

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

- vs. -

LEWIS PERDUE,

Defendant.

Civil Action No.
04 CV 7417 (GBD)

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LEWIS PERDUE,

Counterclaimant,

- vs. -

DAN BROWN, RANDOM HOUSE, INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
SONY PICTURES ENTERTAINMENT INC.,
SONY PICTURES RELEASING CORPORATION, and
IMAGINE FILMS ENTERTAINMENT, LLC,

Counterclaim Defendants
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AFFIDAVIT OF CHARLES B. ORTNER

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CHARLES B. ORTNER, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Proskauer Rose LLP, counsel to counterclaim defendants Columbia Pictures Industries, Inc., Sony Pictures Entertainment Inc., Sony Pictures Releasing Corporation, and Imagine Films Entertainment,

LLC (collectively, the “Sony Parties”) in the above-captioned action. I am fully familiar with the facts and circumstances set forth herein.

2. In an Opinion and Order dated August 4, 2005 (the “Decision”), this Court granted plaintiffs’ motion for summary judgment and dismissed the counterclaims of defendant-counterclaimant, Lewis Perdue (“Perdue”). The Decision, which rejected each of Perdue’s claims of copyright infringement based on well-settled principles of copyright law, supports the arguments of plaintiffs and the Sony Parties concerning the unreasonableness of Perdue’s claims.

3. I submit this affidavit in support of the application by the Sony Parties for an award of prevailing party costs, including attorneys’ fees, against Perdue, pursuant to 17 U.S.C. § 505 and Fed. R. Civ. P. 54(b). Set forth below are further detail and support for the application, in the amount of **\$28,863.75**, made on behalf of the Sony Parties.

4. The Sony Parties were not parties to this action when it was filed by plaintiffs Random House and Dan Brown. Rather, Perdue filed counterclaims that named the Sony Parties, thereby bringing them into this case involuntarily. In his counterclaims, Perdue sought drastic measures – including an injunction against the production, filming and publicity of a planned film version of plaintiff Dan Brown’s book *The Da Vinci Code* – that potentially could have cost the Sony Parties tremendous monetary damages, and further injuries incapable of monetary estimation. For these reasons, the Sony Parties reasonably and understandably felt that strong legal action by experienced counsel was necessary to protect their rights.

5. It must be emphasized that there was no legitimate reason for Perdue to drag the Sony Parties into this dispute. The Sony Parties’ actions with regard to a planned motion picture based on *The Da Vinci Code* were taken under licenses granted ultimately from that book’s author, Dan Brown, and/or its publisher, Random House, who had initiated this matter by filing a declaratory judgment action against Perdue. Therefore, as a practical matter,

there was no reasonable basis for Perdue to believe that, should this Court have determined that *The Da Vinci Code* infringed Perdue's books, the Sony Parties would have been so irresponsible as to have incorporated into their planned motion picture allegedly protectible elements contained in Perdue's works without proper licenses and/or authorizations. In short, joining the Sony Parties in this case served no justifiable purpose, and it is difficult to escape the conclusion that the only two reasons why Perdue named those parties was to harass them (and to cause them to incur legal fees), and to attract further publicity to himself and to his books.

6. The Court is respectfully referred to the accompanying Affidavit of Elizabeth A. McNamara for a further summary of the relevant facts and procedural history of the instant action.

7. The work performed by me and my firm in the instant action included research as to possible defenses to Perdue's counterclaims, consulting with Davis Wright Tremaine LLP, counsel to plaintiffs, with regard to plaintiffs' combined motion to dismiss and for summary judgment, attendance at and participation in court conferences and oral argument on the parties' motions, and the preparation of the instant motion for attorneys' fees and supporting documents. As co-counsel to Davis Wright Tremaine, I and my firm were very careful to avoid duplicating any of the work Davis Wright Tremaine had done in connection with the defense of the Sony Parties.

8. Annexed hereto as Exhibit A are copies of the bills my firm has rendered to Sony Pictures Entertainment Inc., on behalf of the Sony Parties, in connection with this matter. These bills are rendered at my firm's regular hourly rates (which are comparable to those of other similar law firms) and in accordance with Sony Pictures Entertainment Inc.'s billing procedures and practices.

9. At all relevant times, my hourly billing rate, as a senior partner at my firm, was \$695.00. The primary other attorney at Proskauer Rose to perform work on this matter was Jerry L. Dasti, a third-year associate at my firm. From January through April 2005, Mr. Dasti's hourly billing rate was \$325.00; in May 2005, Mr. Dasti's hourly billing rate was raised to \$385.00. In addition to Mr. Dasti and myself, Sandra A. Crawshaw-Sparks, a partner at Proskauer Rose, engaged in approximately 1.5 hours worth of work on this matter during my absence from my office for a few days in August 2005. Ms. Crawshaw-Sparks's hourly billing rate, at all relevant times, was \$525.00.

10. Ms. Crawshaw-Sparks, Mr. Dasti and I are experienced intellectual property litigators with extensive substantive expertise in copyright law. Short biographies of Ms. Crawshaw-Sparks, Mr. Dasti and me, detailing our experience both as litigators and as intellectual property attorneys, are attached hereto as Exhibit B.

11. The bills attached as Exhibit A reflect a total bill for attorneys' fees incurred by the Sony Parties, in connection with my firm's work on this matter, of \$25,338.75 for the period January through July, 2005. However, certain entries on those bills have been redacted; these redacted entries are of a privileged nature, and do not reflect work that is clearly recoverable under the applicable Federal and Local Rules and 17 U.S.C. § 505. Therefore, reimbursement of attorneys' fees charged in connection with those entries is not sought by the Sony Parties. The time represented by the redacted entries amounts to 1.5 hours at my customary billing rate of \$695.00 per hour, for a total of \$1,042.50. Therefore, the total amount of attorneys' fees for the period January through July, 2005 for which the Sony Parties seek reimbursement is **\$24,296.25**.

12. The bills attached as Exhibit A also include a total of \$976.53 in disbursements billed to the Sony Parties, including fees for photocopying, Westlaw research, long distance telephone calls, car services, and other miscellaneous expenditures. In accordance with standard practice under S.D.N.Y. Local Rule 54.1, the Sony Parties do not seek reimbursement of those disbursements.

13. In addition, my firm will be billing the Sony Parties a total of **\$4,567.50** for attorneys fees for the month of August 2005, in connection with my firm's work on this matter and on the instant application for reimbursement of attorneys' fees and costs. A copy of a statement of attorneys' fees from August 2005 to be billed to the Sony Parties in connection with this matter is attached hereto as Exhibit C. (Confidential information unrelated to the current application, or to the charges to be billed to the Sony Parties for August 2005, has been redacted from Exhibit C.)

14. The total amount of attorneys' fees for which my clients seek reimbursement from Perdue is **\$28,863.75**.

15. An order awarding to the Sony Parties their attorneys' fees incurred in connection with his action is particularly appropriate in this case, as set forth herein and in the accompanying Affidavit of Elizabeth A. McNamara.



CHARLES B. ORTNER

Sworn to before me this 15th day of September, 2005



Notary Public

ANTHONY T. WLADYKA, III
Notary Public, State of New York
No. 02WL607894
Qualified in New York County
Commission Expires July 22, 2006