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## PRELIMINARY STATEMENT

In this copyright infringement action, Appellant Lewis Perdue (“Perdue”), appeals from a Memorandum Opinion and Order dated August 4, 2005 (“Order”) entered in the United States District Court for the Southern District of New York (Hon. George B. Daniels). (A. 423-448). In the District Court, Appellees Random House, Inc. and Dan Brown (hereinafter “Plaintiffs”) sued Perdue for a declaration that Brown, in his novel *Da Vinci Code* (“Code”), did not infringe on two novels written by Perdue, namely *Daughter of God* (“Daughter”) and *The Da Vinci Legacy* (“Legacy”). (A. 15-31).<sup>1</sup>

Perdue responded by counterclaiming for copyright infringement pursuant to 17 U.S.C. § 101, *et seq.*, against Plaintiffs for monetary and injunctive relief. (A. 37-87). Because steps were already undertaken to produce a movie based on Code, Perdue also counterclaimed against Columbia Pictures Industries, Inc., Sony Pictures Entertainment Inc., Sony Pictures Releasing Corporation, and Image Films Entertainment, LLC (collectively “The Movie Defendants”). (A. 83-87).

After Perdue answered Plaintiffs’ complaint and asserted his counterclaims, Plaintiffs moved for judgment on the pleadings or, in the alternative, for summary judgment on their declaratory judgment claim and to dismiss Perdue’s counterclaims. (A. 96-98). The Movie Defendants also moved to dismiss Perdue’s

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<sup>1</sup> True and correct copies of all three novels are submitted to the Court as Exhibit Volumes to the Joint Appendix in accordance with FRAP 30(e).

counterclaims against them. *Id.* In the alternative, they collectively also asked that their motion be treated as one for summary judgment. *Id.* For purposes of the motions only, Plaintiffs and the Movie Defendants conceded that Brown had copied, or had access to, the works of Perdue. Instead, the gist of the motions, and the ground upon which they were decided, was that Code was not substantially similar to either Daughter or Legacy or the combination of the two.

Notably, although the Order indicates to the contrary, Perdue never moved for summary judgment on his counterclaims. (A. 447).

After treating the motion by Plaintiffs as one for summary judgment, the District Court granted Plaintiffs' motion and declared that Plaintiffs' authorship, publication and exploitation of the rights in and to Code do not infringe any copyrights owned by Perdue. (A. 423-448). Notably, although Perdue had not moved for summary judgment, the District Court denied such a motion and dismissed Perdue's counterclaims. (A. 447). Finally, the District Court did not mention the motion made by The Movie Defendants in the Order.

### **JURISDICTIONAL STATEMENT**

Plaintiffs-Appellees Random House, Inc. and Dan Brown brought this action against Defendant-Appellant Lewis Perdue for a declaration that Brown, in his novel Code, did not infringe on two novels written by Perdue, namely Daughter and Legacy. Subject matter jurisdiction in the United States District Court for the

Southern District of New York was based upon 28 U.S.C. §§ 1331, 1338(a), 2201(a) and 2202.

Perdue counterclaimed against Plaintiffs and the Movie Defendants alleging violations of the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.* Jurisdiction and venue was proper in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1331 and 1338(a).

This appeal focuses on claims of copyright infringement under 17 U.S.C. § 101 *et. seq.* This appeal is from judgment of the United States District Court for the Southern District of New York disposing of all claims with respect to the parties; and subject matter jurisdiction is conferred by 28 U.S.C. §§ 1291 and 1294.

The judgment in this case was entered on August 8, 2005 (A. 449-450), and the notice of appeal was filed on September 2, 2005 (A. 451-452).

#### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

First: Did the District Court err by filtering out elements it believed were unprotected while never considering each individual element in relation to each other?

Second: Did the District Court have an adequate evidentiary basis for filtering out allegedly unprotected elements from Perdue's novels?

Third: Did the District Court err by necessarily relying upon matters that were not part of the record?

Fourth: Did the District Court err in refusing to consider the Declarations of Perdue's two experts?

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Fifth: Did the existence of questions of material fact require the denial of the summary judgment motions?

### **STATEMENT OF FACTS**

Perdue's claims in this action are based on the purported infringement upon the copyrights owned by him in and to two of his novels. The first, *Legacy*, was published by Pinnacle Books in 1983. (A. 124, 207). In 1985, Publisher Donald I. Fine, Inc. published a Perdue novel entitled *The Linz Testament* ("Linz"). (A. 124, 207). In 1988, *Linz* was again published by Pinnacle/Kensington Publishing. (A. 124, 207). Thereafter, Perdue extensively re-worked *Linz* into *Daughter* and in 2000, *Daughter* was published by Tom Doherty Associates LLC. (A. 124, 207). It was not until 2003 that Plaintiffs published *Code*. (A. 123, 207). Perdue contends that *Code* plagiarized primarily *Daughter* and, to a lesser extent, *Legacy*.

While it would be beyond the bounds of legitimate advocacy to deny that there are differences between *Daughter* and *Code*, there are also striking similarities. While Plaintiffs 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,<sup>2</sup> both novels share a common pseudo-religious and pseudo-historical base, without which neither novel would have any meaning. It is precisely that common pseudo-religious and pseudo-historical base that the District Court erroneously determined was unprotectible under the copyright laws.

**a. Introduction**

Daughter and Code employ identical narrative strategies, dividing their attention evenly between a story in present time and a background story that sets the context for the present action. These novels share the same background story, not only in the personages and events they refer to, but more importantly, in the identical ways they distort these historical events to support their nearly identical stories. Both novels contain a back story and a front story. The back story is about the divine feminine, the suppression of the divine feminine and the role played by Constantine and the Council of Nicea in suppressing the divine feminine.<sup>3</sup> It was the back story that the District Court effectively found was unprotectible.

The back story is related to the front story because it provides the exclusive motivation for all the action in both novels. The front story involves the effort by Zoe and Seth in Daughter and Sophie and Langdon in Code, to recover sacred

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<sup>2</sup> Given the complexity of the novels, it is extremely difficult to pigeon hole the novels into a particular genre.

<sup>3</sup> Because the back story permeates and is the exclusive motivation for the front stories of both Daughter and Code, the theme of the back story can be found in numerous places throughout both novels. In Daughter it is primarily found in EX. 477-488, 491-501, and 668-674. In Code it is primarily found in EX. 42-43, 130-132, 236-250, 259-268, and 272-275.

proofs of the divine feminine and either continue hiding them from the public in order to preserve religious unity, as some would prefer, or giving them wide circulation, as others insist, to restore the divine feminine to a Christianity much in need of her. It is a critical element of both *Daughter* and *Code* that the Roman Catholic Church, at the time of the Council of Nicea, was involved in the suppression of the idea of the divine feminine. Also critical to both novels is the concept that if the sacred proofs of the divine feminine were found, they would rock the very foundations of the Catholic Church because the proofs would demonstrate that the Church had been involved in a cover-up in the fourth century.

It is therefore indispensable to both *Daughter* and *Code* that the Catholic Church be involved in a fourth century cover-up involving the existence of the divine feminine. Because, among other things, there is no historical evidence that such a cover-up ever occurred, and because Brown mimicked Perdue's description of the cover-up three years after *Daughter* was published, the evidence is overwhelming that Brown plagiarized Perdue when he wrote *Code*.

**b. The Protected Elements**

While it is historically accurate to say that the Roman Emperor Constantine existed, that there was a Council of Nicea in the fourth century, and that the Council of Nicea adopted dogmas binding on members of the Roman Catholic Church, most of what Perdue wrote about that period and event in *Daughter* is an

literary device and invention that he made up. While Perdue may have skillfully made it appear that his historical inventions were actual historical facts, they simply never happened. More importantly, Plaintiffs have presented no evidence to show that Perdue's historical inventions were instead actual historical facts, yet the District Court accepted Plaintiffs' arguments as to what was and was not history. Having failed to offer evidence to show that Perdue's pseudo-history is an actual historical fact, Plaintiffs have failed to show that Brown, in Code, did not plagiarize Perdue because he adopted and copied Perdue's faux history lock, stock and barrel.

Indeed, in order to find that Perdue wrote about pure historical fact, it would have been necessary for the District Court to have found, among other things, that the following was based on actual historical events:

- The Roman Emperor Constantine, who was not even a Christian, played an instrumental and often determining role in formulating the religious dogma that was adopted by the Council of Nicea.
- One aspect of this dogma was the suppression of the idea of a deity that was feminine and the establishment of the Roman Catholic Church as a male-dominated religion.
- That prior to the Council of Nicea, Christ was not considered to be divine.<sup>4</sup>

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<sup>4</sup> Exhibits submitted by Plaintiffs (A. 379-380) contradict the claim that Christ was not considered to be divine prior to the Council of Nicea. According to the Encyclopedia Britannica, the purpose of the Council of Nicea was to 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

- That the reason why the Council of Nicea established Christ's divinity as Church dogma was because Constantine forced it to do so.
- That although Constantine was a life-long pagan, he forced the pagan community in Rome to integrate principles of Christianity into their religion in order to put an end to the civil disorders between the pagans and Christians.
- That immediately prior to the Council of Nicea, the Christian community rivaled the pagan community in Rome in terms of size and political influence.
- That Constantine convoked the Council of Nicea to put an end to the civil disorders and open warfare resulting from conflicts between the Christians and the pagans.
- In order for the Roman Catholic Church to survive it had to adopt certain pagan practices

That the pagan Constantine was able to manipulate the Roman Catholic Church into adopting religious dogmas, such as the divinity of Christ, is a historical absurdity because the divinity of Christ is the very foundation of the Roman Catholic Church. Why would a pagan even care? Yet both Daughter and Code say it was so. Indeed, both Daughter and Code have as foundations for their back stories each and every one of the elements just listed. (A. 171-186, 194-195, 197-199, 337-342, 345, 352-356). If Plaintiffs claimed that those elements were

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but a created being. The fact that the non-divinity of Christ was considered to be heretical demonstrates that the predominant sentiment in the Church prior to the Council was that Christ was divine. The fact that first Daughter, and then three years later Code, said that prior to the Council of Nicea the prevailing belief was that Christ was not divine, appears to be a significant historical error. If, as Brown's attorneys have claimed without any evidentiary assistance from Brown, Code was based on extensive research by Brown, it is difficult to understand how Brown could have made the identical historical error made by Perdue and how that historical error could have also become the lynchpin for his novel.

historical facts, they should have offered evidence to support their claims. Because no such evidence was presented, the District Court could not have properly have filtered out any historical “facts” because it could not have known whether the claims were historically factual.

**c. The Divine Feminine**

Daughter expressed a sequence of pseudo-religious and pseudo-historical notions that served as the backbone of the back stories of both Daughter and Code. Whatever the genre of Daughter, the inclusion and sequencing of such unusual pseudo notions that are not at all common to action novels and must, in and of itself, be considered to be an act of originality. The sequence developed in Daughter progresses as follows:

- Once, people believed that God was both male and female and that neither sex was superior or inferior to the other.
- The female branch of the deity was named Sophia, which means wisdom.
- The world was in harmony when people believed in the dual nature of God.
- When people believed in the dual nature of God, there were no prurient aspects to the sexual act.
- Jesus Christ believed in the co-equality of the female and intended Mary Magdalene to be his successor.
- After the death of Christ, there was a power struggle between Peter and Mary Magdalene in which Peter prevailed.

- From the time of Christ's death until the fourth century, followers of Christ made great progress in winning over converts to the Christian religion.
- During the fourth century, there was considerable unrest in Rome between pagan sun-worshippers and followers of the Christian religion.
- In order to quell the unrest, the Roman emperor Constantine convened the Council of Nicea.
- The Council of Nicea succeeded in blending elements of the pagan religion and Christianity together.
- As a result of such blending, peace was restored to Rome.
- The Council of Nicea determined that Christ was divine even though the prevailing sentiment prior to the Council was that He was not.
- However, one consequence of the Council of Nicea was that Christianity became a male dominated religion that suppressed notions of the existence of a divine feminine.
- As a result of the suppression of the notion of a divine feminine, the world became out-of-balance and sexual intercourse became a prurient, sometimes dirty act.
- Since the Council of Nicea, the Catholic Church has acted to suppress the notion of a divine feminine.

Like Daughter, Code also incorporated an almost identical sequence of pseudo-religious and pseudo-historical notions as the backbone of its story. The sole driving force of both novels is the preservation of proof that Christianity originally had a female who was revered as a near equivalent of Christ, either because she performed miracles parallel to Christ's miracles (Daughter), or because she was Christ's wife from whom a continuous line has proceeded to the

present day (Code). It is equally important to note that Willie Max<sup>5</sup> and Jacques Saunière,<sup>6</sup> despite facing certain death, have greater concern for the ancient objects in their custody than for their own lives. The similar priorities these two men share provide a stunning clue to the similar hierarchy of literary values that guide these books: the impact of the ancient past—the “back story”—is the most important ingredient in these novels.

Perdue contends that the District Court erred in holding that virtually the entire quasi-religious and quasi-historical sequence of the novels was unprotected, even though much of Perdue’s “history” was not history at all but was created by him as a literary device and despite the fact that it was Perdue who originally expressed these historical distortions in entirely and new original ways (later copied by Brown) in order to create a more interesting work of fiction. Unlike Brown, who submitted no affidavit or declaration, Perdue submitted a lengthy Declaration. (A. 206-225). The purpose of the Declaration was to demonstrate to the District Court that the core of *Daughter* was based, not on mere ideas or historical facts, but was Perdue’s original creation. In his Declaration, Perdue identified the original elements of *Daughter* that he had created, which original

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<sup>5</sup> Willie Max in *Daughter* was in possession of a vast treasure trove of art looted by the Nazis. He knew of the sacred relics and had a premonition that he was about to die. He summoned Zoe and Seth (of *Daughter*) to see him in order that he might entrust them with the secret of the sacred relics and gave them clues on how to find them.

<sup>6</sup> Saunière (from *Code*) was Sophie’s grandfather. After he was shot, he created clues to be followed by Robert Langdon and Sophie on how to find the sacred relics.

elements were copied by Brown and found their way into Code. For example, in his Declaration, Perdue talked about the Gnostic Gospels. (A. 212-218). He said that the religious views expressed in Daughter cannot be found in any single Gnostic writing. (A. 212-215). Perdue also declared that what he expressed in Daughter was his own personal synthesis and creation of religious views and that the Gnostic Gospels are by no means unanimous in accepting the existence of a Divine Feminine. (A. 219). He also noted that Brown copied Perdue's personal synthesis in writing Code. (A. 219). Most to the point was the following statement made by Perdue in paragraphs 55 and 56 of his Declaration:

- That unique system of theology and history is a mixture of the following elements:

The evolution of Goddess worship and the causally linked cultural transitions of women in society,

The reasons human visions of God changed from female to male and the fact that by the time of the birth of Jesus, Goddess worship had been nearly stamped out and women were little better than slaves,

Life became "out of balance" when women and the Goddess were dominated by men, and

- The books then begin a reformist theme that calls for a return of Christianity to its true roots with a curious combination of history and Gnostic opinion that posit the following:

Jesus believed men and women were equal,

Mary Magdalene was supposed to lead the church, not Peter,

Power struggles resulted in the ouster of Mary and other women but diverse factions of Christianity retained her and fought with each other,

Constantine, a pagan, grew tired of Christian squabbling, ended it at the Nicean conference, but in the process created an awesome secret the Church has spent 1,800 years killing to keep secret, and

- Church scriptures are cynically twisted works misconstrued to support the personal power trips of those at the top.

(A. 220-221).

Perdue then added:

- There is no source for this complete and systematic structure other than my works. The only credible explanation for this complete system's presence in *Code* is that of plagiarism.

(A. 221).

Perdue's brief, submitted to the District Court, contains numerous tables containing side-by-side comparisons of actual quotations from both Daughter and Code.<sup>7</sup> (A. 323-369). Those quotations are the expression of the authors of Daughter and Code. The quotations show that Perdue incorporated his original personal synthesis by way of actual expression in Daughter, as well as Perdue's faux history involving Constantine and the Council of Nicea (A. 339-341) and that

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<sup>7</sup> A redacted copy of Perdue's brief submitted to the District Court that contains the tables demonstrating the similarity of expression appears on pages 323 through 369 of the Joint Appendix. The memorandum of law was redacted upon Plaintiffs' insistence.

Brown copied that expression in Code. Because Perdue's original personal synthesis, particularly its order, sequence and arrangement, became actual expression in Daughter, and because Perdue showed that Brown had copied that expression, Perdue contends that the District Court could not have properly determined that "Perdue has not alleged that his unique *expression* of these ideas and themes were copied." (A. 437). Such allegations of similar expression are there in black and white for all to see in Perdue's brief submitted to the District Court. Inexplicably, however, the District Court overlooked Perdue's side-by-side comparison of similarities in expression and instead held that Perdue "has made no factual allegations, however, to support a finding that Brown copied his *expression* of those ideas." (A. 438) (emphasis in original).

### SUMMARY OF ARGUMENT

While the District Court was required to filter out unprotectible materials before determining substantial similarity, it nevertheless was required to consider those unprotectible materials in determining whether Perdue combined them in such a way so as to give rise to an original expression of artistic merit. Here, the District Court erred because it merely filtered out, and then discarded, unprotectible materials without considering how Perdue used those materials as part of his creative expression in his novels.

Plaintiffs offered no evidence to assist the District Court in determining the genre of the novels in question, what is and is not a historical fact, and what is and is not original to the genre of the novels.<sup>8</sup> Absent such evidence and absent expert testimony, the District Court had no basis upon which to hold that portions of Daughter contained materials that were unprotectible. Nevertheless, it did make such determinations, which were unsupported by the record.

While, as a general proposition, expert testimony may properly be excluded when determining the substantially similarity of literary works, its use *should* be allowed where necessary, in certain cases, to filter out unprotectible materials. Expert testimony may be necessary because knowledge of what is and is not protectible may be beyond the ken of the average lay observer. Furthermore, while the opinions of experts might be excluded, there is no reason why an expert witness cannot testify as a fact witness.<sup>9</sup>

Finally, Perdue's Declaration made material factual assertions, namely his discussion of the divine feminine, concerning his original personal synthesis and his faux history which was his personal creation and not the product of historical

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<sup>8</sup> The mere fact that an author chooses to characterize something in the context of his writing as historical fact does not make it so for the purpose of making an analysis of similarities between works. The putative "historical facts" may, as in the instant case, be fictional and there would therefore be no reason to characterize such "facts" as unprotected elements. In plain English, one author cannot choose to inhabit a fictional universe created by another author.

<sup>9</sup> For example, a learned historian might well be necessary to distinguish between actual historical facts and the artificial contextual world that Perdue created and Brown copied.

research. Plaintiffs never rebutted these assertions. Therefore a question of material fact existed that precluded the granting of a summary judgment motion.

## ARGUMENT

### POINT I

#### **THE DISTRICT COURT ERRED BY FILTERING OUT ELEMENTS IT BELIEVED WERE UNPROTECTED WHILE NEVER CONSIDERING EACH INDIVIDUAL ELEMENT IN RELATION TO EACH OTHER**

##### **A. Introduction**

Because Plaintiffs conceded copying or access for purposes of the motion, the District Court was left to determine whether the novels were substantially similar. Perdue does not take issue with the statement by the District Court that the test for substantial similarity is “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Warner Bros. Inc. v. American Broadcasting Companies*, 654 F.2d 204, 208 (2d Cir. 1981). *See also Williams v. Crichton*, 84 F.3d 581, 558 (2d Cir. 1996); *Knitwaves, Inc. v. Lollytogs Ltd*, 71 F.3d 996, 1002 (2d Cir. 1995). Nor does Perdue take issue with the approach taken by the District Court in filtering out the unprotectible elements of his novels before probing whether the works are substantially similar.

However, as discussed in Point II, *infra*, Perdue does contend that, based on the record before this Court, it was not possible for the District Court to determine what was and was not protectible. Even if the District Court properly determined that elements of the novels were unprotectible, something that Perdue disputes, it

nevertheless erred in not considering the unprotectible elements in relation to one another or in considering whether the use and arrangement of those elements by Perdue resulted in original expression that was entitled to copyright protection.<sup>10</sup>

**B. Matters Filtered Out Must Nevertheless Be Considered in Determining Creative Expression**

On page 13 of the Memorandum Opinion and Order (A. 435), the District Court excerpted and isolated from Perdue's argument the components of Perdue's original expression that he claims had been plagiarized by Brown. The District Court then indicated that "[a]ll of these similarities, however, are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue's work." (A. 436). After viewing in isolation each element that Perdue claimed showed substantial similarity, the District Court filtered out those elements from its analysis of substantial similarity on a number of different grounds, including that some isolated elements were mere ideas, others were based on historical facts, others were not original, and others were unprotectible *scenes a faire*. (A. 436-439).

Assuming, *arguendo*, that the District Court was correct in filtering out the elements that it did, it was nevertheless reversible error for the District Court to

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<sup>10</sup> An analogy may make this point clearer. Quite obviously musical notes are not protected, but the arrangement of such notes into a musical composition may well be protected. If one were to consider each note by itself, ignoring its assembly into a completed work, one would come to the conclusion that the work lacked similarity of the protected elements.

have considered those elements exclusively in isolation of one another. It was also reversible error for the District Court to have failed to consider how Perdue used those elements to construct an original story that was plagiarized by Brown.

At no point during this action has Perdue denied that there are differences between the stories told in *Daughter* and *Code*. However, Perdue has also contended that there were great similarities. Indeed, the *raison d'être* of the stories, which is based on Perdue's original creative expression, is identical and is found in the almost identical back story of each novel. However, after filtering out one hundred percent of what was similar in the stories, which was the entire back story, the District Court then erroneously believed that it was free to consider only what was dissimilar. By eliminating the striking similarities that *Daughter* and *Code* have in common, which was the back story, the District Court could not help but to conclude, albeit erroneously, that the stories were not substantially similar.

This Court has recognized that:

“in distinguishing between themes, facts, and scenes a *faire* on the one hand, and copyrightable expression on the other, courts may lose sight of the forest for the trees. By factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression.”

*A.A. Hoehling v. Universal Studios, Inc.*, 618 F.2d 972, 979-80 (2d Cir. 1980).

Unlike other media of creative expression, such as graphic design, it is almost impossible to conceive of a literary work that is not largely comprised of

unprotectible elements. The events of life have been written about tens of thousands of times, and those events, viewed in isolation of one another, are not only unoriginal but may appear to be absolutely dull. It is only by combining these otherwise unremarkable events in an original way that an original literary work is created. Here, the error of the District Court was that it failed to discern the original expression in *Daughter* because it failed to consider how Perdue combined otherwise unprotectible events to create an original story when he wrote *Daughter*.

While it is true that the unprotectible elements of a literary work must be filtered out when determining substantial similarity, how those elements are used in the work must be nevertheless be considered because the original way in which unprotectible elements, in combination with each other, are used in the work can be original and often results in original creative expression.

“[E]ven if elements are found ‘unprotectible’, they should not be eliminated from the substantial similarity of expression analysis ... If ... the works are deemed substantially similar, then copyright infringement will be established even though the copyrighted work is composed of unprotectible elements. There is simply no other logical way of protecting an innovative arrangement or ‘look and feel’ of certain works.”

*Apple Computer, Inc. v. Microsoft Corporation*, 779 F.Supp. 133, 135 (N.D.Cal. 1991), accord, *Softel, Inc. v. Dragon Medical and Scientific Communications, Inc.*, 118 F.3d 955, 965 (2d Cir. 1997). See also *Tufenkian Import/Export Ventures*, 338

F.3d 127, 134-35 (2d Cir. 2003); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

“Thus, individual program elements that are ‘filtered’ out at one level may be copyrightable when viewed as part of an aggregate of elements at another level of abstraction.” *Softel, Inc. v. Dragon Medical and Scientific Communications, Inc.*, 118 F.3d at 964 (citing Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L.Rev. 977, 1003 (1993)).

Although it involved computer programs, *Softel, Inc. v. Dragon Medical and Scientific Communications, Inc.*, *supra* is on point.<sup>11</sup> There, Softel contended that the District Court had ignored its claim that certain computer programming design elements had been combined in an expressive way, which were thereafter illegally copied. Instead, as in the present case, the District Court held that none of the design elements, taken individually, were protectible expression. However, the District Court never considered those elements in combination with one another. In holding the actions of the District Court to be potentially erroneous, this Court stated:

If by this statement the district court meant that there is no need to analyze alleged structural similarities between

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<sup>11</sup> “[C]opyright law is to be uniformly applied across a variety of media and audiences.” *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996).

the programs because all of the constituent elements of the allegedly infringed program's structure have been found to be individually unprotectible, then the statement is erroneous ...”

*Id.* at 967.

Hence, if for purposes of argument, Perdue may have incorporated some unprotectible elements in his novels, as did Dan Brown, the way in which he used and developed those elements in relation to each other is entitled to copyright protection and the District Court erred in failing to understand that.

**C. Examples of How Perdue Used Matters Filtered Out By the District Court in His Creative Expression in Daughter**

There are numerous examples of how Perdue used in a creative way matters that were filtered out, after which they were not again considered by the District Court.

**1. The Swiss Bank Accounts and the Gold Keys**

The District Court held that Swiss bank accounts and gold keys are unprotectible *scenes a faire*. (A. 487). However, the novels do much more than to merely “discuss” Swiss bank accounts. This is but one of many examples of how the District Court, instead of viewing things as part of a sequence of events playing an important role in the novels, isolated and then discarded matters that, standing alone, would be *scenes a faire*. In both Daughter and Code, the following sequence of events takes place and is identical in events, pacing, tone and sequence in both books:

A slain curator of art leaves a gold key,  
Concealed in a work of art,  
Painted on wood.

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

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

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

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

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

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

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

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

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

The object of their search is a set of physical evidence and documents  
relating to the divine feminine at the heart of the book. The District Court erred in  
failing to see how what may have been stock elements were used in connection

with each other to tell an original story. In writing Code, Brown plagiarized that sequence from Perdue.

## **2. The Similarities Between Opus Dei and the Congregation for the Doctrine of Faith**

The District Court held that similarities between Opus Dei and the Congregation for the Doctrine of Faith were real organizations and were unprotectible. (A. 437). However, the District Court failed to recognize that the similarities go beyond the natures of the organizations and extend in important ways into the plot of each novel. In each case the leader of the organization is attempting to blackmail the Vatican in order to gain or retain power and that they go about it with: (1) the aid of a shapeshifter; (2) to locate the source of the relics and documents; (3) in order to protect the reputation of the church; (4) by knowingly deceiving the 'faithful' as to the true nature of Christ and the role of the feminine. Hence, the point not only is that the organizations are similar, but the roles the organizations play in the novels are similar as well.

## **3. Mary Magdalene**

The District Court held that

“Furthermore, there is no substantial similarity in the expression of the divine feminine in each book. In [Code], the divine feminine is expressed as Mary Magdalene, a true biblical figure, while in [Daughter], the divine feminine figure is Sophia, a fictional second Messiah created by Perdue. As copyright protection ‘does not extend to facts or to true events, even if they

are discovered through original research,' Perdue's claims regarding these ideas and themes are unprotectible."

(A. 439).

However, in his Declaration, which Declaration the District Court refused to consider, Gary Goshgarian commented:

"Both novels involve a secret sacred female who was wronged by patriarchal religious/political powers centuries ago and whose true place in the hierarchy and history of the church could bring down the Christendom. In the novels, this secret sacred female is the real and symbolic Sophia/Magdalene sacred female. I know of only one other novel of religious intrigue involving a sacred female whose existence could destroy the church, namely, *The Last Day* by Glenn Kleier (Warner Books, 1997) in which there is a second coming at the turn of the millennium, and Jesus is a woman whose wisdom threatens to bring down, and can topple, a secret the Vatican has sat on for centuries—that God is within, and not sitting on the rock of Peter, thus, that there is no need for churches or organized religion."

(A. 295-296).

#### **4. The Wolf in Sheep's Clothing**

The District Court held that characters that were wolves in sheep's clothing were *scenes a faire*. (A. 436). However, in both *Daughter* and *Code*, the wolf in sheep's clothing was a person who was determined to locate a hidden religious relic in order to shake the foundations of the Catholic Church. It is a gross oversimplification to mention a wolf in sheep's clothing as being a "stock theme" without also considering the identical role the characters played in both novels.

**5. History Is Relative and Is Controlled by Victors, not Losers**

The District Court also held that the assertion that history is relative and is controlled by the victors was unprotectible (A. 436). However, the points at issue in the instant case go far beyond the simple statement that history is relative and is controlled by the victors. Essential to both novels is the faux historical claim that the Emperor Constantine altered the history of the Catholic Church and that the stories of both Daughter and Code involve the possibility of disrupting that history by locating the physical evidence of the divine feminine and exposing the lie upon which the suppression of the divine feminine was based. Once again, the District Court overlooked the fact that both Daughter and Code treated the notion of victors controlling history in the same way.

**6. The Relevance of the Union of Male and Female**

The District Court held that the union of male and female as being greater than the sum of their parts was an unprotectible stock theme common to the genre. (A. 436). However, the union of male and female as being greater than the sum of the parts is integral to both novels. In both Daughter and Code, the union of male and female as being greater than the sum of the parts is a flesh and blood example of the strength that is derived from a god whose nature unites both male and female elements, something that is a major theme of both novels.

## POINT II

### THE DISTRICT COURT ERRED IN NOT LIMITING ITS DETERMINATION TO MATTERS IN EVIDENCE AND IN REFUSING TO CONSIDER THE TWO EXPERT DECLARATIONS SUBMITTED BY PERDUE

#### A. Introduction

As noted above, Perdue does not take issue with the legal conclusion that the question of substantial similarity must be decided by applying the standard of the average lay observer.<sup>12</sup> Indeed, the similarity between Perdue's novels and Code was originally brought to Perdue's attention by numerous lay readers who sent unsolicited emails to him on that subject. (A. 79-80). On a summary judgment motion, the responsibility of the District Court is to decide whether there is any basis upon which the average lay observer could conclude that Perdue's novels were substantially similar to that of Brown. *Walker v. Time Life Films*, 784 F.2d 44, 48 (2d Cir. 1986). In effect, the role of the District Court is to put itself into the shoes of the average lay observer and to determine whether there is any basis for concluding that the novels are substantially similar.<sup>13</sup>

However, the act of determining substantial similarity and the act of filtering out unprotectible elements is not always the same thing. In the case of the former,

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<sup>12</sup> *Warner Bros. Inc. v. American Broadcasting Companies*, 654 F.2d 204, 208 (2d Cir. 1981).

<sup>13</sup> Paragraph 93 of Perdue's Amended Answer (A. 79-80) contains messages from readers of his novels in which they remarked on the great similarities between Daughter and Code.

no knowledge other than the content of the novels is required. However, that may not be true in the case of the latter, because the average lay observer may need assistance to make determinations as to the genre of a novel, the *scenes a faire* that are common to such genre, what are or are not historical facts, or what portions of a novel are and are not original. Similarly, after considering the unprotectible elements, their relationship to one another, and how they were used in a particular story, as discussed in Point I *supra*, the average lay observer may be left unable to know whether the author's use of those unprotectible elements has resulted in original creative expression for novels of a particular genre. Expert assistance may be required to determine questions of originality because such a determination may require a thorough understanding of other novels of the genre.

While that assistance, where necessary, might come in the form of evidence or expert opinion, here there was neither. Instead, the District Court determined, without the benefit of evidence or expert testimony, that almost 100% percent of the portions of the novels that Perdue contended were substantially similar, which were the back stories, were unprotectible. However, even if, as a result of its knowledge and training, the District Court possessed special skills that enabled it to make all needed determinations in the filtering out process, it still would have been legally improper for the District Court to have relied exclusively on its special

skills when there was no evidence in the record to support the conclusions reached by the Court.

**B. The District Court Acted Improperly By Making Crucial Determinations For Which There Was No Evidence In The Record**

A determination in this action may only be based on properly admitted evidence. *See Cocconi v. Pierre Hotel*, 146 F.Supp.2d 427, 429 (S.D.N.Y. 2001) (citing *Bulger v. McClay*, 575 F.2d 407, 408 (2d Cir. 1978)). “[A] trial judge may not deliberately set about gathering facts outside the record of a bench trial over which he [presides].” *Hersch v. United States*, 719 F.3d 873, 878 (6<sup>th</sup> Cir. 1983) (quotation and citation omitted). While judicial notice may be an exception to the foregoing, it may only be employed to take judicial notice of facts that are “not subject to reasonable dispute.” Fed R.Evid. 201(b). “Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b).” *International Star Class Yacht Racing Assoc. v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998).

Here, the District Court did not abide by those rules. Without the benefit of any evidence or expert guidance, and under circumstances that would make judicial notice inappropriate, the District Court proceeded to speak as only an expert can speak because many of its statements would have required an

encyclopedic knowledge of the appropriate genre, as well as world and religious history. After determining that the novels were of a mystery/thriller genre, and without any evidence whatsoever,<sup>14</sup> the District Court arrived erroneous conclusions, all without any basis in the record. As a result of those erroneous conclusions, the District Court filtered out materials that should have never been filtered out from the novels. Those erroneous conclusions involved: (a) originality and stock themes; (b) faux history, and; (c) scenes a faire.

### **1. Originality and Stock Themes**

The District Court repeatedly filtered out portions of Daughter for the sole reason that it believed that those portions were not “original in this genre” or that other material was a “stock theme.” (A. 436-437). As a result, the District Court filtered out numerous scenes and events about which Perdue wrote that involved rival organizations, the keepers of physical evidence, the attempt by rival groups to obtain that evidence, the fact that the hero and heroine were unwilling participants in the search for the physical evidence, and the eventual realization by the hero and

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<sup>14</sup> Perdue did submit a declaration of Gary Goshgarian (A. 294-298), who is an English professor at Northeastern University, is himself a novelist and is a member of at least two associations of mystery/thriller writers. (A. 299-306). While that Declaration does not opine on substantial similarity, Mr. Goshgarian does say what is and is not common to a mystery/thriller. However, the District Court refused to consider the Declaration. Further, Plaintiffs submitted no evidence to show what was and was not common to novels of the mystery/thriller genre and their arguments were based solely upon their attorneys’ say-so. They did not even submit an affidavit from Brown.

heroine that the understanding by the hero and heroine of the significance of the physical evidence was more important than the evidence itself.

The District Court committed reversible error in determining what is and is not “original” to mystery/thriller novels and what were the “stock themes” because the record is barren of any evidence as to what is and is not original to such novels and what are the “stock themes.” Findings of the absence of “originality” could not properly have been based on judicial notice because what is and is not “original” to a novel of any genre is not a matter of common knowledge and is not something anyone would expect the average lay reader to know.<sup>15</sup>

## **2. The Faux History**

Without any evidence as to what was and was not an historical fact, the District Court filtered out all materials that sounded like they might have been based on history (A. 438-439)<sup>16</sup> but actually were, as evidenced by the sworn statement of Perdue (A. 212-221), fictional inventions of Perdue. So, for example, the District Court indicated that “although both novels discuss Emperor Constantine and the Council of Nicea, it is without question that references to

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<sup>15</sup> This is especially the case here where the District Court determined that Daughter and Code involved the “unprotectible *idea* of a mystery thriller set against a religious background.” While the *idea* of combining a religious background with a mystery thriller may be unprotectible, the combination is unusual. Because the combination is unusual, such combination cannot serve as a basis for filtering as scenes a faire out everything the Daughter and Code that mentions religion.

<sup>16</sup> Both references involve a discussion of the divine feminine.

historical figure and events constitute unprotectible elements under the copyright laws. (A. 436).<sup>17</sup> As stated above, unless the District Court had a special historical expertise, it could not begin to decide what was and was not an historical fact. But even if the District Court did have such expertise, it would have been reversible error to rely solely upon such expert knowledge because that would have deprived Perdue of the ability to counter the historical opinions of the District Court with his own historical evidence.

### 3. Scenes a Faire

The District Court determined that “both novels discuss Swiss bank accounts and gold keys or that the novels begin with the murder are unprotectible scenes a faire that precludes a finding of substantial similarity.” (A. 437). The District Court also determined that the discussion of the Catholic Church was a scene a faire because “such discussion is expected from a thriller with religious themes and is an unprotectible *scene a faire*.” (A. 437)

The District Court also held that “because [Daughter] and [Code] share a religious backdrop, Perdue’s claims that the novels share a similar theme that ‘people create their own gods,’ and that both novels have ‘discussions of Mother

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<sup>17</sup> Regarding Constantine and the Council of Nicea, certain findings of the District Court are historically absurd, such as that the Catholic Church resisted proclaiming the divinity of Christ and that such proclamation was made only after the Church was forced to do so by the pagan Emperor Constantine. As a matter of history, Constantine has no reason to care whether Christ was or was not divine, while the Catholic Church had every reason to care because Christ’s divinity is the foundation of the Catholic Church.

Earth' and 'discussions about communion' are not afforded copyright protection.” (A. 437).<sup>18</sup>

As with our discussion of originality and faux history, there is no evidence in the record to support the findings by the District Court regarding scenes a faire.<sup>19</sup> Unless the District Court could rely upon its “expertise” on thrillers with religious themes<sup>20</sup> in the absence of any evidence in the record. Similarly, The District Court also found that solely because Daughter and Code share a religious background<sup>21</sup>, themes that ‘people create their own gods,’ and that both novels have ‘discussions of Mother Earth’ and ‘discussions about communion’ are not afforded copyright protection.” (A. 437). Because the record contains no evidence of what are and are not scenes a faire in thrillers with religious background, the District Court erred in filtering out what is believed, without justification, were scenes a faire.

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<sup>18</sup> That statement is logically disconnected. Merely because the novels share a religious backdrop cannot mean that nothing in the novels involving religion can be afforded copyright protection. Were that the law, nothing in scholarly theological works would be entitled to copyright protection because all works of theology have a religious backdrop.

<sup>19</sup> It is perhaps telling that in most of these instances where the court opines on themes common to the genre, it fails to cite any other novel of the same genre incorporating such allegedly common elements.

<sup>20</sup> The record is devoid of any indication as to whether thrillers with a religious backdrop are common or whether they are rarities.

<sup>21</sup> That is based upon pseudo-history.

#### 4. Conclusions

To be able know what is and is not original in the genre, to understand that was and was not history, and to be able to know what was and was not a scene a faire, the District Court would have had to be an expert in the genre as well as being an expert on history. While perhaps the District Court was an expert, absent an evidentiary basis, the District Court should not be allowed to use that expertise to decide the motions because the determination would not be based on the evidence.

It is ironic that the District Court, while apparently acting as if it were an expert, would not even consider the declarations proffered by Perdue's experts. Hence, the District Court left Perdue with no means to refute the court's own ultimate determinations. Not only was there no basis in the record for determining what are and are not common themes in mystery/thrillers, what history is real and what is made up, and what are the scenes a faire, but it is difficult to see how the average lay observer could have known that the foregoing represented "unprotectible stock themes common to the genre."<sup>22</sup> To have made such a determination would have required the average lay observer to be intimately familiar with both literature and history, something that offends the rule that

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<sup>22</sup> It is one thing to say, as in *Walker v. Time Life Films, supra*, that once upon a time drug dealers and violence were *scenes a faire* in stories about a police precinct in the South Bronx. However, it is much more of a stretch to say that the notion that history is relative and is controlled by the victors, or that the notion that the union of a man and a woman is greater than the sum of their parts, are also *scenes a faire* in mystery/thriller novels. This is all the more an issue because scenes a faire may vary from one genre to another.

generally such determinations can only be based upon the evidence that is presented in court.

**C. In This Action, the District Court Should Have Considered the Declarations of Perdue's Experts**

The District Court should have allowed the use of expert declarations on issues involving filtering out of unprotectible materials. Perdue submitted two such declarations. One was of Gary Goshgarian, who did not opine on substantial similarity. (A. 294-298). Instead, the thrust of his declaration was to state what was and was not original to novels of the mystery/thriller genre. The second expert declaration was that of John Olsson. (A. 307-308). While Mr. Olsson did opine on substantially similarity, he also expressed his observations as to the many similarities he observed after reading the novels. (A. 310-322). On the authority of *Denker v. Uhry*, 820 F.Supp. 722 (S.D.N.Y. 1992), the District Court refused to consider those declarations for any purposes whatsoever. (A. 433).

The determination as to whether to allow the testimony of an expert witness depends, in part, upon whether that testimony will assist the trier of fact in making its determination. *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). Because the question of substantial similarity is one that can be decided by an average lay observer,<sup>23</sup> expert testimony is not allowed. However, sometimes

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<sup>23</sup> *Warner Bros. Inc. v. American Broadcasting Companies*, 654 F.2d 204, 208 (2d Cir. 1981).

questions involving the filtering out of unprotectible materials may be a different matter and in those cases, perhaps expert testimony should be allowed to assist the trier of fact.

The present case, where the District Court proclaimed that certain matters were not "original" to mystery/thriller novels, is a perfect example. It is difficult to see how determinations of what is and is not original to a particular genre would not require expert testimony, such as that of Gary Goshgarian, who is an expert in mystery/thrillers and is in an ideal position to opine on issues of originality. Instead of considering what Mr. Goshgarian had to say, the District Court rejected his Declaration and then proceeded on its own to determine what was and was not original in novels of the relevant genre, which was precisely what Perdue wanted Goshgarian to do, but which the District Court would not allow.

In so doing, the District Court left Perdue powerless to affect the ultimate determinations by the Court because the findings of the District Court were based, not upon the evidence submitted by the parties, but rather on the personal perception of the District Court that it was capable of deciding, without evidence, what is and is not original to novels in whatever genre Daughter and Code belong.

The same is true of many of those matters held by the District Court to be *scenes a faire*. The *scenes a faire* found in *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986), were so common and well known as to make them the

proper subject of judicial notice in a story dealing with a police precinct in the South Bronx (e.g. drunks, prostitutes, vermin, derelict cars, as well as police foot chases, the morale problems of policemen, or the Irish cop). Here, the *scenes a faire* are vastly different from those in Walker. The notion that 'history is relative and is controlled by victors, not losers,' the notion that 'through [the union of hero and heroine], they become much more than the sum of their parts,' (A. 436), that 'people create their own gods,' 'discussions of Mother Earth' and 'discussions about communion' (A. 439) are of a completely different order. To call those items *scenes a faire* is not something that is commonly known, and expert testimony should have been allowed on that point. Certainly, the District Court should not have made its determination without any fact or opinion evidence.

The District Court should also have considered the Declaration of John Olsson. (A. 307-308). While Mr. Olsson did opine on substantial similarity, he also listed the factual similarities between the characters of the novels, and other similarities. Hence, the opinions he expressed could have been ignored while still considering his factual observations. Even if Mr. Olsson could not testify as an expert witness, he still should have been allowed to present his observations as a fact witness. *See Brady v. Chemical Construction Corp.*, 740 F.2d 195, 200-01 (2d Cir. 1984). This is more the case because the District Court held in footnote 4 of the Opinion: "Although Perdue also asserts infringement of his earlier novel, *The*

*Da Vinci Legacy*, he offers no arguments in his moving papers in support of his claims.” (A. 431). Perdue, however, has not abandoned his claims regarding Legacy. In fact, one basis of Perdue’s claims in both Legacy and Daughter are found in the observations of Mr. Olsson (A. 310-322), which the District Court refused to consider. For the District Court to say that Perdue has abandoned his arguments regarding Legacy, while also refusing to consider the Olsson Declaration, which contained Perdue’s arguments regarding Legacy, was extremely unfair.

### POINT III

#### **BECAUSE PLAINTIFFS NEVER REBUTTED PERDUE’S FACTUAL CLAIMS, WHICH WERE MATERIAL, THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS SUMMARY JUDGMENT**

Plaintiffs’ arguments, in support of their motion for summary judgment, suffer from the same infirmities as does the Opinion. For the most part, they constitute lawyers’ arguments without the benefit of evidence, expert opinion or an affidavit or declaration of Dan Brown. Like the District Court, Plaintiffs never considered that Perdue had invented an imaginary history that had never happened and that Brown, thinking it was actual history, copied Perdue’s creation when he wrote Code.

Like the District Court, Plaintiffs have also failed to consider how Perdue assembled and used unprotectible elements in an original way to construct an

original story. In addition, they did not give the District Court an evidentiary basis for ruling that allegedly unprotectible matters actually were unprotectible. Instead, Plaintiffs argued that it was not necessary for them to have done so and that all the District Court was required to do in order to rule on the motion was to read the novels. The unspoken assumption of Plaintiffs was that the District Court, standing in the shoes of the average lay observer, had sufficient knowledge to determine the genre of the novels, what the *scenes a faire* were, what were and were not historical facts and what was and was not original. For the reasons made in Point II, *supra*, that assumption was incorrect.

Plaintiffs did not submit an affidavit of Dan Brown. While Plaintiffs' attorneys tried to act as Brown's surrogate by arguing what Brown did and did not do when he wrote Code, Brown never swore under oath that he conducted any research when he wrote Code, what books, if any, he read, that he never read Daughter or Legacy, and that he did not copy portions of Daughter or Legacy. Even after Perdue submitted his declaration (A. 206-225) stating that his discussion of the divine feminine was the product of his own personal synthesis, some of which he invented, and some of which he arranged by using matters in the public domain in an original way, Brown did not respond under oath.

Even after Perdue presented examples in his memorandum of law of the similarities in the expression between Daughter and Code (A. 337-342, 345, 350-

356), and even after Perdue accused Brown of having copied that expression, Brown *still* did not respond under oath. Indeed, neither Brown, nor anyone else acting on his behalf, ever denied the charges made by Perdue in his Declaration. Because of flaws in the way in which Plaintiffs moved for summary judgment and because of their failure to adequately deny Perdue's charges of plagiarism, there existed questions of material fact requiring the denial of summary judgment. *Fonar Corporation v. Domenick*, 105 F.3d 99, 106 (2d Cir. 1997); *Shapiro & Son Bedspread Corp. v. Royal Mills Associates*, 764 F.2d 69, 75 (2d Cir. 1985).

## CONCLUSION

Based on all of the foregoing, Appellant Lewis Perdue respectfully requests that the District Court's Order, granting Plaintiffs' motion for summary judgment, be reversed and the matter remanded to the District Court for further proceedings in accordance with the Order of this Court.

Dated: New York, New York  
December 21, 2005

Respectfully submitted,

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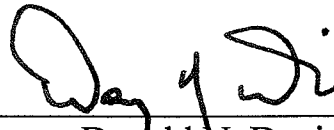
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Respectfully submitted,

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