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PRELIMINARY STATEMENT

In its opposition, Random House (“RH”) presented the following formula for deciding copyright infringement cases involving novels:

It is well settled in this Circuit that a court needs nothing more than the books themselves to determine whether they are substantially similar.” (RH brief, p. 21).

Consistent with that formula, Random House ignored well-known rules involving civil procedure and evidence. As a result, it argues that a motion for summary judgment can be decided without the benefit of admissible evidence, other than the competing novels themselves.

The problem with this analysis is obvious and crucial. When dealing with story-lines and novels that are historical in nature, the Court is faced with the problem of filtering out the unprotected elements as a preliminary step. And, while it is commonplace that historical facts are not protected, the problem is in determining which are historical facts, and which “facts” are nothing more than the creation of the author. While the former are unprotected and may be used by everyone, the latter are, in fact, protected.¹

¹ In the world of science fiction it is common-place for an author to create a series of novels with a shared history, such as the famed *Dune* series created by Frank Herbert. Upon his death, his family utilized that fictional history to bring out several more novels, all of which built on the “history” he had created, with shared characters, worlds and events. Although virtually all of the elements that appeared in the novels were common to science fiction, it was the shared “history”

Perhaps the best proof of this obvious statement, and the best demonstration of why summary judgment should not have been granted, is the brief of RH. Contrary to their own formulation, RH does not rely solely on the two books, but rather argues from newspaper articles, unsworn excerpts from books, such as *Holy Blood, Holy Grail* by Michael Baigent, Richard Leigh and Henry Lincoln (A-114)², but not upon a sworn affidavit of Dan Brown attesting to the fact that he ever actually read those articles or books or used or relied upon them when he wrote *Da Vinci Code* (“Code”). Neither has Random House submitted an affidavit to counter the sworn Declaration of Lewis Perdue. (A. 206-225).

While Random House contends that expert sworn affidavits may not be used on a motion involving the question of substantial similarity, it has instead relied upon unsubstantiated statements in their attorneys’ brief, and other unsworn materials. By means of such unsworn statements, RH contends that the District

that gave them a uniqueness and which would have made it obvious had anyone attempted to misappropriate Herbert’s work.

² The factual accuracy of *Holy Blood, Holy Grail*, which is purported to be a work of history, has been roundly criticized for its numerous historical inaccuracies. Furthermore, the authors of that work have sued Dan Brown in England for plagiarism. Because, as can be seen by the briefs submitted by all parties, the question of whether something is or is not a historical fact is very important in this lawsuit. Accordingly, the parties should not find themselves in the position of having to criticize the historical evidence of their adversaries in legal briefs. Instead, an evidentiary hearing is required if the parties are to be given a full and complete opportunity to confront and to oppose all of the evidence offered by their adversaries.

Court was able to distinguish fact from fiction.³ Although they argue that “this Court is looking at historical novels” (RH brief p. 36), they also contend that the District Court, without the benefit of admissible historical evidence, other than the Declaration of Perdue, was capable of deciding disputed questions of whether something was a historical fact, or whether it was the creative invention of Perdue. Furthermore, although the District Court made numerous findings that certain elements were not “original” to novels of a particular genre, RH has not explained, or even mentioned, the evidentiary basis that enabled the District Court to make findings involving such a supposed lack of originality.

Next, Random House has not denied that both novels contain a “back” and a “front” story that, contrary to the assertions of Random House, are very similar to each other.⁴ In response to such similarity, Random House contends that regardless of whether such similarity may exist, it is found in only a small number of pages of Code (RH brief, p. 33, fn 9). Hence, RH has taken the position that no

³ It is not unknown for a book to be represented as factually accurate and later be discovered to contain fictional elements, contrary to the initial representations made by the author and the publisher of the book. e.g. *A Million Little Pieces* by James Frye. Upon reflection, however, the author of a work will always have a better understanding of what is fact and what is fiction than will his publisher, Random House/Doubleday. While James Frye has addressed the fictitious nature of his work, here Dan Brown has been silent.

⁴ The mere fact that these two novels contain both a back story and a front story is an important point of similarity that is not common to novels of the mystery or thriller genre.

matter how important the qualitative similarities may be, all that matters is the fact that, quantitatively, the similarities occupy only a few pages in Code.

But that is not true; it is more than a few pages. The back stories are what drive the front stories and without them the front stories would have little meaning. The front stories of the novels not only share great similarities, but some of those similarities are uncanny.

ARGUMENT

POINT I

DA VINCI CODE IS SUBSTANTIALLY SIMILAR TO DAUGHTER OF GOD (“DAUGHTER”)

A. The Two Novels Tell Nearly Identical Stories

As Perdue noted in his main brief, the District Court filtered out almost the entire back story and most of the front story as well, leaving only those parts of the novels that are different to use to determine substantial similarity. Accordingly, the thrust of Perdue’s arguments in his main brief on this appeal were to challenge the propriety of removing virtually the entire back and front stories in considering the question of substantial similarity. Once the materials that were filtered out are restored, both the back stories and the front stories of the novels become extremely similar, notwithstanding the efforts of Random House to argue to the contrary.

Both novels tell the same story, expressed in very similar ways even down to the characters, names, symbolism employed and suspiciously similar dialogue.

They are stories about religion and religious discovery. They both involve the belief that God is a union of the male and female. They both involve the efforts of the Catholic Church to change the notion of God from one having both male and female components to one that is male only. Both novels involve a woman who is a symbol of the Great Goddess, also presented as the lost female component of God. Both novels involve physical evidence that proves the existence of the Great Goddess. In both novels, the discovery of that physical evidence will rock the foundations of the Catholic Church. In both novels, the Catholic Church is aware of the existence of that physical evidence and seeks to keep the world from learning of its existence. In both novels, rival groups or organizations seek to obtain possession of the physical evidence for different reasons. In both novels, one of the rival organizations is part of the Catholic Church. In both novels, the organizations that are part of the Catholic Church seek to obtain the physical evidence in order to blackmail or coerce the Pope.

Works of art are very important in both novels. In both novels, there are long, detailed and nearly identical sequences involving gold keys hidden in a painting, left for the heroine (with no instructions) by a murdered art expert; the key, which does not turn a lock, is used (in near-identical settings) used to open a box in either a bank in Zurich or a branch of a Zurich bank. In both novels, the hero and heroine find combination-locked objects in the Zurich bank boxes that

will help them locate the physical evidence. In both novels, the heroine expresses the belief that the object of the quest has found her and not the other way around. Early in both novels, a man in control of a treasure trove of art is murdered.

In both novels, the heroine is at first unaware that God was once considered as having both male and female attributes, but later learns the “truth” in identical settings expressed in nearly identical dialogue. In both novels, once the heroine becomes aware of the male/female nature of God, she undergoes a personal transformation. In both novels, the physical evidence is either not found or is lost. Towards the end of both novels, there is an expression of the belief that actual possession of the physical evidence is not as important as is the belief in what the physical evidence represents.

The basic plots involve the unwitting and unwilling search by a remarkably similar hero and heroine to locate extraordinary documents and relics that prove the divinity of the identical sacred woman who had been wronged by the church, and who is a symbol for the Great Goddess. The documents will shake the foundations of the Catholic Church. Key to the documents is proof that the church has conducted a spin campaign to smear the Goddess in order to support the male-domination in church ranks. The actions are called a cover-up. The cover-up is necessary because Jesus was a feminist.

The quests are launched by the murders of art experts who are curators of fabulous collections. Immediately before their deaths, the art experts, through various clues, gave the hero and heroine cryptic and puzzling clues to find the things they were looking for. The message is an awesome religious puzzle that provides the heroine a clue leading to a painting that was painted on wood.⁵ The painting provides the heroine with a gold key. The key provides access to a safe deposit box in a Zurich Bank. The contents of the container from the safe deposit box are another puzzle that sends them on a quest for a container of religious relics and documents.

The quest is further complicated by a secretive brotherhood with a contentious relationship with the Vatican headed by a man of the cloth who believes the Catholic Church has strayed and that his brotherhood's way is the true faith. The hero and heroine are stalked by people who are intent on killing them and who are seeking the religious relics and documents themselves. The hero and heroine need help for the journey and turn to a shapeshifter who joins the quest. The shapeshifter manipulates the hero and heroine, has no compunction about killing those close to him, and has an intense emotional relationship with the Catholic Church that motivates him. The shapeshifter almost wins but ultimately

⁵ The painting in the Louvre that is featured in Code was originally painted on wood and later transferred to canvas.

loses the prize. In the end, the hero and heroine realize that faith in the ideas behind the physical objects of their quest is more important than the physical objects themselves.

B. Specific Similarities

1. Mary Magdalene

In its attempt to distinguish the Divine Goddess found in each novel, Random House contends that while *Code* was about Mary Magdalene, *Daughter* was about Sophia. However, *Daughter* was also about Mary Magdalene, as evidenced by the following passage:

“Just as valid, but terribly inconvenient to Constantine and the man who defined the institution we have today. Peter, you see, won his power struggle with Mary Magdalene which is why women are relegated as adjuncts, secondary worshipers in every church. Christianity had borrowed from Judaism and institutionalized the doctrine of male dominance in its new religion, rationalizing the authority to do so on spiritual grounds.” (EX-547).

Random House also ignores the fact that, in *Code*, Mary Magdalene is treated as the Divine Goddess, in the same way that Sophia is treated as the Divine Goddess in *Daughter*.

“Yes,” Teabing said. “And that Mary Magdalene was the womb that carried His royal lineage. The Priory of Sion, to this day, still worships Mary Magdalene as the Goddess, the Holy Grail, the Rose, and the Divine Mother.” (EX-261).

2. Symbolism In the Novels

Overlooked by both the District Court and Random House is the important use of symbols in both novels. As one of many examples, the surname of Brown's heroine, Sophie Neveu, is translated as meaning "New Eve." Likewise, the name "Zoe" of Perdue's heroine, Zoe Ridgeway, means "Eve." And, of course, Sophie and Sophia are the same name, meaning "wisdom," and also the name of the Great Goddess. According to Code, its heroine, Sophie Neveu, is a product of the royal bloodline of Jesus and Mary Magdalene. Hence, the heroines in both novels are portrayed as being of divine ancestry.

3. The Emperor Constantine

The novels contain remarkably similar statements regarding Constantine.

For example, the following quote appears in *Daughter*:

"But Constantine is known as the first Christian emperor," Zoe said.

"Only on his deathbed," Seth said. "Sol Invictus, the Sun God was his main deity until the last hours of his life." (EX-483-484).

The following remarkably similar quote appears in *Code*:

"I thought Constantine was a Christian," Sophie said.

"Hardly," Teabing scoffed. "He was a lifelong pagan who was baptized on his deathbed, too weak to protest. In Constantine's day, Rome's official religion was sun worship – the cult of *sol Invictus*, or the Invincible Sun – and Constantine was its head priest." (EX-238).

4. Physical Evidence of the Divine Feminine

Physical evidence of the divine feminine is critical in both novels. In *Code*, the physical evidence consisted of the bones of Mary Magdalene, as well as certain documents establishing the bloodline of Mary Magdalene and Jesus Christ. In *Daughter*, the physical evidence consisted of the burial shroud of Sophia bearing her image, as well as Roman documents that establish the divinity of Sophia as a second Messiah. It was for the express purpose of learning the location of the physical evidence in both novels that Sauniere in *Code* and Willie Max in *Daughter* were murdered.

In the novels, the Catholic Church was aware of the existence of both the Mary Magdalene physical evidence as well as the Sophia physical evidence, known as the Sophia Passion. Either set of physical evidence could rock the foundations of the Catholic Church. Hence, the goal of the Catholic Church in both novels was to prevent the disclosure of the physical evidence.

5. The Competitors for the Physical Evidence

In *Code*, the competitors were Opus Dei and Sir Leigh Teabing. Opus Dei was headed by a Bishop Aringarosa, founder of Opus Dei. Years earlier, Opus Dei had been made a prelature of the Catholic Church. The Church became disenchanted with some of the methods employed by Opus Dei and the Pope threatened to end the status of Opus Dei as a prelature. Bishop Aringarosa sought

to obtain the Mary Magdalene physical evidence to blackmail or coerce the Catholic Church into allowing Opus Dei to remain a prelature of the Church. The antagonist of Opus Dei in Code was Sir Leigh Teabing. Teabing was an historian who hated the Catholic Church and wanted the Mary Magdalene physical evidence to destroy the Church.

An antagonists in Daughter was The Congregation for the Doctrine of the Faith (“CDF”), an actual part of the Catholic Church, which is the current name for the Holy Inquisition. The historical acts of the Inquisition play a prominent role in both Daughter and Code, later serving as a symbolic antagonist. The head of CDF was an archbishop named Neils Braun. Braun was an ultraconservative Cardinal who believed that the Church’s liberalization had gone too far and that the only way to cure that and return the institution to its “true” roots was for him to become Pope. Thus, Braun needed the Sophia physical evidence in order to blackmail the Pope into resigning and having the College of Cardinals name him the new Pope. Hence, in both novels, the head of a religious organization of the Catholic Church sought to obtain the physical evidence to blackmail/coerce the Pope. In Code, it was to allow Opus Dei to remain a prelature; in Daughter it was to allow Neils Braun to become the new Pope. Braun’s antagonist was the Russian KGB/Mafia, which wanted the Sophia physical evidence to blackmail the Church, as has been done by Hitler in World War II. Both Opus Dei and CDF felt that the Catholic

Church had strayed from the “true path” as a result of the 20th Century Vatican Councils and wanted the Church to revert to its earlier conservative ways.

6. The Male and the Female Working Together In the Novels

In *Code*, neither Neveu nor Langdon, acting alone, had the ability to unravel the clues left by Sauniere. Furthermore, Langdon probably would have been captured early in the novel, or possibly even been killed, were it not for the assistance of Neveu. Similarly in *Daughter*, by themselves neither Zoe nor Seth could have located the Sophia Passion were it not for the skills of the other. Likewise, as in *Code*, both Zoe and Seth would have been murdered were it not for the help of the other. Not coincidentally, the view of the importance of the male/female union is lived out in the stories of the hero and heroine in each novel.

7. Neither Success Nor Failure

Both novels are similar in that the hero and heroine neither succeed nor fail in their quest, but rather come to a similar understanding that redefines the nature of success. In both novels, the hero and heroine are left understanding that it is not so much the actual possession of the physical evidence that is important as it is the understanding of what the physical evidence represents. (RH Brief, p. 12).

From *Code*:

"It is the mystery and wonderment that serve our souls, not the Grail itself. The beauty of the Grail lies in her ethereal nature." Marie Chauvel gazed up at Rosslyn now. "For some, the Grail is a chalice that will bring

them everlasting life. For others, it is the quest for lost documents and secret history. And for most, I suspect the Holy Grail is simply a grand idea. . . a glorious unattainable treasure that somehow, even in today's world of chaos, inspires us." (EX- 450).

From Daughter:

"Maybe the mystery is the point." He shrugged. "Maybe the mystery has to remain because we're looking at the infinite through finite eyes. Maybe what God really wants is not blind acceptance of dogma, but a lifetime of searching...discarding what is obviously false, testing the rest." (EX- 486).

8. The Object of the Quest Finds the Hero and Heroine

In both novels, the reader is lead to the unmistakable conclusion that the object of the quest was destined to find the hero and heroine and not the other way around. For example, Daughter contains the following passage:

Zoe had loved art all her life with a passion that had driven her to make it her profession. But despite the satisfaction of spending her life surrounded by the world's most beautiful objects and historical antiquities, she had always dreamed of discovering buried treasure: unearthing a hitherto-unknown trove of priceless art that would be nearly impossible to value. Instead, *it had discovered her*. (EX-471) (emphasis added).

Code has the following similar passages where the object of the quest finds the seeker, not *vice versa*:

You do not find the Grail, *the Grail finds you* And tonight, incredibly, the key to finding the Holy Grail had walked right through his front door." (EX-279-80) (emphasis added).

See also EX-301 and EX-416.

9. There Are Religious Overtones in Code

Random House does not dispute that the hero and heroine in *Daughter* undergo a spiritual transformation. However, they assert that “Brown’s book and characters are more secular and express no imperative to search for a relationship with God.” (RH Brief, p. 28). Perdue could not disagree more. He contends that there are significant transformations that take place in both *Daughter* and *Code*. For example, *Code* literally ends with the following words:

Langdon heard Marie Chauvel’s words. *One day it will dawn on you.*

He was standing beneath the ancient Rose Line, surrounded by the work of masters. *What better place for Saunière to keep watch?* Now at last, he sensed he understood the true meaning of the Grand Master’s verse, Raising his eyes to heaven, he gazed upward through the glass to a glorious, star-filled night.

She rests at last beneath the starry skies.

Like the murmurs of spirits in the darkness, forgotten words echoed. The quest for the Holy Grail is the quest to kneel before the bones of Mary Magdalene. A journey to pray at the feet of the outcast one.

With a sudden upwelling of reverence, Robert Langdon fell to his knees.

For a moment, he thought he heard a woman’s voice. . . the wisdom of the ages. . . whispering up from the chasms of the earth. (EX-459).

Given that Code treats Mary Magdalene as the Divine Feminine, the voice that Langdon heard in that passage was the voice of God, hardly an experience without significant religious overtones.

POINT II

THE RECORD IN THIS CASE WAS NOT SUFFICIENT TO ALLOW THE DISTRICT COURT TO GRANT SUMMARY JUDGMENT TO ANYONE

The act of determining substantial similarity is not necessarily the same as the act of filtering out unprotected elements. While Perdue does not dispute the principle that, in deciding questions of substantial similarity, the District Court was required to read the competing novels, he does dispute the ability of the District Court to filter out all of the allegedly unprotected portions of the novels. Stated more concisely, the District Court was required to determine whether matters in both novels were statements of historical facts, or whether they were fictional inventions of Perdue, as he claimed in his Declaration, which inventions were copied by Brown when he wrote Code. In addition, the District Court made findings that statements and passages in Daughter written by Perdue were not “original” when compared to other novels of the mystery/thriller genre. Whether the District Court was or was not an expert of the mystery/thriller genre is besides the point because Perdue was entitled to know the adverse evidence presented against him so that he might confront that evidence with proof of his own.

Because there is no evidence in the record as to what is and is not “original” in the mystery/thriller genre, the District Court erred in filtering out portions of *Daughter* on the ground it was not “original.”

Finally, the District Court employed a flawed process of “filtering out” because, after it determined that a person, object, event, or scene was a *scene a faire*, without considering the context in which that person, object, event or scene was presented in the novels.

A. These Are Not the Usual *Scenes A Faire*

Although Random House argues that it was no more difficult for the District Court to determine the *scenes a faire* than it was for the Court in numerous other cases decided in this circuit, that is absolutely untrue. The issues being raised on this appeal do not involve the usual types of *scenes a faire* that a court is normally asked to rule upon. For example, the novels in question in this action did not involve the types of *scenes a faire* found in either *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (*scenes a faire* involving a police precinct in the South Bronx) or *Williams v. Crichton*, 84 F.3d 581, 558 (2d Cir. 1996) (*scenes a faire* involving a dinosaur park). In the case of what the average reader might expect in a story about a police precinct in the South Bronx, or in one about a dinosaur park, the court can easily determine what is and is not a scene one would expect to find in such a story. However, when confronting issues involving the

heresy that was spread by Arius of Alexander (RH brief p. 49) and the reaction of the Catholic Church in stamping out that heresy, then the Court is no longer dealing with anything ordinary, well known or routine, much less a *scene a faire*.⁶

While Perdue does not dispute that purely historical facts are not protected, he contends that he invented matters that sounded like historical facts, and that Brown copied substantial portions of them. Fictionalized versions of historical facts and events are protected. “It seems quite clear that original treatment of the life of a historic character, like such treatment of any material even in the public domain, is entitled to protection against appropriation by others.” *De Acosta v. Brown*, 146 F.2d 408, 410 (2d Cir. 1944). *See also Burgess v. Chase-Riboud*, 765 F.Supp. 233 (E.D.Pa. 1991) (dealing with the fictionalized account of the relationship between Thomas Jefferson and Sally Hemmings); 1 *Nimmer on Copyright*, § 2.11[C] at 2-178.12. Hence, without reliable historical evidence as a guide, the District Court was unable to know whether Perdue, as he said he had

⁶ Arius proclaimed that Jesus Christ was created by God the Father, the first person of the Trinity. While Arius nevertheless also proclaimed that Jesus Christ was divine, His divinity was viewed as less than that of the Father. The Nicean Council rejected the teaching of Arius and proclaimed that Jesus Christ was the co-equal of the Father. Notably, Daughter, and later Code, said that the Council of Nicea proclaimed the divinity of Christ for the first time, which is absolutely untrue. Even Arius did not dispute the divinity of Christ. This is precisely the sort of issue that should have been resolved in an evidentiary hearing after hearing expert testimony and should not have been decided on a summary judgment motion.

done, had created a fictionalized account of actual historical events, or whether he had merely copied historical events.

B. The District Court Could Not Take Judicial Notice of Issues Involving History or Originality That Are Present In this Case

Perdue has not suggested that a federal judge may not rely upon his or her knowledge, wisdom, and experience in analyzing the law and the facts and in reaching a conclusion about them. Such an argument would be absurd. However, Perdue does contend that where evidentiary facts are before the court, that court may not add additional evidentiary facts unless permitted to do so under Rule 201 of the Federal Rules of Evidence. As the Advisory Committee Notes to Subdivision (a) indicate, “[t]he usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses.” F.R.E. 201 Adv. Comm. Notes, 1972.

That statement is consistent with the statement quoted by Perdue in his main brief from *Hersch v. United States*, 719 F.2d 873, 878 (6th Cir. 1983) that “a trial judge may not deliberately set about gathering facts outside the record of a bench trial over which he [presides].” The attempt by RH to argue on page 52 of its brief that the quoted statement means something different when the quote is read in context fails. There, the trial judge had military experience involving aircraft and was able to plot the courses of two aircraft based on his prior experience. 719 F.2d at 878. After the plaintiff challenged his right to do that, the Sixth Circuit said that

the trial judge could use his experience to reach a conclusion based on the facts that were in evidence. *Id.* All that was proscribed was relying upon facts that were not in evidence, the very thing that Perdue claims was done in this case.

Here, what the District Court did was not to reach an educated conclusion based upon the evidence that was properly presented to the court, but rather one that either was based on no evidence at all, or evidence that was not part of the record. Furthermore, Perdue contends that the determinations by the District Court regarding Constantine, his influence on the Council of Nicea and his success in suppressing notions of a female deity are historically incorrect. As mentioned by Perdue in his main brief, “[b]ecause 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). Random House has not argued that the questions of history and originality that are involved in the present case are “beyond controversy under Rule 201(b).” Even if, as Random House contends, the District Court could take judicial notice of historical facts, Rule 201(c) of the Federal Rules of Evidence provides that “[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.” F.R.E. 201(c). Here,

the District Court never notified the parties that it was taking judicial notice of anything. This Court should therefore hold that it was improper for the District Court to have considered evidentiary matters that are not in the record.

C. Expert Evidence Is Not Only Helpful, But Necessary, In This Case

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).

While such assistance will not normally be needed in determining substantial similarity, the filtering out process may require expert assistance in very complicated cases such as this one. Competing novels might involve complex scientific issues, such as a fictional step-by-step description of nuclear fusion. If a question of plagiarism arises, expert assistance might very well be needed.

What follows are two similar remarks, one made by the Random House lawyers, and the other by Gary Goshgarian, Perdue's expert. Presumably, although Mr. Goshgarian is more qualified than the attorneys for Random House to say what is common and what is not to novels written in the mystery/thriller genre, the Declaration of Mr. Goshgarian was not considered by the District Court, while the statement by Random House's attorneys might be considered by this Court.

On pages 41 and 42 of their brief, Random House remarks:

While Perdue proclaims ... that Brown has copied his
“unique scene, seen in no other thriller” where “the

Protagonists must break OUT of a bank”, this conceit is commonplace and can be found, for example, in the bestselling Robert Ludlum thriller *The Bourne Identity* (1980) in which the protagonist also must escape from, not surprisingly, a Swiss bank.

While anyone who has read *The Bourne Identity* can say if it is or is not true that the protagonist in that novel escaped out of a Swiss bank, what the attorneys for Random House are not qualified to do is to call such escapes “commonplace.”

While the attorneys for Random House can make such statements in their brief, the District Court refused to consider the Declaration of Gary Goshgarian, one of Perdue’s experts, in which the following statement appears:

“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).

The logic of a court’s considering the lawyer’s statement but not that of the expert is mystifying. The same holds true for the extensive and comprehensive analysis done by Forensic Linguistics Institute Director John Olsson who offered

his help not for pay but out of his conviction that plagiarism was clearly present. (A-307-322).

D. Because of the Absence of Evidence, Summary Judgment Should Not Have Been Awarded

Random House submitted no affidavits or declarations of anyone other than its own attorneys. Instead, they have relied exclusively on a mélange of either unsupported lawyers' statements,⁷ newspapers clippings, or portions of books. In the face of the Declaration produced by Lewis Perdue, Random House has not submitted an affidavit of Dan Brown either refuting what Perdue said, or making any factual assertions in support of its motion.

References to books, or newspaper or magazine articles, should be disregarded as being inadmissible hearsay. *Owens v. Nationwide Mutual Ins. Co.*, No. Civ. 3:03-CV-1184-H, 2005 WL 1837959 at *11 (N.D.Tex. Aug. 2, 2005); *Cox v. National Football League*, 29 F.Supp.2d 463, 468 (N.D.Ill. 1998). On a summary judgment motion, such materials are inadmissible hearsay and may not

⁷ The statement on page 7 of the brief of Random House that Perdue caused this lawsuit, even though he is the one that was sued, by launching a “campaign in the press and on the internet” is a perfect example of the sort of unsupported statements made by the attorneys for Random House. Not only is that statement unsupported, but it ignores the fact that now pending in the District Court is a motion made by Random House for attorneys' fees in very substantial amount. In opposing that motion, Perdue has stated, under oath, that the last thing he wanted to do was to become embroiled in litigation with Random House. Perdue has indicated that he knows that the resources of Random House far exceed his own,

be considered. *See Eisenstadt v. Central Corporation*, 113 F.3d 738, 742 (7th Cir. 1997); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993); *Taylor v. Polygram Records*, No. 94 CIV. 7689(CSH), 1999 WL 124456 at *18 (S.D.N.Y. Mar. 8, 1999).

Likewise, statement by attorneys not having personal knowledge of the facts may not be considered. *See Beyah v. Coughlin*, 789 F.2d 986, 989 (2d Cir. 1986). In summary, and consistent with the formula espoused by Random House, the only evidence upon which they rely are the books themselves.

Random House's argument that even if significant similarities are found to exist between the novels, that should have no bearing on the outcome of this case because they are quantitatively small⁸ is contrary to the law in this circuit. *See Sheldon v. Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 56 (2d Cir. 1936). Because what was appropriated by Brown was "the heart and core of [Perdue's] work, and for the most part is the product of [Perdue's] invention,"⁹ Random House et al. must be found liable for illegally infringing Perdue's works.

Summary judgment was not appropriate because there exist issues of material fact that must be tried. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36-37 (2d Cir. 1994). "The function of the district court in considering the

and that it would be extremely foolhardy for him to go head-to-head against Random House in any lawsuit.

⁸ Random House brief, p. 38.

⁹ *Smith v. Little, Brown & Company*, 245 F.Supp. 451, 459 (S.D.N.Y. 1965).

motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried.” *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991). “Summary judgment is perforce improper if conflicting evidence is adduced.” *Schering Corp. v. Home Insurance Co.*, 712 F.2d 4, 9 (2d Cir. 1983). Random House has offered virtually no admissible evidence to support its claims other than the novels themselves. Random House has failed to provide an evidentiary rebuttal of Perdue’s Declaration that is admissible. The District Court should not have granted summary judgment to Random House.

Finally, the reliance by Random House on *Medforms, Inc. v. Healthcare Management Solutions, Inc.*, 290 F.3d 98 (2d Cir. 2002) is inapt because it involved evidentiary rulings made during the trial. Here, there has been no trial, and district courts do not make evidentiary rulings on motions for summary judgment.

E. The Author’s Note In Daughter Does Not Estop Perdue From Contending That Daughter Was A Work of Fiction

On pages 45-47 of its brief, Random House argues that, based upon the author’s note appearing at the end of *Daughter*, Perdue should be estopped from arguing that what he said in *Daughter* about Constantine and the Divine Feminine, etc., was his own fictional creation. However, that author’s note does not support

the conclusions made by Random House that Perdue represented everything he wrote about Constantine and the Divine Feminine to be historically accurate.

The statement upon which Random House relies appears on page 46 of its brief and begins with the phrase “This is a work of fiction based on fact.” Not mentioned is that after that statement was made, there are an intervening 4+ pages (EX-884-887) between the point at which the quote leaves off and where it resumes with the words “[a]ll of the other historical shenanigans.”

Taken in context, Perdue’s author’s note recognizes that *Daughter* is a work of fiction that contains some facts that are true. Unlike certain book recently published by Random House, no responsible reader could come away from the author’s note and conclude that everything Perdue said about Constantine and the Divine Feminine was true. Because the question of whether Perdue should be estopped from arguing that major portions of *Daughter* were his fictional creations depends on whether Perdue held *Daughter* out to the public as being factually true, and because Perdue did no such thing, Perdue may not be estopped in any way.

See Houts v. Universal City Studios, Inc., 603 F.Sup. 26 (C.D.Cal. 1984).

POINT III

THE ARGUMENTS OF RANDOM HOUSE REGARDING SELECTION AND ARRANGEMENT ARE ILLOGICAL AND CONTRARY TO THE LAW IN THIS CIRCUIT

Random House has wrongly claimed that holdings involving selection and arrangement apply primarily to cases involving compilations, tapestries and computer programs. (RH brief, p. 3). It argues that the cases dealing with selection and arrangement provide “only extremely thin protection to the original, actual selection and arrangement of unprotected material.” (RH brief, p. 4; pp. 33-39). It claims that “Perdue’s ‘selection and arrangement’ argument has no application to the novels at issue here.” (RH brief, p. 36).

The arguments are absurd. Neither Daughter nor Code are the sort of compilations discussed in *Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340 (1991). As a matter of fact, the tapestry involved in *Tufenkian Import/Export v. Einstein Moomjy*, 338 F.3d 127 (2d Cir. 2003) and the computer program involved in *Softel, Inc. v. Dragon Med. and Scientific Corp., Inc.*, 118 F.3d 955 (2d Cir. 2003) were not *Feist* type compilations either. As this court expressly noted in *Softel*, the selection and arrangement argument applies to novels and may be used for precisely the points made by Perdue in his main brief:

We also note that there may be protectible expression *within* an unprotectible element as well. Our *scene a faire* cases have made this point for many years. For example, in *Walker v. Time Life Films, Inc.*, 784 F.2d 44

(2d Cir. 1986), we observed that *scenes a faire* are not protectible “except to the extent they are given unique – and therefore protectible – expression in original creation.” *Id.* at 118 F.3d 964, fn. 8.

Furthermore, the contention that *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) demonstrates the fallacy of Perdue’s argument (RH brief, p. 36), was effectively rejected by this Court in *Softel* when it stated:

Our statement in [*Hoehling*] that “[t]here cannot be anything such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection,” *id.* at 978 (quoting *Meyers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919) (L. Hand, J.)), may at first blush appear to contradict this. However, we have explained this statement as referring only to compilations of facts that fail to display the constitutional minimum of originality. *See Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992). *Id.* at 118 F.3d 964, fn. 7.

There is very little in existence that cannot be considered to be a *scene a faire*. The creativity to be found in a novel resides, not in the presence of everyday hum-drum items, but rather the original ways in which those items are used. For a court, as was done here, to filter out what it considered to be the everyday hum-drum items without considering how the author used those items to create an original story, would make it impossible for any fiction writer to ever create a protected work.

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.

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February 3, 2006

Respectfully submitted,

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