate to conclude that the few similarities he plucked out to press his claim constituted historical facts, ideas, historical theories or *scenes à faire*, and (ii) it should have considered and relied on his expert witnesses. Both arguments fail. The District Court properly considered all the evidence it had before it, including the books themselves, the pleadings and previously published historical works concerning the Gnostic Gospels. Further, it was appropriate and routine for the Court to draw on its own knowledge in identifying factual material, historical theories, ideas and *scenes à faire* in the course of analyzing substantial similarity. Finally, the Court was free to accord Perdue's experts little weight, or none at all, in conducting this analysis.

A. Perdue Cannot Now Claim That His Work Is Protected As "Faux History" Where He Presented It To Readers As Fact And Historical Theory

Perdue's new found theory of "faux history" is critical to his argument that the Court erroneously concluded, without sufficient evidence, that many of the alleged similarities were facts, historical theories and ideas.

It is remarkably disingenuous for Perdue to suggest that the material on which he focuses – the emphasis on the "Divine Feminine" found in several

Gnostic Gospels; Constantine's consolidation of his power through the establishment of Jesus' divinity at the Council of Nicaea; and the suppression of the Gnostic Gospels – is copyrightable expression rather than a mélange of unprotected facts, historical theories and ideas. The Court below did not make any evidentiary leap of faith in recognizing this material was based on historical facts or theories. Perdue's own Author's Note in *Daughter* said this was all based on fact – which he never acknowledges on appeal. (SPA-16).

> This is a work of fiction based on fact …. All of the other historical shenanigans involving … emperors is true. And of course, there was an Emperor Constantine who put an end to spiritual squabbling with bureaucratic decrees enforced by the blade of sword. It has been true throughout religious history … that matters of faith are decided by political expediency rather than matters of the spirit. The sections of the book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and far better documented than any scriptures in the Hebrew or Christian Bible….

(EX-884, 888) (emphasis added). Further, the Author's Note refers to Perdue's historical "research about the early Christian Church and the seminal roles that woman played in it" and the views of the Gnostics, and expressly represents "there is no question that for the vast part of human existence, God was viewed as a woman." (EX-888-89).[14] Perdue cannot now switch gears and claim that this was

[14] Perdue's own declaration details his 25 years of research, including many books in his own library on the very topics on which he seeks a monopoly here.

only "faux history" invented by him. As the Second Circuit aptly observed, "having expressly represented to the world that [his material is] factual, … [plaintiff] is not now permitted to make an inconsistent claim so as to better serve its position in litigation." *Arica Institute, Inc.*, 970 F.2d at 1075.

Most significantly, as discussed above, *Hoehling* makes clear that "the protection afforded to the copyright holder has never extended to history, be it documented fact or explanatory hypothesis." 618 F.2d at 974. There can be no question that Perdue's presentation of the religious beliefs of the Gnostics, the actions of Constantine and the suppression of the Gnostic's belief in the divine feminine are historical theories. Whether right or wrong, well-grounded or speculative, they are theories about major historical events. Thus, as *Hoehling* teaches, "where, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law." *Id.* at 978. Further, *Hoehling*'s protections would be eviscerated were each author who covered similar historical ground required to prove that each aspect of the first author's work was objectively a historical fact or pre-existing theory. Perdue presented his material as historical fact or theory, and its subject matter is historical fact or theory. As such, it is simply not protectible.

(A-211-12; A-227-36). These include: *Paganism and Christianity, Sophia: Aspects of the Divine Feminine Past & Present*, and *When God Was a Woman*.

While *Hoehling*, coupled with Perdue's admissions, puts an end to Perdue's argument, it is also the case that Perdue blatantly misrepresents the record when he states that, "Plaintiffs have presented no evidence to show that Perdue's historical inventions were instead actual historical facts." Perdue Mem. At 7. As reviewed in the Statement of Facts above, Brown submitted excerpts from *The Gnostic Gospels* and other works with his motion papers, and these works, although a small sliver of the literature on the Gnostic Gospels and the Nicaean Conference, immediately establish that many of Perdue's so-called pseudo historical and pseudo religious theories are well-tred terrain. Indeed, while Perdue claims that Brown copied him, he wrongfully seeks to cloak others' work as his own inventions and to monopolize what is not his in the first instance. Popular topics in history, including the groundbreaking Gnostic Gospels and theories on how their notions of a divine feminine were eradicated from Christianity, are free for all to use.

A few examples suffice to demonstrate the falsity of Perdue's claim that "most of what Perdue wrote about [the Fourth Century] and [Nicaean Conference] in *Daughter* is a literary device and invention that he made up." Perdue Mem. at 7. He provides a list on pp. 9-10 of his brief itemizing his so-called "pseudo" notions about the Divine Feminine, yet as the record makes clear, the vast majority appear in *The Gnostic Gospels*. Several examples are listed below:

Perdue Memorandum at pp. 9-10	***The Gnostic Gospels* or Other Record Sources**
"Once, people believed that God was both male and female."	"[S]ome [Gnostics] concluded that the God in whose image we are made must also be masculine and feminine – both Father and Mother." (A-103-04).
"The female branch of the deity was named Sophia, which means wisdom."	"[C]ertain Gnostics suggest a third characterization for the divine Mother: as Wisdom. Here the Greek feminine term for "wisdom," *Sophia*, translates a Hebrew feminine term." (A-105-06).
"Jesus Christ believed in the co-equality of the female."	"[I]n its earliest years the Christian movement showed a remarkable openness toward women. Jesus himself violated Jewish conventions by talking openly to women, and he included them among his companions." (A-109).
"[Jesus Christ] intended Mary Magdalene to be his successor."	*See The Gnostic Gospels* discussion of passage from a gnostic text: "[But Christ loved Mary Magdalene] more than [all] disciples," at A-111.
"After the death of Christ, there was a power struggle between Peter and Mary Magdalene in which Peter prevailed."	See *The Gnostic Gospels* discussion of the "rivalry between the male disciples and Mary Magdalene" including two "argument[s] between Peter and Mary" after the crucifixion. A-111; *see also* A-116.
"The Council of Nicaea determined that Christ was divine even though the prevailing sentiment prior to the Council was that he was not."	"[The Council of Nicaea] was called by the Emperor Constantine I…. He hoped a general council of the church would solve the problem created in the Eastern church by Arianism, a heresy first proposed by Arius of Alexandria that affirmed that Christ is not divine but a created being." A-379; *see also* A-378.

Based on Perdue's own admissions and pleadings, the evidence in the record, and the evident subject matter of the material at issue, the Court had ample ground to conclude that Perdue's "back story" was largely based on historical fact, theory and idea.

B. The District Court Appropriately Took Judicial Notice Of What Constitutes Facts, Historical Theories And Ideas Based On Its Own Experience And Common Sense

Without citing any precedent or bothering to distinguish a massive body of case law to the contrary, Perdue asserts the radical proposition that courts may not rely on their own personal knowledge and common sense in determining what is a fact, historical theory or *scene à faire* for purposes of evaluating substantial similarity in a copyright infringement case. Perdue Mem. at 29-33.

Yet, courts have routinely identified ideas, *scenes à faire* and factual material on the basis of no more than their own personal knowledge. For instance, this Circuit had no difficulty identifying on its own that "a superhuman muscleman crouching in what since Neanderthal times has been a traditional fighting pose," is an unprotectible idea (*Mattel v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983)) or deciding without supporting evidence that "electrified fences, automated tours, dinosaur nurseries, and uniformed workers" are all "classic *scenes à faire* that flow from the uncopyrightable concept of a dinosaur zoo."

Williams 84 F.3d at 589.[15] These examples, and those listed in the footnote below, demonstrate that – contrary to Perdue's completely unsupported theory – courts may and routinely do take notice of facts within their own knowledge in identifying factual material, ideas or *scenes à faire*, whether obvious or esoteric. Their ability to do so is critical in allowing them to dismiss copyright claims before discovery as frequently as they do. *See Williams*, 84 F.3d at 587.

Perdue provides but one example in support of his argument that the District Court acted improperly, although he (again) selectively quotes from the case to convey a point antithetically opposed to its holding. *See* Perdue Mem. at 28

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[15] *See also Nelson v. Grisham*, 942 F. Supp. 649, 655 (D.D.C. 1996), *aff'd mem.*, 132 F.3d 1481 (D.C. Cir. 1997) (determining that death penalty advocates' "protectiveness and hatred" are stock themes); *Kerr v. The New Yorker Magazine, Inc.*, 63 F.Supp.2d 320, 325 (S.D.N.Y. 1999) ("idea of the New York City skyline on someone's head" is unprotectible); *Hogan*, 48 F. Supp. 2d at 310-11 ("half-vampire character who is on a quest that leads him to discover his origins" is an unprotectible idea, leading "predictably" to character's "sinister genealogy," the "dual nature of the character, and the use of flashback or memory to portray events from character's past); *Arden v. Columbia Pictures Industries, Inc.* 908 F. Supp. 1248, 1262 (S.D.N.Y. 1995) (central character awakening each day to the sound of his clock; repetition of actions, conversations and events; and reliving of experiences are *scenes à faire* in context of a plot based on a repeating day); *Denker v. Uhry*, 820 F. Supp. 722, 734 (S.D.N.Y. 1992) (in context of story about elderly person's resistance to hiring minority group member as domestic servant, stock features include belief that new employee will steal and current, trusted employees are "different"); *Zambito v. Paramount Pictures Corp.*, 613 F.Supp. 1107, 1112 (E.D.N.Y. 1985) ("That treasure might be hidden in a cave inhabited by snakes, that birds might frighten an intruder in the jungle, and that a weary traveler might seek solace in a tavern" are *scènes à faire*). In none of these cases were the courts relying on cited evidence.

(quoting *Hersch v. United States*, 719 F.2d 873, 878 (6th Cir. 1983)). *Hersch* is a suit arising out of an airplane crash and plaintiff challenged that the judge "plotted the courses of the two aircraft relying, in part, on his 'background in the military' and having done 'a little sailing.'" The Sixth Circuit rejected plaintiff's challenge, expressly approving of this judicial notice. The Court stated the following (although Perdue has misleadingly quoted only the portion in bold):

> It is true that **a trial judge may not deliberately set about gathering facts outside the record of a bench trial over which he [presides].** Moreover, it is error for a trial court , sitting as a trier of fact, to interject its personal evidentiary observations. *The trial judge, however, like a juror, is permitted to bring his experience and knowledge to bear in assessing the evidence submitted at trial. The trial judge did not overstep the bounds of propriety in this case.*

Hersch, 719 F.3d at 878 (emphasis added). Perdue blatantly misconstrues the case as it plainly underscores that relying on personal knowledge is well within a court's discretion.

Perdue's sole purported source of authority, Federal Rule of Evidence 201, could not be more off the mark. Rule 201 "governs only judicial notice of *adjudicative* facts," F.R.E. 201(a) (emphasis added), and sets the parameters and procedural requirements for such judicial notice. However, as the Advisory Committee Notes to the Rule make crystal clear, the rule does not govern "legislative facts." "Adjudicative" facts – "who did what, where, when, how, and

with what motive or intent" must typically be established through the introduction of evidence for a court to take judicial notice, but not "legislative" facts – "those which have relevance to legal reasoning and the law-making process." F.R.E. 201 Adv. Comm. Notes, 1972.

Thus, courts freely draw on their personal experience, and inevitably must do so, in taking judicial notice of legislative facts, without adhering to the parameters or procedural rules set by Rule 201. As the Notes to Rule 201 make clear, taking notice of "hundreds or thousands of non-evidence facts is entirely appropriate and, indeed, inevitable in every single case: 'The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*.'" F.R.E. 201 Adv. Comm. Notes, 1972 (quoting Davis, "A System of Judicial Notice Based on Fairness and Convenience," in *Perspectives on Law* 69, 73 (1964)).[16]

In sum, the District Court reasonably relied on its own personal experience in identifying ideas, factual material and stock literary features. This Court is (as the lower court was) fully equipped to identify historical figures and events such as Emperor Constantine and the Nicaean Conference; find that murders at the start of a mystery, or competition between religious factions in a thriller involving a

[16] Further, it requires no pre-existing, in-depth historical knowledge to identify what is a "historical theory." "Historical theories" are merely categories of thought, common in everyday life. We know it when we see it.

religious secret, are stock elements; or make other such determinations that elements are not copyrightable. Indeed, Perdue acknowledges as much by acknowledging that drug dealers and violence were reasonably filtered out as *scenes à faire* in *Walker v. Time Life*. Perdue Mem. at 33 n.22. No court need put the parties to the time and expense of discovery on such issues, let alone waste its own resources on unnecessary factual submissions.

C. The District Court Properly Found Perdue's So-Called Expert Witnesses' Affidavits Unnecessary To Assess Substantial Similarity

The District Court appropriately placed little or no reliance on two expert affidavits submitted by Perdue, correctly holding that expert testimony is not determinative on the question of substantial similarity. (SPA-11) In case after case, particularly when considering literary works, this Court and others have rejected the use of expert testimony on the issue of substantial similarity. *Nichols*, 45 F.2d at 123; *Denker*, 820 F. Supp. at 729; *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 724 & n.8 (S.D.N.Y. 1982) (granting summary judgment without consideration of expert's opinion; stating that where issue is substantial similarity expert's affidavit is not properly considered; listing cases in footnote); *Nelson v. Grisham*, 942 F. Supp. 649, 652-53 (D.D.C. 1996) (expert testimony not relevant to substantial similarity determination), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997).

Nonetheless, despite the above-cited authority, Perdue argues that "perhaps"

expert testimony should be allowed to assist the court in determining what is protectible. (Perdue Mem. at 35).[17] He offers no authority for this proposition. Moreover, the expert testimony submitted here was particularly irrelevant. *See Nelson*, 942 F. Supp. at 653. Each of the two broad-sweeping affidavits aims to convince the Court that the books were similar by adopting a "scattershot approach" of selectively listing supposed similarities. (A-294-322). Such an approach "fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another." *Williams,* 84 F.3d at 590. Courts have routinely analyzed the alleged substantial similarity of works – including identifying idea, fact or *scenes à faire* – without expert testimony. The Court below appropriately accorded the expert affidavits little or no weight.

Indeed, the expert affidavits could have been excluded altogether, either on the basis that they did not "assist the trier of fact to understand the evidence or determine a fact in issue," Fed. R. Evid. 702, or because they are far more prejudicial than probative, Fed. R. Evid. 403. Both experts fail to apply the

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[17] Perdue's case law fails to support his point. In *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005), this Court vacated a district court judgment because of the lower court's admission of expert testimony which had "essentially instructed the jury as to an ultimate determination that was exclusively within its province." Here, Perdue's experts were offered for their supposed knowledge regarding the substantial similarity of the novels, a determination well within the factfinder's province.

controlling legal standard, namely whether the works are "substantially similar." *See* Declaration of Gary Goshgarian (A-294-98), ¶ 6 (concluding that the two books contain "some similar elements" that are not generic, as well as "sequencing" of both generic and non-generic elements which is "suspicious"); Declaration of John Gabriel Olsson (A-307-22), ¶ 4 ("As a result of my analysis, I have concluded that there are similarities among the three novels."). Further, Olsson improperly draws not just on *Daughter* but on Perdue's other books to increase the alleged similarities.

V.

Perdue's Factual Claims Do Not Preclude Summary Judgment

Finally, Perdue creates a classic red herring by arguing that plaintiffs never rebutted his factual claims with an affidavit from Dan Brown, expert testimony, or other evidence. First, as the case law establishes, no evidence other than the books themselves is necessary to determine the absence of substantial similarity. *Williams*, 84 F.3d at 583. Second, almost every single issue on which Perdue claims evidence is required (*see* Perdue Mem. at 38) goes not to substantial similarity, but to access – *i.e.*, the degree to which Brown used other historical material and/or copied from Perdue – yet access was conceded (solely) for purposes of this motion. (SPA-10, n.5). Furthermore, as already discussed, it was well within the province of the District Court to separate protected and unprotected

elements, and it did so properly. Neither an affidavit from Mr. Brown nor expert testimony nor any other evidence is necessary in this regard.

CONCLUSION

Plaintiffs-Counterclaim Defendants-Appellees Dan Brown and Random House and Counterclaim Defendants-Appellees Imagine Films Entertainment, LLC, Sony Pictures Releasing Corporation, Sony Pictures Entertainment Inc. and Columbia Pictures Industries, Inc. respectfully submit that the District Court's Order should be affirmed in all respects.

Dated: New York, New York
January 20, 2006

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(1) This brief complies the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman Font Style and 14 Point Size for the body of the brief and for the footnotes.

Respectfully submitted,

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 20, 2006

deponent served the within: **Brief for Plaintiffs-Counter-Defendants-Appellees and Counter-Defendants-Appellees**

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the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

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