

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

against

LEWIS PERDUE,

Defendant.

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: Civil Action No.
: Index No. 04 CV 7417 (GBD)
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LEWIS PERDUE,

Counterclaim-Plaintiff,

against

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

Counterclaim-
Defendants.

: **DECLARATION OF**
: **DONALD N. DAVID IN**
: **OPPOSITION TO PLAINTIFFS'**
: **MOTION TO DISMISS OR,**
: **IN THE ALTERNATIVE,**
: **FOR SUMMARY JUDGMENT**

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I, DONALD N. DAVID, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a member of the law firm Cozen O'Connor, P.C., counsel to Defendant and Counterclaim-Plaintiff Lewis Perdue ("Perdue") in the above-captioned action. I am fully familiar with the facts set forth below and make this Declaration in opposition to the motion by Plaintiffs Dan Brown and Random House, Inc. and Counterclaim-Defendants Dan Brown ("Brown"), Random House, Inc. ("Random House"), Columbia Pictures Industries, Inc., Sony Pictures Entertainment, Inc., Sony Pictures Releasing Corporation, and Imagine Films Entertainment, LLC (collectively "Plaintiffs") for a judgment on the pleadings or, in the

alternative, for summary judgment and to dismiss or, in the alternative, for summary judgment on Perdue's counterclaims.

2. Plaintiffs Dan Brown and Random House commenced this action seeking a declaration that *Da Vinci Code*, authored by Brown, does not infringe Perdue's novels, *Daughter of God* and *The Da Vinci Legacy*. Perdue answered and asserted counterclaims against Plaintiffs Dan Brown and Random House, Inc. for copyright infringement, an accounting and unjust enrichment, and against Plaintiffs for an injunction.

3. Plaintiffs now move for the aforementioned relief before any discovery has been had. However, summary judgment on the issue of substantial similarity is not appropriate at this point in time.¹

4. Plaintiffs' mantra that all the Court must do to decide a summary judgment motion is to read the novels is woefully oversimplified. In determining whether substantial similarity exists, the Court must have the tools available to distinguish matters that are protected from those that are unprotected. Plaintiffs have not given the Court those tools because no discovery has been had.

5. Without any discovery, the Court is unable to answer questions crucial to a fair adjudication of the claims asserted, such as:

- What is the genre?
- What are the scenes a faire that are typical of that genre?
- What are the historical facts?

¹ For purposes of their motion to dismiss the counterclaims or, in the alternative, for summary judgment, Plaintiffs do not dispute that Dan Brown had access to Perdue's novels, *Daughter of God* and *The Da Vinci Legacy*. See Plaintiffs' memorandum of law in support of their motion for a judgment on the pleadings or, in the alternative, for summary judgment and to dismiss or, in the alternative, for summary judgment on Perdue's counterclaims ("Plaintiffs' MOL") at 13. Therefore, Plaintiffs motion should be denied because it is premature for the Court to decide, as a matter of law, that *Da Vinci Code* is not substantially similar to Perdue's works.

- How did Perdue weave together unprotected elements to create an original story that is entitled to protection?
- Did Brown conduct any original research or did he merely copy the original thought and expression of Perdue?

6. At a minimum, Perdue needs to depose Brown and anyone else who contributed to the writing of *Da Vinci Code*, including Jason Kaufman, Brown's editor, Blythe Brown, Brown's wife, and anyone else credited by Brown in assisting him to write and research his novel. If Perdue is not given that opportunity, the Court risks depriving Perdue of a fair adjudication of the claims by examining an incomplete record. Additionally, such discovery will give rise to genuine issues of material fact concerning the extent to which Brown conducted original research or merely copied Perdue's original synthesis of historical and religious concepts.

7. Furthermore, the absence of an admissible evidentiary basis for many of Plaintiffs' arguments also proves that their motion is premature and that discovery is necessary.

8. In order for the rival parties to establish their cases, they must rely upon matters outside the novels themselves, or matters to be addressed through discovery. The fact that Plaintiffs have relied upon matters outside the novels themselves proves the point. Not only have Plaintiffs relied upon matters for which no admissible evidence has been presented, but they have failed to submit an affidavit of Plaintiff Dan Brown, author of *Da Vinci Code*.

9. Without an affidavit of Dan Brown, Plaintiffs may not argue, as they do, that *Da Vinci Code* was based on extensive research.² Indeed, without such evidence, one would be equally justified in concluding that Dan Brown conducted no research and that all of his

² See Plaintiffs' Rule 56.1 Statement at ¶ 2.

references to the Divine Goddess, to Constantine, etc., were simply copied from Perdue's *Daughter of God*.³

10. Furthermore, there is no evidentiary basis in the record for concluding that the "historical facts" contained in *Daughter of God* were actually historical facts, or whether Perdue took artistic liberties with history and simply embellished on history to make his novel more interesting. The conclusion that Brown copied from Perdue cannot be avoided. *Daughter of God* does not express ideas, beliefs or historical facts that can be found in existing scholarly works. The ideas, beliefs and historical facts described in *Daughter of God* were invented by Perdue, and were organized by Perdue in a way that resulted in the creation of an original view of theology and religious history. See Declaration of Lewis Perdue in opposition to Plaintiffs' motion to dismiss or, in the alternative, for summary judgment, dated April 5, 2005 at ¶ 71.

11. Brown does not contradict Perdue's creation of an original view of theology and religious history, but merely relies upon his lawyers to say it for him. For this reason alone, summary judgment should be denied. If summary judgment is not denied, at a minimum, Perdue is entitled to discovery in order to learn how his original synthesis of religion and history resurfaced in Brown's *Da Vinci Code*.

12. Because no discovery has taken place and no affidavit of Dan Brown was presented, Plaintiffs have no evidentiary basis for contending that Brown did not copy Perdue's historical embellishments that were created by Perdue when he wrote *Daughter of God*.

13. Next, Plaintiffs also contend that Brown's discussion of Mary Magdalene and her purported marriage to Jesus Christ, the existence of a Divine Goddess, or all of the other

³ More than a dozen books and innumerable articles, many by top academic scholars with no theological axes to grind, have extensively documented a large number of errors in *Da Vinci Code*. The existence of those errors cast substantial doubts on whether Brown actually conducted any research or whether he simply copied from Perdue.

religious themes that parallel Perdue's *Daughter of God*, was taken from the Gnostic Gospels discovered at Nag Hammadi, Egypt in 1945.⁴

14. However, without an affidavit from Dan Brown attesting to the fact that he even read the Gnostic Gospels, or used them as a basis for *Da Vinci Code*, there is simply no evidence to support such a contention. Copying from Perdue is just as plausible. This is particularly the case because the Gnostic Gospels reflect the religious views of different sects, and Perdue's discussion of matters contained in those Gospels constitutes a "blend" of different Gnostic viewpoints, which blend was copied by Brown.

15. Furthermore, while Plaintiffs have bandied about words such as "genre" or phrases such as "scenes a faire," they have not provided an evidentiary basis for determining what is and is not common to "thriller" or "mystery" novels or what scenes one would expect to find in such novels. Instead, Plaintiffs have acted as if they expect the Court to rely solely upon their unsupported "say so."

16. For the foregoing reasons, the Court should not entertain Plaintiffs' motion for summary judgment without providing Perdue any opportunity to conduct discovery, which when conducted is reasonably expected to create genuine issues of fact concerning the substantial similarities between Perdue's novels, *Daughter of God* and *The Da Vinci Legacy*, and Dan Brown's *Da Vinci Code*.

Dated: New York, New York
April 7, 2005



DONALD N. DAVID, ESQ.

⁴ "The idea of the 'sacred feminine' which plays a role in both books stems from historical research involving the Gnostic Gospels, an ancient collection of biblical texts which were unearthed in Nag Hammadi, Egypt in 1945 but not made accessible to the public until the late 1970's." Plaintiffs' Rule 56.1 Statement, ¶ 94.