

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

- vs. -

LEWIS PERDUE,

Defendant.

-----X

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

-----X

State of New York)
) ss.:
County of New York)

ELIZABETH A. McNAMARA, being duly sworn, hereby deposes and says:

1. I am a partner at Davis Wright Tremaine LLP, counsel to plaintiffs/counterclaim defendants Dan Brown (“Brown”) and Random House, Inc. (“Random House”) (collectively, “Plaintiffs”) and co-counsel with Charles B. Ortner, Esq. of Proskauer Rose LLP, to additional counterclaim defendants Columbia Pictures Industries, Inc. (“Columbia”), Sony Pictures

Entertainment Inc. (“Sony Entertainment”), Sony Pictures Releasing Corporation (“Sony Releasing”) and Imagine Films Entertainment, LLC (“Imagine”) (all six entities collectively, “Plaintiffs/Counterclaim Defendants”) in this action.

2. I make this affidavit in support of the Motion of Plaintiff Random House and Counterclaim Defendants Columbia, Sony Entertainment, Sony Releasing and Imagine (collectively, “Movants”) for Prevailing Party Attorney’s Fees and Costs (the “Motion”), pursuant to the Copyright Act, 17 U.S.C. § 505, and Federal Rule of Civil Procedure 54(d).

3. Movants base this motion upon (i) the objective unreasonableness of the claims asserted by Defendant/Counterclaim Plaintiff Lewis Perdue (“Perdue”) and (ii) the improper motivations fueling his accusations and legal claims. While the Court may determine the objective unreasonableness based on the record in this case – and, indeed, it has done so – this Affidavit contains information relevant to the issue of Perdue’s improper motivation, namely information about the overwhelming success of Brown’s novel, *The Da Vinci Code* (“*Da Vinci Code*”) and Perdue’s efforts to falsely trade on that success by claiming that all of the critical aspects of *Da Vinci Code* were copied from Perdue’s earlier works, *Daughter of God* (“*Daughter*”) and *Da Vinci Legacy* (“*Legacy*”). This Affidavit also includes information regarding the work done by Movants’ counsel and fees and costs incurred by Movants in connection with this matter.

Publication and Success of *The Da Vinci Code*

4. Dan Brown’s thriller, *Da Vinci Code*, was published by Doubleday, an imprint of Random House, in or about March 2003.

5. Sales of *Da Vinci Code* skyrocketed immediately and stayed aloft. The book debuted at #1 on *The New York Times* bestseller list and remained on the list for over two years. As of the filing of Plaintiffs’/Counterclaim Defendants’ summary judgment motion, there were

over 10 million copies of the book in print in the United States and another 15 million copies in print abroad. *Da Vinci Code* is one of the bestselling novels ever.

6. *Da Vinci Code* also garnered tremendous critical acclaim and press coverage. Glowing reviews appeared in *The New York Times*, *The Library Journal*, *The Washington Post*, *The San Francisco Chronicle*, *The Chicago Tribune*, *The Boston Globe*, *The Christian Science Monitor* and many other publications. Brown was interviewed on The Today Show, Good Morning America, National Public Radio, Voice of America, CNN Sunday Morning and countless other media venues.

7. *Da Vinci Code* has also spurred the success of other works associated with it. All three of Brown's earlier novels rose to the bestseller lists as a result of *Da Vinci Code*'s success. Doubleday has successfully published an illustrated edition of the thriller with over 150 color photographs of paintings and other important images. Columbia, Sony and Imagine are currently making a motion picture based on *Da Vinci Code*, starring Tom Hanks and directed by Ron Howard, which is due out next year. Aside from these authorized derivative works, Movants are aware of at least 15 published books by others purporting to crack, debunk or otherwise comment on *Da Vinci Code* and the historical material on which it draws.

Perdue's Campaign to Exploit the Success of *The Da Vinci Code*

8. On information and belief, prior to the success of *Da Vinci Code*, neither *Daughter* nor *Legacy* had achieved significant commercial success or had appeared on bestseller lists. *Legacy* was originally published about 1983 and was long out of print when *Da Vinci Code* was published.

9. Shortly after *Da Vinci Code* ascended to the top of the bestseller lists, Perdue asserted that Brown had duplicated all of the important elements of *Daughter* (originally published in 2000), as well as *Legacy*. Rather than pursue his supposed grievances in court,

where they were likely to be readily dismissed, he launched a 14-month publicity campaign to link his books to *Da Vinci Code* based on his false and exaggerated claims – a campaign that later continued in full force after Brown and Random House were forced to sue Perdue in September 2004. As set forth below, as an evident result of his publicity campaign, Perdue succeeded in securing a reissue of *Legacy*, obtained sales for *Daughter* and *Legacy* far beyond anything these books had ever achieved and sold motion picture rights in both novels. Perdue's website for *Legacy* is telling evidence of his ulterior motives in publicizing his accusations; there, Perdue forthrightly proclaims that one of the two "KEY SELLING POINTS" for the reissued book is that "Perdue has received major publicity for comparisons between his novel *Daughter of God* and David [sic] Brown's bestseller *The Da Vinci Code*, including an article in *Newsweek* (6/9/03)." (A true and correct copy of two screenshots from www.davincilegacy.com, including the publisher's sell sheet, is annexed hereto as Exhibit A.)

10. More specifically, Perdue first wrote to Doubleday, a division of Random House, on May 28, 2003, shortly after *Da Vinci Code* hit the bestseller lists, to assert his claim of alleged copyright infringement and enclosed an analysis of the supposed "duplications and similarities" between *Da Vinci Code* and *Daughter*. (A true and correct copy of the letter is annexed hereto as Exhibit B.)

11. On or about June 16, 2003, Katherine J. Trager ("Trager"), Senior Vice President Secretary and General Counsel of Random House, Inc., responded to Perdue's May 28 letter. She stated unequivocally that Brown was unaware of Perdue and had not read his books, including *Daughter* or *Legacy*. Further, having read *Daughter* and reviewed Perdue's supposed comparison of that novel with *Da Vinci Code*, Trager informed Perdue that she saw no basis for a claim of copyright infringement under cited case law. (A true and correct copy of Trager's

letter is annexed hereto as Exhibit C.)

12. Despite Trager's representation that Brown had never read Perdue's books, echoed repeatedly by Brown's counsel, Perdue mounted a prolonged press campaign -- involving press releases, interviews and other contacts with the media -- in a concerted effort to widely disseminate his tenuous claims of plagiarism and copyright infringement and boost interest in his books. (See, e.g., Business Wire Press Release, "ABC News Special on 'Jesus Mary and Da Vinci' Sure to Omit the Original Treatment of the Subject, According to Author Lewis Perdue," Oct. 31, 2003, annexed as Exhibit D hereto). Perdue's claims were wildly inflated; as *The New York Sun* reported, "He...claims that the basic setup of the two books -- including the protagonist, the antagonist, the female love interest, the antagonist organization, and the MacGuffin -- is...remarkably similar." (See "Hillary's No Underdog", *The New York Sun*, June 11, 2003, annexed as Exhibit E hereto). To add credibility to his assertions, Perdue repeatedly indicated that he intended to sue Brown and Random House for copyright infringement. As a result of his concerted campaign, articles recounting Perdue's charges and threats of litigation appeared in *Newsweek*, *Associated Press*, *The New York Post*, *The International Herald Tribune*, *San Francisco Chronicle*, *The New York Times* and other publications. (True and correct copies of certain of these articles are annexed as Exhibits E through J hereto).

13. As a companion to his press accusations, Perdue also launched an Internet campaign to further exploit his accusations and trumpet his own works, creating and/or utilizing his own websites (www.ideaworx.com; www.davincilegacy.com; www.daughter-of-god.com) and posting entries on other websites (www.oursbrun.com/blog/archives/000070.html, annexed hereto as Exhibit K).¹ He posted the list of exaggerated similarities previously sent to Random

¹ True and correct copies of screenshots from www.ideaworx.com are annexed hereto as

House, which made such patently false statements as that the antagonists in *Da Vinci Code* and *Daughter* were both ambitious cardinals or bishops – whereas the antagonist in *Da Vinci Code* is Sir Teabing, the eccentric former Royal Historian. See Exhibit B, p. 1 of attachment. He even created a “Daughter of God Message Board” (“Did The Da Vinci Code Borrow Too Much From Daughter of God? Read This and You Decide”), containing plugs for his books and a link to his biography (see www.daughter-of-god.com/wwwboard/wwwboard.html, annexed as Exhibit M hereto), and a “Reading Group Guide” comparing *Daughter of God* and *Da Vinci Code* (see www.daughter-of-god.com/Daughter-DVCode-BookClub-Guide.html, annexed as Exhibit N hereto). In these various fora, Perdue catalogued his retention of counsel and expert witnesses, and various other supposed developments in the controversy – while simultaneously touting his own books. Thus, for example, in one such web posting, he attached reviews of *Daughter* and asserted that *Daughter* received better trade reviews and Amazon reader reviews than *Da Vinci Code* (see Exhibit K, pp. 2-3); likewise, his Reading Group Guide comparing *Code* and *Daughter* is marked by such questions as, “Which book was most persuasive on this issue?” (Exhibit N, p. 2 of Guide).

14. As an apparent result of Perdue’s concerted campaign to link *Da Vinci Code* and his two books, and thereby increase interest in his books, Perdue was able to secure the reissue of a mass market edition of *Legacy* in January 2004 by Tor, a publisher affiliated with Holtzbrink. Despite the fact that, as revealed in this litigation, there are almost no parallels between *Da Vinci Code* and *Da Vinci Legacy* except for their very different uses of Da Vinci, the publicity for the new edition was shameless in its attempt to capitalize on the success of Brown’s *Da Vinci Code*. Perdue’s website for *Legacy* boldly proclaims, “The Da Vinci Legacy: The ORIGINAL

Exhibit L. More recently, Perdue created blogs to fan the controversy, including the colorfully named <http://davincicrock.blogspot.com> and <http://writopia.blogspot.com>.

Leonardo and Religion Thriller,” and contains explicit references to *Da Vinci Code*, including a quote from Perdue’s expert John Olsson (“This is the most blatant example of in-your-face plagiarism I’ve ever seen. There are literally hundreds of parallels.”) and Perdue’s own self-serving allegations in the *San Francisco Chronicle* (“One ‘Da Vinci’ has sold millions, the other is little known. Lewis Perdue alleges the popular novel has his book to thank.”). See Exhibit A. As noted above, the publisher’s sell-sheet, posted on the book’s website, revealed that the key selling point for the book was Perdue’s successful attention-getting campaign against Brown. See *id.* Perdue even delivered a public address titled “The Legacy of the Da Vinci Code” – actually conflating his title and Brown’s (A true and correct copy of a notice for this address is annexed as Exhibit O hereto).

15. On information and belief, Perdue’s campaign to improperly associate his works with *Da Vinci Code* and to trade on its phenomenal success had its intended effect: *Daughter* and the reissued *Legacy* saw significant increases in sales, and, on information and belief, for the first time a Perdue work even reached *The New York Times* bestseller list. As his publishing house admitted, “‘The publicity is helping,’ says his editor at Tor, Natalie Aponte, of the published reports on the controversy.” See Exhibit J, p. 4. In addition, as an apparent result of his campaign, Perdue successfully sold an option to acquire film rights to his two books.

16. After Perdue’s publicity campaign had successfully gained significant attention for his books, he turned to extracting a settlement payment from Random House. On or about September 2, 2004, counsel for Perdue wrote Trager and Brown’s attorney. This letter stated that both counsel and Perdue’s expert, John Olsson, had analyzed the works and concluded that Perdue had “substantial claims” against Random House and Brown for infringement of his copyrights in *Daughter* and *Legacy*. The letter enclosed a report prepared by Olsson identifying

supposed similarities between the works. (True and correct copies of the letter and report are annexed hereto as Exhibit P.)

17. The catalogue of supposed similarities among the works identified by Perdue's expert collapses and confuses the two Perdue works – plainly to create an appearance of greater similarity – and is largely based on gross mischaracterizations of the content of the respective works. Alleged similarities that do not rely on distortions of the books either fail to rise above stock elements common to novels, particularly thrillers, or reflect well-documented historical facts or legends.

18. The September 2, 2004 letter gave notice of Perdue's intention to commence an action for copyright infringement in the immediate future if Brown and Random House declined to settle the matter or indicate an attempt to settle by September 13, 2004.

This Litigation

19. On September 17, 2004, Plaintiffs filed the complaint in this action, with a single claim seeking a declaration that *Da Vinci Code* did not constitute an infringement of *Daughter* and *Legacy* under the Copyright Act.

20. On January 6, 2005, Perdue filed an Amended Answer With Counterclaims. The Counterclaims asserted claims against Random House and Brown, and derivative claims against the Counterclaim movie Defendants that were mirror images of the original declaratory judgment claim. Perdue sought at least \$150 million in damages based on claims of infringement and unjust enrichment, an accounting of all income deriving from *Da Vinci Code*, and a permanent injunction against all Plaintiffs/Counterclaim Defendants, barring distribution of the book and the motion picture of *Da Vinci Code*. The request for an injunction, in particular, sought a drastic remedy that would potentially have caused the Movants tremendous monetary loss and further injuries incapable of monetary estimation.

21. On February 25, 2005, Plaintiffs moved for judgment on the pleadings or, in the alternative, summary judgment on their declaratory judgment claim. Plaintiffs further moved, along with additional Counterclaim Defendants Columbia, Sony Entertainment, Sony Releasing and Imagine, to dismiss all counterclaims for failure to state a claim, or in the alternative, for summary judgment.

22. Perdue filed his opposition papers, including affidavits from two supposed experts regarding the works' substantial similarity, on April 8, 2005.

23. Plaintiffs/Counterclaim Defendants filed reply papers on April 22, 2005.

24. On May 6, 2005, the Court heard oral argument on Plaintiffs'/Counterclaim Defendants' motion.

25. On August 4, 2005, the Court issued a Memorandum Opinion and Order. It held that *Da Vinci Code* was not substantially similar to *Legacy* or *Daughter*; granted summary judgment for Brown, Random House, Columbia, Sony Entertainment, Sony Releasing and Imagine in all respects; and issued a declaratory judgment declaring that "plaintiffs' authorship, publication and exploitation of rights in and to *Da Vinci Code* do not infringe any copyrights owned by defendant." Opinion and Order, pp. 25-26.

Movants' Attorney's Work and Fees

26. My law firm, Davis Wright Tremaine LLP, represented Plaintiffs and Counterclaim Defendants in this action. I worked on this matter with partner Linda Steinman and associate James Rosenfeld of Davis Wright. Charles B. Ortner of Proskauer Rose LLP, who submits a separate affidavit concerning his work and fees on this litigation herewith, served as co-counsel to Columbia, Sony Entertainment, Sony Releasing and Imagine.

27. Ms. Steinman, Mr. Rosenfeld and I are experienced intellectual property litigators with extensive substantive expertise in copyright law. Biographical information on each of us is

annexed hereto as Exhibit Q.

28. The work we performed in connection with this case was very substantial. At stake were three long books that required significant analysis. Moreover, Perdue repeatedly changed his arguments, from his initial letter to Random House, to his subsequent letter annexing John Olssen's "expert" opinion, to his Counterclaim, and then to a more limited degree in his opposition papers, where he first aired his "selection and arrangement" theory regarding his use of material about the divine feminine and early Christian beliefs. Further, these documents all contained extremely lengthy lists and charts of alleged similarities, often without page references identifying which of Perdue's books was being referenced.

29. Further, Perdue's claims focused heavily on assertions that the religious material in his works was original – despite his own admission in the Author's Note of *Daughter* that he was drawing on established facts and theories discussed in many secondary sources. This required Davis Wright to undertake extensive and time-consuming research into the literature on the Gnostic Gospels, the divine feminine, Emperor Constantine and related issues to refute Perdue's argument that his presentation of the religious material was original and to demonstrate, instead, that the books merely drew from common sources.

30. Finally, Davis Wright spent significant time on its court filings because of the enormous stakes involved. Perdue sought an injunction against one of Random House's bestselling books of all time, responsible for significant income to the house, as well as an injunction against the release of a major motion picture. In particular, since the movie was in production, it was critical to Movants to win this case up front – and thus Davis Wright spent the extra time to insure that its papers were of the finest quality.

31. Annexed hereto as Exhibit R are true and correct copies of the bills we have

rendered to Random House in connection with this matter. Our billing rates, which are listed on the individual bills, are comparable to or less than those of other similar law firms with our expertise.

32. Annexed hereto as Exhibit S are true and correct copies of internal records indicating attorney's fees which have not yet been billed, but which I intend to bill, to Random House.

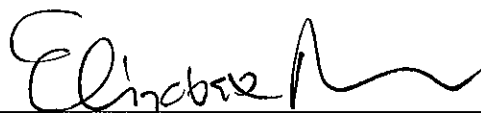
33. The total attorney's fees billed (and to be billed) to Random House are in the amount of \$281,460.36.

34. In addition, allowable costs incurred by Random House (counting only those costs taxable as costs under Local Rule 54.1(c) of the Local Rules of this Court) amount to \$256.13.

35. The Accompanying Ortner Affidavit demonstrates that his firm's time charges as co-counsel total \$28,863.75.

36. The aggregate amount of fees requested in this motion is \$310,324.11. The aggregate amount of costs is \$256.13.

37. For the reasons set forth in the accompanying memorandum of law, I respectfully request that this Court grant this Motion, award attorney's fees and the other costs set forth herein to Movants, and grant such further relief as this Court may deem appropriate.



Elizabeth McNamara

Sworn to before me this
2nd day of September, 2005



JOHN BELIVE
NOTARY PUBLIC, State of New York
No. 01BE4949725
Qualified in Westchester County
Commission Expires April 17, 2007

2007