UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF RANDOM HOUSE'S AND CERTAIN COUNTERCLAIM DEFENDANTS' MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS

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PRELIMINARY STATEMENT

In opposition to this fee application, defendant Lewis Perdue ("Perdue") strenuously argues that his claims were objectively reasonable and asserted in good faith. Yet simply put, this was not a close case. Indeed, this conclusion is perhaps best demonstrated by Perdue's utterly unfounded persistence in pressing his claims arising out of his *Da Vinci Legacy* -- where he offered no substantive rebuttal to plaintiffs' summary judgment motion on that work and yet he *still* refused to withdraw the claim when pressed on the issue at oral argument. Even as to *Daughter of God*, the Court had no trouble disposing of Perdue's copyright claim for lack of substantial similarity and, indeed, did not identify a single component of the works (e.g. plot, character, setting) as being substantially similar. This across-the-board rejection of Perdue's arguments -- especially when premised on so many blatant misrepresentations -- bespeaks the objective unreasonableness of his case and alone warrants the award of attorney's fees. (*See* Point I *infra*).

This conclusion is underscored by the incontrovertible evidence of Perdue's patently improper motivation in asserting his copyright infringement claims. Perdue did not merely exercise his First Amendment right to air his allegations, as he now claims. Rather, fueled by unfounded accusations, he used this dispute as the centerpiece of a marketing campaign to promote his books as the source of Brown's captivating bestseller. Nor did he limit his charges to reasoned comparisons of the respective works, but rather he leveled personal attacks on Dan Brown, his publisher and his attorneys. (*See* Point II *infra*). Finally, Movant's fees were completely appropriate and – because Perdue's frivolous claims sought to impose a cloud on the title of one of the most successful novels in the world, soon to become a major motion picture – it was entirely appropriate for Movant's to allocate significant fees to disposing of these claims summarily. (*See* Point III *infra*). Neither Perdue's crafty legal theories, recycled merits arguments nor gross mischaracterizations of the facts provide the slightest basis for denying this motion

for attorney's fees.[1]

I.

PERDUE'S FRIVOLOUS CLAIMS DID NOT REMOTELY APPROACH THE NECESSARY THRESHOLD OF OBJECTIVE REASONABLENESS

Perdue's papers do nothing to rebut the objective unreasonableness of his claims. He offers no response to Movants' argument that he asserted baseless claims regarding the *Da Vinci Legacy*, and then failed to provide any substantive opposition to Movants' painstaking comparison of the work with *Da Vinci Code*, which demonstrated the patent lack of similarity between the works. Even when confronted at oral argument with the issue of whether his lack of opposition amounted to a withdrawal of the claim, he declined to withdraw it. Tr. of May 6, 2005 Hearing, pp. 21-22. Nor does Perdue rebut Movants' argument that his counterclaim and motion papers regarding *Daughter of God* were filled with inaccuracies, were tremendously inflated and were based on obviously unprotectible ideas, historical facts, and stock elements. Even now, Perdue proclaims that the Court found "many" similarities before admitting, almost as an afterthought, that the Court found that every single one of these similarities related to unprotected elements. Perdue Mem. at 9. In the end, this fee motion turns on the fact that Perdue's claims as to *Da Vinci Legacy* were irrefutably unreasonable and, even as to *Daughter of God,* this Court readily concluded that *all* of the alleged similarities related to "unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue's work." Memorandum Opinion and Order (the "Decision"), p. 15; *see also id.* at p. 25 ("Any slightly similar elements are on the level of generalized or otherwise unprotectible ideas."). Far from the necessary finding of substantial similarity, this Court did not identify a single protectible similarity shared by the works. Thus, Movants readily meet the standard for a fee award. *See* Movants Mem. at 5, 7.

Perdue offers three arguments in an attempt to establish that his claims as to *Daugher of God* were

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[1] It should be noted at the outset that, although Perdue refers repeatedly to Plaintiffs' motion for fees, only Random House, Inc. ("Random House") and the counterclaim movie defendants moved for attorney's fees. Dan Brown ("Brown") did not join this motion.

objectively reasonable. (Again, he offers no defense at all to his pressing his claim arising out of *Da Vinci Legacy*.)

First, Perdue improperly rehashes supposed similarities of plot and theme that the Court has already rejected or held unprotectible. *See* Perdue Mem. at 2-7, 10. He relies most heavily on the theory that Brown copied Perdue's "synthesis" or "arrangement" of elements (Perdue Mem. at 2-3), incorrectly asserting that the Court's Decision makes no reference to this argument. Perdue Mem. at 7 n.4. Yet Perdue's repetition of this theory only underscores how objectively *un*reasonable it is: he is not able to cite a single case supporting the unprecedented application of his "selection and arrangement" theory to novels. As Movants previously argued, "[n]either Brown's nor Perdue's book contain a list of Perdue's nine items. ... The religious and historical notions contained in Perdue's book...are not freestanding items listed in the same order and context in the two books but rather are broad concepts enmeshed in Brown and Perdue's stories, each with their different characters, story lines, scenes and other aspects." Movants' SJ Reply Mem. at 17. Not surprisingly, the Court forcefully rejected Perdue's selection and arrangement theory on the grounds that the alleged similarities were mere ideas or facts, not expression -- and, to boot, that such ideas find their origin in pre-existing works. Decision, p. 16.

Incredibly, Perdue presses the reasonableness of his legal arguments by citing once again alleged similarities in plot that are grounded in objectively false characterizations of the works (concerning the "Gold Key Sequence"). Perdue Mem. at 4. Yet, this Court has already correctly found that *Daughter of God* does not even contain a "gold key" (Decision n. 7) and implicitly rejected the additional alleged "similarities" that inform Perdue's supposedly similar "sequence." *See* Movants' SJ Reply Mem. at 18-19. Further, it is remarkable that Perdue highlights these particular facts given the Court's express findings that gold keys and Swiss banks are *scenes a faire* (Decision at 15), a conclusion as to Swiss banks that even Perdue has admitted ("[y]ou would expect to find a Swiss bank and a safe deposit box in a thriller.") McNamara Aff. Ex. J, p. 4.

Second, Perdue argues that his theory of substantial similarity must have been objectively

reasonable because others agreed with it. This supposed consensus can be found only in emails to Perdue -- undoubtedly fanned by his accusations in the media and addressed to his many anti-Dan Brown websites and blogs such as "Da Vinci Crock" (McNamara Aff. ¶ 13 & Exs. L-N) -- and in the report of a so-called expert retained by Perdue himself. For good reason, courts generally give no credence to "expert" opinions on substantial similarity.[2] Likewise, the Court should not cast aside the "discerning reasonable observer" standard in favor of selected quotes from Lewis Perdue fans (or, as Perdue would have it, "aficionados of the genre"). The Court, of course, correctly applied the governing standards, rather than looking to Perdue's supporters or agents, in assessing substantial similarity.

Third, Perdue points to the complexity of the novels and "the elusive nature of distinguishing between an idea and the expression of an idea." However, the legal precepts governing substantial similarity are well settled and straightforward. Movants Mem. at 7-8. While Perdue's claims, involving many details from three long novels and requiring an analysis of the historical record, might have been fact-intensive, the necessary legal analysis was not complex and the case did not present the Court with a difficult call.

II.

PERDUE THREATENED AND LITIGATED HIS CLAIMS IN BAD FAITH

Even apart from the objective unreasonableness of his claims, Perdue's bad faith warrants the imposition of attorney's fees. Once again, Perdue trots out one unfounded legal argument after another to avoid this conclusion.

Perdue's answering papers do nothing to rebut Random House's showing that Perdue did far more than merely tell the public about his claims. While Perdue weakly asserts that publishing houses often

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[2] In any event, even Perdue's expert, Mr. Olsson -- who admittedly sought not to evaluate whether infringement occurred but rather "to demonstrate substantial infringement by Daniel Brown of Lewis Perdue's three books" (Olsson Report, p. 2) and who improperly drew not just on *Daughter of God* but on Perdue's other books to increase the alleged similarities -- did not ultimately draw a conclusion of substantial similarity at all, merely concluding that "there are similarities" among the novels (Olsson Declaration, ¶ 4).

compare one author's work with another's, Perdue's tactics were of an entirely different order: although Brown had firmly denied any knowledge of Perdue' works, Perdue launched an extensive publicity campaign to boost sales of his own books on the flimsy assertion that his books were the source of Brown's bestselling work. Thus, despite his inability to mount *any* argument to substantiate his copyright claim on *The Da Vinci Legacy,* Perdue does not and cannot deny that the "KEY SELLING POINT" for the re-launch of the work was Perdue's "major publicity" for his accusations against Brown, and that Perdue's website for *Da Vinci Legacy* was filled with his allegations that Brown had plagiarized *Legacy*, the "ORIGINAL Leonardo and Religion Thriller." McNamara Aff. Ex. A (e.g., "This is the most blatant example of in-your-face plagiarism I've ever seen. There are literally hundreds of parallels.").

Perdue also seeks to divert the Court from his improper motivation by arguing that courts may not award fees based on this factor alone, if the nonprevailing party's claims are objectively reasonable. Perdue Mem. at 13. This argument is not only inapplicable (because Perdue's claims are objectively *un*reasonable), but wrong. In *Fogerty v. Fantasy, Inc*, 510 U.S. 517, 535 n.19 (1994), the U.S. Supreme Court identified "motivation" as a possible basis for attorney's fees, and in *Matthew Bender & Co. v. West Publishing Co.*, 240 F.3d 116, 122 (2d Cir. 2001), the Second Circuit expressly held that "the presence of other factors might justify an award of fees despite a finding that the nonprevailing party's position was objectively reasonable."[3]

Matthew Bender likewise foils Perdue's next legal theory -- that his pre-litigation conduct is not relevant to the Court's assessment of his motivation. Perdue Mem. at 13. Contrary to his statement that Movants base their allegations of bad faith "primarily" upon pre-litigation conduct, the allegations are equally founded on Perdue's conduct during the litigation, during which he has continued his publicity

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[3] In fact, the *Matthew Bender* Court held that although West's positions were objectively reasonable, its bad faith could be a valid ground for awarding fees and remanded with the instruction that the court determine whether any bad faith conduct warranted awarding fees. *Id.* at 125-26; *see also Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 325-26 (5th Cir. 1998) (affirming fee award based solely on fact that claim was motivated merely by plaintiff's desire to dominate market).

campaign to falsely associate his books with *Da Vinci Code* (as well as engaging in such antics as blog entries alleging ethical violations on the part of plaintiffs' lawyers and his recent revelation that he intends to write an "investigative biography" of Brown because now is the time to "loose the punches we've been pulling"). Supplemental Affidavit of Elizabeth A. McNamara in Support of Fee Motion ("McNamara Supp. Aff.") ¶¶ 3-4. Further, the Second Circuit made crystal clear in *Matthew Bender* that pre-litigation conduct was indeed relevant to the determination of improper motivation and framed its inquiry as "whether West's conduct in this litigation -- *both before and after the initiation of suit* -- was truly in bad faith." *Id.* at 125 (emphasis added).[4]

Next, Perdue raises a red herring by asserting that all he did was assert a compulsory counterclaim which mirrored plaintiffs' declaratory judgment claim, and that he cannot be held accountable for legal fees when he did not initiate the suit against Brown and Random House. Such an assertion is disingenuous in the extreme; although Brown and Random House nominally sued Perdue, they did so only when it was clear that Perdue was on the verge of suing them. Perdue Mem. at 14. In March 2004, Perdue wrote in his blog: "Under U.S. law, I have three years from the point of infringement [to file suit]. That leaves me two more years to file and I intend to do so... Settlement is not in my vocabulary." McNamara Supp. Aff. ¶ 5. Later that month, he announced that he would file the "infringement litigation" "probably [in the] September time frame, plus or minus a month or two." *Id.* A steady drumbeat of threats continued for many months afterwards (McNamara Aff. Ex. F – J). After hiring an expert witness, Perdue's counsel wrote to Random House and Brown in September, 2004, expressly claiming copyright infringements and threatening to "proceed accordingly" unless a settlement offer was proffered by September 13, 2004. (*Id.* Ex. P). Given these direct threats of suit, the mere fact that Brown

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[4] Perdue also surprisingly suggests that the dismissal of his claims prior to discovery, rather than later in this litigation, militates against awarding attorney's fees. Of course, this is exactly the right stage at which to dismiss frivolous claims like Perdue's. The fact that the Court dismissed at the pleading stage cuts in favor of, not against, this motion. *See, e.g., Torah Soft Ltd. v. Drosnin*, No. 00 Civ. 5650 (JCF), 2001 WL 1506013 (S.D.N.Y. Nov. 27, 2001) (summary judgment granted prior to discovery; fees granted); *Adsani v. Miller*, No. 94 Civ. 9131 (DLC), 1996 WL 531858 (S.D.N.Y. Sept. 19. 1996) (same).

and Random House nominally initiated the action by filing a defensive declaratory judgment action in September before Perdue followed up on his threats to file suit is inconsequential. *Cf. Fogerty*, 510 U.S. at 534 (prevailing plaintiffs and prevailing defendants are to be treated alike for attorney's fee purposes).

Moreover, Movants have not argued that Perdue's filing of his counterclaims *per se* demonstrates bad faith, as Perdue suggests. Rather, they have argued that the facts in this case -- Perdue's fabrication of a connection to Brown in order to promote Perdue's own works based on exaggerated claims of similarity and his maintenance of his unfounded claims in this Court -- amply demonstrate bad faith. Likewise, Perdue misconstrues Movants' argument about his unnecessary inclusion of the Sony counterclaim defendants. Movants' assertion, which Perdue cannot answer, is that there was no reasonable basis to name these particular parties, respected major motion picture studios, given that they were obviously licensees of Brown and/or Random House and that a judgment against plaintiffs would undoubtedly have served Perdue's asserted purpose of preventing their alleged infringement. Perdue's only conceivable purposes in adding the movie counterclaim defendants were harassing them and gaining even greater publicity for himself.[5]

Finally, Perdue seeks to entirely avoid an award of fees with the unsupported assertion that any award would throw him into bankruptcy. It was Perdue who launched his exaggerated claims in bad faith and it would be deeply unfair to allow him to fully escape the consequences of his actions. Further, far from impoverished, Perdue previously has alleged that he is an "extremely successful" author of 19 published books, at least four of which were bestsellers, and that he has sold 2.5 million copies in all. Amended Answer, ¶¶ 45-46; Perdue SJ Mem. at 1. Indeed, he just published yet another novel. McNamara Supp. Aff. ¶ 6. Most importantly, he reaped substantial ill-gotten gains based on his unfounded copyright allegations and self-made association with *Da Vinci Code*. McNamara Aff. ¶¶ 14-

[5] Perdue's reference to *Procter & Gamble Co. v. Colgate-Palmolive Co.*, No. 96 Civ. 9123 (RPP), 1999 WL 504909, at *4 (S.D.N.Y. Jul. 15, 1999) is unavailing. Unlike the situation here, there was an obvious reason to add defendants who were jointly and severally liable for a potential damage award, in order to increase the likelihood that plaintiff would fully recover.

15. As detailed in the McNamara Affidavit, in an apparent attempt to trade on Perdue's unfounded claims of plagiarism, *Legacy* was re-launched (after being out of print for years) and *Daughter* achieved unprecedented sales. Finally, the only evidence Perdue has offered regarding his finances – his 2003 and 2004 federal tax returns – tell the Court nothing regarding his assets. Nor are these returns likely to reflect his uptick in royalties for *Daughter* and *Legacy* based on the false association with *Da Vinci Code*[6] or his advance from his next book. The Court should reject Perdue's unsupported plea of poverty. *Agee v. Paramount Communications, Inc.*, 869 F. Supp. 209, 212 (S.D.N.Y. 1995) (financial condition need not be considered where the losing party has failed to submit proof that such award "would lead to his financial ruin").

Notwithstanding this long list of frivolous legal arguments, Perdue's protracted publicity campaign, persistent threats of litigation, transparent settlement efforts, baseless claims, caustic websites and blogs and forthcoming "investigative biography" are more than enough evidence of his bad faith. Movants Mem. at 12-15.

III.

THE FEES SOUGHT BY RANDOM HOUSE ARE APPROPRIATE

Perdue has failed to demonstrate why the amount of fees requested by Movants is inappropriate. He does not challenge the reasonableness of counsel's rates, nor could he: they are in line with prevailing rates for experienced intellectual property litigators in this market. Opening Mem. at 16. Thus, Defendant's sole argument appears to be that counsel's hours are excessive. Yet as already noted (Movants Mem. at 16), this case was litigated with care and effort for good reason. *Da Vinci Code* is one of the bestselling novels of all time, the hardcover remains near the top of the bestseller lists to this day, and a major Hollywood film version is in production. Movants could ill afford to take Perdue's attempt to enjoin distribution of both the book and movie lightly, no matter how frivolous they consider his claims to

[6] Publishers generally report royalties biannually and make royalty payments within 90 days of the end of each 6-month period. McNamara Supp. Aff. ¶ 7-8 Thus, royalties owing to Perdue as a result of sales in the latter part of 2004 would not have been paid until 2005.

be. It was essential for counsel to engage in the time-consuming process of closely reading, analyzing and comparing the three books at issue in detail as the law requires -- and, of course, to forcefully argue Movants' positions in pleadings, briefs and oral argument so as to obtain the earliest possible dismissal.

Perdue states that the number of hours billed by Movants' counsel either is excessive and should be reduced or, alternatively, that the substantial number of hours supports his theory that the issues were complex, and that therefore the Court should find his claims to be objectively reasonable. Perdue Mem. at 18-19. But this is trickery. The sole legal issue underlying the summary judgment motion (substantial similarity) was straightforward, not complex or novel. Movants Mem. at 7-8. However, engaging in the necessary analysis was very time-consuming. Faced with a 50-page counterclaim from Perdue replete with pages and pages of charts of alleged – and exaggerated – similarities, Movants were required to carefully read three long books and rigorously compare, page by page, often detail by detail, the diverse aspects of those books.

Perdue is able to point to only three specific examples of alleged excess in the months and months of legal bills provided -- each of which is entirely justifiable. The fact that the three attorneys integrally involved in the case read the books is an obvious necessity in light of the detailed analysis that the law requires. The fact that Ms. McNamara prepared for oral argument, and other attorneys mooted or otherwise assisted her in preparation for this important stage of the case, is standard and necessary. And the fact that counsel spent a number of hours after oral argument is likewise attributable to required, relevant tasks. The fact that these few mundane billing entries represent the most glaring excesses Perdue can find in Movants' many months of legal bills only shows the reasonableness of Movants' fee request.

IV.

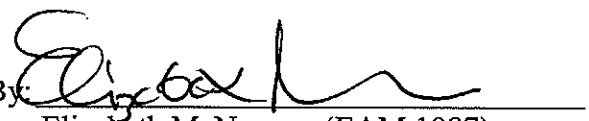
NO STAY IS NECESSARY

Perdue requests a stay of any fee award in this matter. While he cites a single case in which a court granted such a stay, neither the Federal Rules of Civil Procedure nor the Copyright Act requires a stay. Indeed, the Advisory Committee Notes to Rule 54 suggest that the preferable procedure is for the

district court to decide the fee motion soon after the merits, so that both may be appealed together. Adv. Comm. Notes to 1993 Amendments, Subdivision (d), Para. (2) ("Prompt filing...enables the court...to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case."). If any stay is granted, Perdue should be required to post a bond pursuant to Fed. R. Civ. P. 62(d).

Dated: New York, New York
September 27, 2005

DAVIS WRIGHT TREMAINE LLP

By: 

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

Leslie Majer, being duly sworn and says:

I am not a party of this action, am over 18 years of age and reside in Kings County, New York. On September 27, 2005, I caused to be served the within REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF RANDOM HOUSE'S AND CERTAIN COUNTERCLAIMS DEFENDANTS' MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS and SUPPLEMENTAL AFFIDAVIT OF ELIZABETH A. MCNAMARA IN SUPPORT OF MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to the following at the last known address set forth below:

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Sworn to before me this
27 th day of September, 2005

Notary Public

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