

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

- vs. -

LEWIS PERDUE,

Defendant.

Civil Action No.
04 CV 7417 (GBD)

-----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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, SUMMARY
JUDGMENT ON PLAINTIFFS' DECLARATORY JUDGMENT CLAIM
AND IN SUPPORT OF PLAINTIFFS' AND COUNTERCLAIMS
DEFENDANTS' MOTION TO DISMISS THE COUNTERCLAIMS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS**

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Plaintiffs Dan Brown (“Brown”) and Random House, Inc. (“Random House”) (collectively, “Plaintiffs”) respectfully move pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings or, in the alternative, under Rule 56 for summary judgment on their declaratory judgment claim. Plaintiffs further move, along with 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”), to dismiss all counterclaims asserted by Lewis Perdue – which are a mirror image of Plaintiffs’ declaratory judgment claim – under Rule 12(b)(6) for failure to state a claim, or in the alternative under Rule 56 governing summary judgment.

PRELIMINARY STATEMENT

This action arises out of *The Da Vinci Code* (“*Da Vinci Code*”), one of the best-selling novels of all time. Based on nothing more than superficial similarities common to countless thrillers, and a fundamental misunderstanding regarding the breadth of copyright protection, Lewis Perdue (“Perdue”) claims that *Da Vinci Code* infringes on copyrights he holds in two books, *Daughter of God* (“*Daughter*”) and *The Da Vinci Legacy* (“*Legacy*”). Prior to this dispute, *Da Vinci Code*’s author, Dan Brown (“Brown”) had never heard of Perdue nor read his books. But even assuming access for the purposes of this motion, Perdue cannot come close to showing the requisite “substantial similarity” in protectible expression between his books and Brown’s. Accordingly, Brown’s and Random House’s motion for judgment on the pleadings should be granted and Perdue’s counterclaims should be dismissed in their entirety.

Perdue does not – and could not – claim that *Da Vinci Code* used actual expression, or even close paraphrasing, from either of his two books. Yet, the Copyright Act is not designed to create a monopoly on ideas. Instead, Perdue must show copying of his original “expression” of his ideas. Thus, in a case such as this where the claimant alleges similarities in plot and characters, the claimant must show that the author has “appropriated the fundamental essence or structure of [claimant’s]

work” and that there is sufficient similarity of treatment, details, settings, characters, scenes and events to conclude that the works are “substantially similar.” Here, despite Perdue’s effort to catalogue through meaningless charts supposed similarities between the respective works, the appropriate standard is a review of the works themselves. Any discerning reader of *Da Vinci Code*, after completing either *Daughter* or *Legacy*, could not possibly conclude that the protectible elements of the works as a whole are similar, let alone substantially similar.

Da Vinci Code is a “gleefully erudite suspense novel”¹ built on complex puzzle clues, several of them connected to Da Vinci’s art, eventually demonstrating that Jesus and Mary Magdalene were married and had descendants, a secret long kept by the Priory of Sion. *Daughter* is an entirely different story – a “shoot-em-up” thriller, involving Nazis and the Russian mafia, where the protagonists battle an ultranationalist Russian leader and a Cardinal seeking to depose the Pope to uncover the fanciful secret that a second Messiah named Sophia was born and arose in Anatolia in the Fourth Century. *Legacy* is so dramatically far removed from *Da Vinci Code* – it involves a quest to find the pages of Da Vinci’s notebooks depicting a charged-particle beam weapon before the forces of evil can make the weapon – it appears to have been tagged on to Perdue’s claim for no other reason than to create a superficial overlap in the use of Da Vinci.

When one scrolls through Perdue’s charts of supposed similarities in the works, it becomes readily apparent that virtually all of the alleged similarities amount to nothing more than abstract ideas, stock elements common to mysteries and thrillers, or the use of similar factual theories. Yet, abstract ideas, stock elements and facts are quintessentially unprotected under the Copyright Act and must be stripped from the works before any comparison can even be made. Thus, Perdue cannot premise his claim, as he tries, on such abstractions – common in many works of fiction – as the fact that the heroes in the three books are “falsely accused” of murders (Counterclaim ¶ 84 at 41), or that all the books have “different story lines that follow different characters. Eventually all the story lines are brought

¹ Janet Maslin, “Spinning A Thriller From A Gallery at the Louvre,” *New York Times*, March 17, 2003. Affidavit of Elizabeth McNamara (“McNamara Aff’t”), Exhibit G.

together and resolved at the end of the book” (Counterclaim ¶ 83 at 16).

At bottom, Perdue’s claim rests on the fact that the *Da Vinci Code* and *Daughter* are both thrillers that include revelations involving a religious “secret” that would expose a more matriarchal role in religion. Yet it is only at that level of abstraction that *any* similarity exists. Indeed, the works’ use of this abstract idea, based on historical material, could not be more distinct. In *Da Vinci Code*, the great secret protected by the Priory of Sion is that Jesus and Mary Magdalene were married, and that the bloodline of Christ leads via the French Merovingians to the protagonist, Sophie Neveu. In stark contrast, *Daughter*’s plot turns not on Mary Magdalene, but instead creates an entirely fictional second Messiah named Sophia who lived centuries after Christ. She, along with her village, were massacred by the Church, leading to a modern day quest to uncover the Shroud of Sophia, involving Nazis and Russian mafia in evil plots to gain power. In short, from every possible perspective – plots, characters, settings and scenes – the respective works could not be more different.

In case after case, the Second Circuit has had no trouble disposing of claims similar to Perdue’s when the *only* similarities between literary works are abstract ideas, facts and stock elements common to the applicable genre. Here, a simple reading of the three books at issue reveals that no similarities exist in protectible expression and that the fundamental and innumerable differences in expression doom Perdue’s claims.

FACTUAL BACKGROUND

There are no material facts at issue on this motion beyond the three books themselves. Before summarizing the three novels in detail, however, we provide the Court with a few background facts in order to put this suit in proper context.

A. *Da Vinci Code*’s Remarkable Success and Perdue’s Efforts to Exploit It

1. *Da Vinci Code*’s International Acclaim and Popularity

Brown is the author of four acclaimed novels. Plaintiffs’/Counterclaim Defendants’ Statement of Material Facts as to Which There is No Genuine Issue to be Tried (“SOF”), ¶ 2. In 2000, Brown

published *Angels & Demons*, which told the story of an ancient secret religious brotherhood in conflict with the Vatican that was exposed by “world renowned” Harvard symbologist, Robert Langdon. After publication of *Angels & Demons*, Brown wrote a sequel based on some of the same research, which also featured Langdon as the hero. This sequel ultimately became *The Da Vinci Code*, published by Doubleday, a division of Random House, in March 2003. The factual foundation to *Da Vinci Code* – from which the fictional novel emerges – is based on extensive interviews and research that Brown had conducted on subjects ranging from Da Vinci’s art, to cryptography and symbols, to recently discovered early Christian texts known as the Gnostic Gospels. *Id.*, ¶ 1-3.

Da Vinci Code was a blockbuster success. The book met glowing critical acclaim and quickly became one of the most rapidly selling books ever. *Id.*, ¶ 4. It debuted at the number one position on the *New York Times* bestseller list and has remained in one of the top four positions on the *Times* list consecutively for an astounding 101 weeks. *Id.* It has been translated into at least 40 languages and has also dominated bestseller lists worldwide, from England to France to Turkey. *Id.* To date, there are 10 million copies of *Da Vinci Code* in print in the United States and 15 million copies in print abroad, numbers that only a small handful of novels have ever matched. *Id.*

Da Vinci Code’s success has led to a virtual cottage industry of related works. Doubleday has published an illustrated edition of the thriller with over 150 color photographs of paintings and other important images. *Id.*, ¶ 5. Columbia, Sony Entertainment and Imagine are currently making a motion picture based on *Da Vinci Code* starring Tom Hanks and directed by Ron Howard; filming is planned to be commenced for release of the film in the Spring of 2006. *Id.* Aside from these authorized derivative works, Plaintiffs 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. *Id.*

2. Perdue’s Campaign to Exploit *Da Vinci Code*’s Success

It was amid this global whirlwind of attention to *Da Vinci Code* that Perdue began to voice claims that the book resembled his own novels, and to mount a media campaign to trumpet his

allegations and thereby link his books to Brown's. In 2003, Perdue wrote Doubleday, citing the supposed similarities between *Da Vinci Code* and both *Daughter* and *Legacy*. *Id.*, ¶ 7. A simple review of the respective works caused Doubleday to reject his unfounded claims. Perdue nonetheless ramped up his campaign in earnest, issuing press releases documenting the supposed "similarities," posting similar allegations on multiple websites and making statements to various national news organizations about his intent to sue over Brown's alleged infringement. *Id.*, ¶ 8. The campaign had its desired effect. Prior to 2003, Perdue had published 12 novels and, on information and belief, none had achieved significant commercial success. Indeed, at the time *Da Vinci Code* was originally published, most of Perdue's previously published works were not even in print, including *Legacy*, which had originally been published in 1983. As a result of Perdue's effort to "link" his books and *Da Vinci Code*, sales of both *Daughter* and a re-issued, revised version of *Legacy* skyrocketed; and Perdue sold an option to acquire film rights to both books. *Id.*, ¶ 9.

3. Procedural History of the Lawsuit

In early September, 2004, Perdue's counsel wrote to Random House threatening to file suit unless Brown and Random House agreed to an immediate settlement. Brown and Random House responded by filing the Complaint, with a single claim seeking a declaration that *Da Vinci Code* did *not* constitute an infringement of *Daughter* and *Legacy* under the Copyright Act. *Id.*, ¶ 10-11. On January 6, 2005, Defendant filed an Amended Answer With Counterclaims. *Id.*, ¶ 12. The Counterclaims assert claims against Random House and Brown, and derivative claims against the Counterclaim movie Defendants that are mirror images of the original declaratory judgment claim. In short, Perdue seeks at least \$150 million in damages based on claims that Brown's book *does* infringe upon his copyright in *Daughter* and *Legacy* under the Copyright Act and constitutes 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 parties have not engaged in any discovery, nor is any necessary to dispose of this

motion. As set forth below, a determination of whether “substantial similarity” exists requires nothing more than a comparison of the protectible elements of the respective works, an analysis based simply on the actual works as a whole.

B. The Three Novels

Since “a determination of substantial similarity requires a detailed examination of the works themselves,” *Williams v. Crichton*, 84 F.3d 581, 583 (2d Cir. 1996), a summary of each of the three novels at issue follows.

1. The Da Vinci Code

a. The Murder of Saunière and His Trail of Ingenious Clues

Da Vinci Code begins with a murder in the Louvre Museum. Jacques Saunière, curator of the museum, has been killed by an albino monk seeking the Holy Grail. The monk is an agent of Opus Dei, a devout Catholic sect, and he is in turn acting at the behest of a mysterious figure originally known to the reader only as the “Teacher.” In a dying effort to send a message to his estranged granddaughter, Saunière leaves behind an array of mysterious clues, including the inscription “P.S. Find Robert Langdon.” Robert Langdon, Brown’s hero from *Angels and Demons*, and a Harvard professor of religious symbology, is summoned to the Louvre to help solve the mystery, unaware that he is suspected of Saunière’s murder. Also present at the crime scene are Bezu Fache, captain of the French judicial police, and, as hoped by Saunière, his granddaughter Sophie Neveu, a police cryptologist. Neveu recognizes that the “P.S.” is an abbreviation of her childhood nickname, “Princess Sophie”, and warns Langdon that he is in danger. SOF, ¶¶ 14-16.

b. Following the Clues to the Holy Grail

With Captain Fache now convinced that Langdon is the murderer and in hot pursuit, Langdon and Neveu band together to follow Saunière’s clues. These include coded and invisible messages, a poem that is an anagram of “Leonardo da Vinci! The Mona Lisa!”, the Fibonacci numerical sequences (scrambled), and other brain-teasing puzzles. Combined with Neveu’s childhood recollections, the

clues reveal that Saunière was the Grand Master of a secret society named the Priory of Sion, an organization founded centuries ago whose members included Da Vinci and Sir Isaac Newton. In the novel, the Priory “believes that Constantine and his male successors successfully converted the world from matriarchal paganism to patriarchal Christianity by waging a campaign of propaganda that demonized the sacred feminine, obliterating the goddess from modern religion forever.” *Da Vinci Code* at 124. Most critically, Langdon and Neveu learn the Priory has for centuries kept secret startling historical information and documents long suppressed by the Church – namely that Jesus was married to Mary Magdalene; they had a female child; and their descendants still live in France. The “Holy Grail” is in fact not an object, but the secret of Mary Magdalene’s identity. *Id.*, ¶¶ 17-19.

Neveu follows Saunière’s clues to a key with the symbol of the Priory of Sion hidden in the frame of “Madonna of the Rocks” by Da Vinci. After escaping the Louvre, Langdon and Neveu go to the Paris branch of the Depository Bank of Zurich where they are presented with yet more riddles. They figure out the account number for Saunière’s deposit box, where they find a carved wooden box with a cryptex – a stone cylinder invented by Da Vinci to store objects safely, which can only be opened by twisting five disks to spell a password. They are convinced the cryptex will lead them to the documents exposing Mary Magdalene’s true identity. *Id.*, ¶¶ 20-21.

A bank guard recognizes Langdon and Neveu as fugitives; however, they are saved by the bank president, an old friend of Saunière’s. Langdon and Neveu escape to the home of Langdon’s friend, Sir Leigh Teabing, a wealthy, eccentric Royal Historian and eminent authority on the Holy Grail. Teabing provides a necessary tutorial on the legend of the Grail, the evidence that Jesus and Mary Magdalene were married and had a child, and the clues to Magdalene’s role in Da Vinci’s artwork. *Id.*, ¶¶ 22-23.

Both the French police and the albino monk trail the heroes to Teabing’s estate, but Teabing saves them from the monk’s attack and spirits them away to London on his jet. Langdon, Neveu and Teabing work together to unlock the cryptex, while Teabing expresses strong views that the

information about Mary Magdalene should be made public, and voices a deep antipathy toward the Church. *Id.*, ¶¶ 24-25.

c. Outwitting the “Teacher” and Solving the Riddle of the Holy Grail

Eventually it becomes clear that Teabing is the villainous “Teacher”, and that he has deceived Opus Dei into murdering Saunière and the other Priory masters because he is obsessed with finding and publicizing the information about Mary Magdalene. Fache arrests Teabing, and Langdon and Neveu finally crack the code for the cryptex. In the end, the clues lead them to the Rosslyn Chapel in Edinburgh, Scotland, where Sophie Neveu is reunited with her grandmother and brother, whom she thought had died long ago in a car crash. She learns from them that she is a descendant of Jesus and Mary. At the end of the book, Langdon suspects the documents concerning Mary Magdalene are housed underground in an inverted pyramid at the Louvre, although Sophie’s grandmother makes it clear that the belief in their possibility is far more important than their actual existence. The book ends with Neveu and Langdon expressing the beginnings of some romantic interest in each other. *Id.*, ¶¶ 26-30.

2. *Daughter of God*

a. The Disappearance of Zoe Ridgeway and the Second Messiah Sophia

At the open of *Daughter*, two Americans, Zoe Ridgeway, an art assessor and broker, and her husband Seth Ridgeway, an ex-police officer turned professor of philosophy and comparative religion, are invited to Zurich by Willi Max, an elderly former Nazi. Faced with his imminent death, Max belatedly wishes to return his vast collection of art stolen during the war to its rightful owners and asks Zoe to assist in this endeavor. After their meeting, Max sends over to Zoe’s hotel a small painting by a minor German artist named Frederick Stahl and gives Zoe a document which is apparently from the lost writings of Emperor Constantine’s biographer. The document reveals the existence of a second Messiah named Sophia, who lived in a small, remote village in what is now Turkey during the fourth century A.D. Later we learn that Sophia was an illegitimate child born into a family of merchants

raised in isolation until age 13, when she began healing people with her touch. When the reports of Sophia's miracles reached Rome, the Church, fearful of the growing worship of her, sent a scribe to record her miracles and then massacred her entire village and buried the inhabitants in shrouds. Sophie's body disappeared from her shroud, leaving her image imprinted on it. *Daughter* at 73-76, 78-81. We learn that centuries later, Hitler gained possession of the sacred shroud, the Passion of Sophia (the story of this Messiah's life) and other documents testifying to her godliness, and bribed the Vatican into silence regarding the Nazis' atrocities by agreeing to keep these artifacts secret. Church leaders bought into this Faustian bargain in order to uphold Christian teachings and the Church's authority. Hitler hid this evidence of the second Messiah in salt mines in Austria. *Id.*, ¶¶ 31-34.

Against this backdrop, we learn that powerful groups around the globe are trying to find the Sophia materials. KGB officials, working in cahoots with the Russian mafia, steal Willi Max's art, burn down Max's house, thereby killing him, and kidnap Zoe. The Russians, led by their ultranationalist leader Zhirinovsky, are looking for the Sophia shroud and Passion, since their secrets will allow them to blackmail the Russian Orthodox Church and give them great power. Meanwhile, Cardinal Neils Braun, a former archbishop of Vienna and head of a secretive, powerful Vatican intelligence force called the Congregation for the Doctrine of the Faith ("CDF"), tells an unnamed American about the second Messiah, and asks the American's assistance in securing the shroud and related documents so that the Church can ensure the continuing suppression of the story. *Id.*, ¶¶ 35-36.

Unable to find his wife and completely in the dark about the second Messiah, Seth retreats to California. There, Seth falls into serious despondency over his wife's disappearance, and is about to lose his job when a mysterious woman arrives at his boat in Marina Del Ray. She reveals that the Stahl painting Max had sent to their Zurich hotel may help to explain his wife's capture. Suddenly, they are attacked by unknown assailants, and the woman and her bodyguard die in the gunfight. Seth escapes. As Seth flees, he is assisted by George Stratton, purportedly of the United States National Security Agency ("NSA"). Seth realizes that the Stahl painting would be in his unopened mail at

UCLA. He throws off the NSA tail, goes to his office, retrieves the painting and discovers his wounded department head, presumably killed by the unknown assailants likewise looking for the Stahl painting. Seth leaves for Europe. *Id.*, ¶¶ 37-39.

b. Battling Corrupt Russians and a Pretender to the Papacy

Meanwhile, back in Europe, Zoe is incarcerated by the Russians in a warehouse, interrogated about the painting and forced to help the Russians value their stolen art. She is imprisoned along with a Russian Jewish woman who teaches her about the history of the “Great Goddess,” and the presence of divine feminine elements in the world’s religions and art. At the same time, Seth rushes through Amsterdam and Zurich, engaging in multiple gunfights with mysterious assailants, at least some of them Russian, in his quest to find his wife. Ultimately, Zoe escapes from the Russians with a plan that she perceives as divinely inspired, and the NSA’s Stratton shuttles her to safety at the luxury hotel in Zurich where Seth and Zoe last saw each other. The couple reunite at the hotel. They then bring the Stahl painting to a bank in Zurich where bank officials use turpentine to remove the paint, revealing a gold ingot with Herman Goering’s account number and a safe deposit key. In Goering’s safe deposit box are documents leading to the Sophia cache and instructions on how to dismantle the many traps in the salt mine where the treasure is located. After nearly being gunned down at the bank, Seth and Zoe, along with Stratton, go to a small Austrian town called Alt Aussee, where they join forces with a priest named Father Hans Morgen and his cadre of supporters. Morgen was active in the resistance during the Nazi era and is now a zealous Church reformer who is determined to reveal the truth concerning Sophia. *Id.* ¶¶ 40-44.

c. Finding the Shroud and Foiling Cardinal Braun’s Plot

Zoe, Seth, Stratton and Morgen crawl through mineshafts to the heavily fortified salt mine, and find the shroud and Passion of Sophia in a jeweled box deep within the mine. Stratton – who we now realize was the American who had promised to help Cardinal Braun recover the shroud – then turns on Zoe, Seth and Morgen, and escapes with the priceless box. He brings it to his true boss, Cardinal

Braun, a megalomaniac who intends to use it to blackmail the Pope into stepping down and appointing Braun as his successor. Just as Cardinal Braun is preparing to head to Rome, Seth, Zoe and Morgen land on the roof of his chalet in Innsbruck and attack him. Father Morgen reveals to Cardinal Braun that Braun is his illegitimate son. However, Braun only cares about the Shroud and he dies after leaping into a fire to try and save it. Zoe tells Seth that God has been good to them – she has had a spiritual reawakening since learning about the “Great Goddess” – and that he should renew his lapsed faith. They learn that as a result of the fire at Braun’s retreat, the entire structure burned except, miraculously, for a patch of flooring in the shape of a woman where Sophia’s shroud had last been. *Id.*, ¶¶ 45-48.

3. *The Da Vinci Legacy*

a. The Missing Da Vinci Papers, and Battling the Bremen Legation and the Elect Brothers

Curtis Davis, an American exploration geologist and amateur Da Vinci scholar, is a maverick working for Harrison Kingsbury, owner of Continental Pacific Oil Company in California. With Davis’s assistance, Kingsbury acquires a portion of Da Vinci’s writings, but Davis discovers (based on a diary written by Antonio de Beatis in the 1500’s) that two pages of the manuscript are a forgery designed to replace a missing section. Kingsbury sends Davis on a mission to determine the reason for the cover-up. *Id.*, ¶¶ 49-50.

Three scholars who saw the de Beatis diary have been murdered, including Geoffrey Martini, an old friend of Davis’s, and yet another Da Vinci scholar, Professor Emilio Prati, is missing. In Italy for a Da Vinci conference, Davis encounters Suzanne Storm, a columnist for “Haute Culture” magazine. The two at first have an antagonistic relationship but soon become lovers and join in a quest to discover the truth about the missing Da Vinci pages, the murdered scholars and the kidnapping of Prati. *Id.*, ¶¶ 51-52.

Through the course of many chases and shootings throughout Italy, in which Davis is hunted by both the “bad guys” and the police, the reader comes to understand that there are two evil entities

working together to obtain possession of the missing Da Vinci pages, which we learn contain information essential to building the most powerful weapon ever, a charged particle beam weapon. The first evil entity is the secretive, excommunicated order of the Elect Brothers of St. Peter, headquartered in Como, Italy. The Brothers have been at odds with the Catholic Church for centuries and have long been plotting to take over the Papacy. Over the years they have joined forces with Hitler and kidnapped and drugged many famous scientists and others of use to their projects, including Galileo, Mozart and Amelia Earhart. When Davis infiltrates their monastery, he discovers their evil agenda, finds Prati and Storm (who has also been kidnapped) and comes upon stores of priceless artworks. Davis is apprehended by the Brothers, but he and Storm escape together. *Id.*, ¶¶ 53-55.

The other evil entity is the Bremen Legation, a secretive, nefarious coalition of corporate titans who seek to dominate the world. One of their agents is James Elliot Kimball IV, a rich Ivy Leaguer and psychopathic killing machine who frames Davis for the murders in order to prevent him from foiling the villains' plot. The Elect Brothers and Kimball hire a Turkish assassin to kill the Pope, who holds the missing Da Vinci pages, so that they can steal the writings and exploit their secret. *Id.*, ¶¶ 56-58.

b. Defeating the Plans of the Legation, the Elect Brothers and Kimball

In the end, Davis and Storm – who turns out to be an undercover CIA agent – foil the Brothers' efforts to take over the Papacy, the Legation's plot to obtain the secret to the particle beam weapon and dominate the world, and Kimball's attempt to double-cross both groups. Aided by Tony Fairfax, a British intelligence official and old flame of Storm's, they prevent the assassin from killing the Pope. Kimball discovers that the Bremen Legation and Elect Brothers intend to kill him for botching the assassination, and consequently decides to steal the Da Vinci papers and sell them to the KGB. He also kills Brother Gregory, the leader of the Elect Brothers, who discloses to Davis in his last moments that Kimball has the papers and intends to sell them to the Russians at the Tower of Pisa. Davis and Storm race to Pisa, find Kimball and kill him. Fleeing with the papers, Davis and Storm are

immediately kidnapped by the leader of the Bremen Legation, Merriam Larsen, who has also abducted Kingsbury. Davis and Storm escape, but Kingsbury is fatally shot in the effort. At home in California, Curtis settles down with Storm, runs Continental Pacific (which he has inherited from Kingsbury) and uses documents held by Kimball to root out corrupt corporate and government officials everywhere. *Id.*, ¶¶ 59-63.

ARGUMENT

This motion turns on a single issue: the presence or absence of substantial similarity between each of Perdue's two novels and *Da Vinci Code*. The application of well-settled Second Circuit law to these works reveals that Perdue's claim rests on abstract ideas, historical facts or stock elements common to all thrillers – elements that are not protected by copyright – and that neither the fundamental essence and structure of the works, nor their particular expression in the treatment, details, scenes, events and characterization, are remotely similar.

I.

DISMISSAL IS REQUIRED WHERE THE PARTIES' WORKS ARE NOT SUBSTANTIALLY SIMILAR

To establish copyright infringement, a claimant must establish (i) ownership of a valid copyright and (ii) copying of constituent elements of the work that are original. *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996). In the absence of direct evidence of copying – which Perdue has not alleged – copying may only be established by proving (i) that the alleged infringer had access to the plaintiff's work and (ii) that the parties' works are substantially similar as to protected expression. *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993). Even assuming *arguendo* that the ownership and access requirements are satisfied², plaintiffs' declaratory judgment claim must be granted and Perdue's counterclaims must be dismissed, because Perdue cannot show substantial similarity of the protected elements of his works.

² Should the Court deny this motion in any part, access will be fiercely contested. Dan Brown never heard of Lewis Perdue nor read any of his books before this dispute began.

A. Only Elements Subject to Copyright Are Considered to Determine Substantial Similarity

In determining whether two works are substantially similar, courts in this Circuit apply the “ordinary observer test,” asking “whether a lay observer would consider the works as a whole substantially similar to one another.” *Williams*, 84 F.3d at 590. Critically, where, as here, the works in question contain both protectible and non-protectible elements, the court must apply a “discerning ordinary observer test” (*Hogan v. DC Comics*, 48 F. Supp.2d 298, 309 (S.D.N.Y. 1999)): “we must take care to inquire only whether ‘the protectible elements, standing alone, are substantially similar.’” *Williams*, 84 F.3d at 588 (quoting *Knitwaves v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)).

In exercising its gatekeeper function by analyzing the works at issue, the court is required to separate that which constitutes protectible expression from that which is not protectible expression under the Copyright Act, and then take into consideration only the protectible expression. In performing that function, there are several fundamental principles which must be applied.

First, it is “universally understood” that facts are not copyrightable. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 344 (1991). “[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis.” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980). Courts thus give “broad latitude” to “authors who make use of historical subject matter, including theories or plots.” *Id.* at 978. Thus, for example, in *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.), *aff’d*, 728 F.2d 419 (2d Cir. 1984), where both scripts featured prison rodeos, the court found that the description and use of the prison rodeo was not copyrightable since the rodeo was a real event reported in the press, and dismissed the claim on the ground that the plaintiff’s protection extended only “at a level that particularizes this general theme into characters, details and events.”

Second, “[i]t is a principle fundamental to copyright law that a copyright does not protect an idea, but only the expression of an idea.” *Williams*, 84 F.3d at 587 (internal quotations and citations omitted). “It has long been recognized that all fictional plots, when abstracted to a sufficient level of

generalization, can be described as similar to other plots.” *Jones v. CBS, Inc.*, 733 F. Supp. 748, 753 (S.D.N.Y. 1990). As Judge Learned Hand explained:

Upon any work...a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). In an oft-quoted passage, Professor Chafee defined the boundary between idea and expression, stating that “protection covers the ‘pattern’ of the work...the sequence of events and development of the interplay of characters.” *Williams*, 84 F.3d at 588, quoting Z. Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513 (1945).

Finally, the Second Circuit has repeatedly held that stock scenes and stock themes, often termed *scenes a faire*, cannot form the basis of a copyright claim. These are often defined as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic,” *Hoehling*, 618 F.2d at 979, or as “thematic concepts...which necessarily must follow from certain plot situations.” *Reyher v. Children’s Television Workshop*, 533 F.2d at 87, 91 (2d Cir. 1976). The Second Circuit has stated that in a police story set in the Bronx, for example, “[e]lements such as drunks, prostitutes, vermin and derelict cars” as well as “[f]oot chases[,]...the morale problems of policemen...[and] the Irish cop” were unprotectible *scenes a faire* or stock elements. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).³

In recognition of the necessarily close parallels in abstract ideas and literary conventions in many works of creative fiction, the standard for establishing substantial similarity is a demanding one.

³ See also *Hoehling*, 618 F.2d at 979 (revelry in German beer hall, common greetings of that time such as “Heil Hitler” and songs such as German national anthem were *scenes a faire*s in works about Hindenburg); *Hogan v. DC Comics*, 48 F. Supp.2d 298, 310-11 (S.D.N.Y. 1999) (a “sinister genealogy”, the use of flash-back or memory to explain the protagonist’s origins, his obligation to choose between good and evil, and the character’s indoctrination into the forces of evil by killing all flow predictably from the unprotectible idea of “a half-vampire character...on a quest that leads him to discover his origins”).

The Second Circuit requires that a copyright plaintiff demonstrate that the defendant author has “appropriated the fundamental essence or structure of plaintiff’s work.” *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1073 (2d Cir. 1992), quoting Nimmer, 4 *Nimmer on Copyright*, § 13.03[A][1] at 13-36 (defining “comprehensive nonliteral similarity”); see also *Twin Peaks Productions, Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993) (describing standard for comprehensive nonliteral similarity as requiring “global similarities in structure and sequence”). Moreover, “the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization.” *Reyher*, 533 F.2d at 91. The works must share similarities in “such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting.” *Williams*, 84 F.3d at 588. In addition, “the Second Circuit has observed that numerous differences tend to undercut substantial similarity.” *Adsani v. Miller*, 1996 U.S. Dist. LEXIS 5310 at *7-8 (S.D.N.Y. Apr. 19, 1996), citing *Warner Bros. Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 241 (2d Cir. 1983).

The Second Circuit’s decision in *Williams v. Crichton*, 84 F.3d 581, aptly illustrates these various principles. In that case, both the plaintiff’s stories and Michael Crichton’s *Jurassic Park* involved the idea of “an imaginary present day man-made animal park for dinosaurs where ordinary people . . . can, in presumed safety, visit, tour and observe the creatures in a natural but hi-tech controlled habitat.” *Id.* at 583. In both works, the child protagonist(s) visit the dinosaur park and are attacked by the dinosaurs, spend the night in the dinosaur zoo, and escape from the dangerous dinosaurs by helicopter. Despite the overlap in this rather novel idea and the many plot parallels, the Second Circuit found that key differences in the total concept and feel, plot, themes, settings and characters precluded a finding of substantial similarity. *Jurassic Park* was a high-tech horror story whereas the plaintiff’s works were adventure stories with a happy ending. *Id.* at 589. The court likewise observed that “[w]hile both the *Dinosaur World* books and the *Jurassic Park* works share a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur

nurseries, and uniformed workers, these settings are classic *scenes a faire* that flow from the non-copyrightable concept of a dinosaur zoo.” *Id.* The Second Circuit further emphasized that, “When one looks beyond the superficial similarities in the characters, many differences emerge, including the motivations for the characters’ trip to the dinosaur parks, the skills and credentials of the characters, and their inter-personal relationships.” *Id.*

Here, as in *Williams*, there are at most only superficial similarities between the respective works and absolutely no similarity between the “fundamental essence or structure” of Perdue’s works and *Da Vinci Code*. *Arica*, 970 F.2d at 1073.

B. The Court May Dismiss Defendant’s Claims as a Matter of Law, Without Discovery, Based on the Lack of Substantial Similarity of the Works

Courts routinely dismiss meritless copyright infringement claims like Perdue’s under either Rule 12(b)(6) or Rule 56 where the alleged similarity “concerns only noncopyrightable elements of plaintiff’s work or no reasonable trier of fact could find the works substantially similar.” *Williams*, 84 F.3d at 587; *see also Boyle v. Stephens, Inc.*, No. 97 Civ. 1351 (SAS), 1998 U.S. Dist. LEXIS 1968, at *11-12 (S.D.N.Y. Feb. 25, 1998), *aff’d*, 2001 U.S. App. LEXIS 23196 (2d Cir. 2001). “It is well-established that a court may determine the absence of substantial similarity as a matter of law” on a Rule 12(b)(6) motion. *Boyle*, 1998 U.S. Dist. LEXIS 1968, at *9; *see also Bell v. Blaze Magazine*, No. 99 Civ. 12342 (RCC), 2001 U.S. Dist. LEXIS 2783, *8-9 (S.D.N.Y. Mar. 16, 2001).⁴ Courts in the Second Circuit also regularly grant Rule 56 motions for lack of substantial similarity “to put ‘a swift end to meritless litigation’ and to avoid lengthy and costly trials.”⁵ As the Second Circuit has repeatedly emphasized, courts “have an important responsibility...to monitor the outer limits within which juries may determine” the issue of substantial similarity. *Warner Bros. Inc.*, 720 F.2d at 245; *cf.*

⁴ The standard for granting a motion for judgment on the pleadings under Rule 12(c) is identical to that of a Rule 12(b)(6) motion. *Franzos v. Pinnacle Credit Services LLC*, 332 F. Supp.2d 682, 684 (S.D.N.Y. 2004).

⁵ *Hoehling*, 618 F.2d at 977. *See, e.g., Williams*, 84 F.3d at 587; *Kregos*, 3 F.3d at 663; *Arica*, 970 F.2d at 1072; *Walker*, 784 F.2d at 48; *Warner Bros.*, 720 F.2d at 240; *Hogan v. D.C. Comics*, 48 F. Supp.2d 298, 310 (S.D.N.Y. 1999); *Arden v. Columbia Pictures Industries, Inc.*, 908 F. Supp. 1248, 1259 (S.D.N.Y. 1995); *Green v. Lindsey*, 885 F. Supp. 469, 477 (S.D.N.Y. 1992), *aff’d*, 9 F.3d 1537 (2d Cir. 1993); *Denker v. Uhry*, 820 F. Supp. 722, 729-30 (S.D.N.Y. 1992), *aff’d*, 996 F.2d 301 (2d Cir. 1993).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993) (envisioning a “gatekeeping role” for courts in connection with admission of expert testimony).

Because dismissal on motion is based on an ordinary observer’s comparison of the actual, published works, discovery is not necessary. *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1213 (11th Cir. 2000); *Polsby v. St. Martin’s Press, Inc.*, 8 Fed. Appx. 90, 92 (2d Cir. 2001) (discovery “not necessary for a comparison of the works in order to assess whether, as to the protectible elements, they were substantially similar”). “[I]n any case involving substantial similarity, the actual texts are the relevant evidence.” *Nelson v. Grisham*, 942 F. Supp. 649, 652 (D.C. Cir. 1997) (citing *Walker*, 784 F. 2d at 51). “[T]he works themselves, not descriptions or impressions of them, are the real test for claims of infringement.” *Walker*, 784 F.2d at 51. Likewise, expert testimony is not relevant here. In *Computer Assoc. Int’l v. Altai Inc.*, 982 F.2d 693, 713 (2d Cir. 1992), the Second Circuit held that “[s]ince the test for illicit [i.e., unlawful] copying is based upon the response of ordinary lay observers, expert testimony is thus ‘irrelevant’ and not permitted.”⁶

Here, by simply reading Perdue’s two works and comparing them with Brown’s *Da Vinci Code* – after stripping the books of their abstract ideas, historical and religious underpinnings and stock mystery and thriller elements – only one conclusion can reasonably be reached: there is no similarity between the works and Perdue’s claims of copyright infringement must be rejected.

II.

DAUGHTER AND DA VINCI CODE ARE COMPLETELY DISSIMILAR

Under the proper analysis, it is readily apparent that the *Da Vinci Code* is radically different from *Daughter* in total “concept and feel,” plot, theme, characters, setting, time sequence, and style and tone.

⁶ *Id.* (citing *Arnstein v. Porter*, 154 F.2d 464, 468, 473 (2d Cir. 1946)). See also *O’Neill v. Dell Publishing Co.*, 630 F.2d 685, 690 (1st Cir. 1980) (“[W]e are fitted by training and experience to compare literary works and determine whether they evidence substantial similarity. We share Learned Hand’s feeling that, in this type of case, expert evidence ought generally to be excluded.”) (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930) (Learned Hand, J.), *cert. denied*, 282 U.S. 902 (1931)).

A. Plot

Given no overlap in characters, setting or themes, as seen below, Perdue attempts to build his claim by focusing primarily on alleged similarities in plot. However, even here, “the fundamental essence or structure” of the parties’ plots are starkly different (*Arica Institute*, 970 F.2d at 1073 (2d Cir. 1992)), as are their development in the “treatment, details, scenes, [and] events.” *Reyher*, 533 F.2d at 91. Perdue tries to mask these disparities by relying on charts of random similarities scattered throughout the works⁷ and by attempting to create a sense of greater similarity by misleadingly plucking characteristics from *Daughter* and characteristics from *Legacy* and then, without indicating that they come from different books, asserting that *Da Vinci Code* features these same elements. See, e.g., Counterclaim ¶¶ 71-82.⁸ However, a review of standard plot elements for each work – structure, sequence, heroes, villains – reveals that the plots of the two books are dramatically different.

Overarching Structure and Sequence: The overarching structure and sequence of the two books are totally divergent. *Da Vinci Code* is built around a central quest of decoding the complex puzzle-like clues left behind by the murdered Saunière as a message to his estranged granddaughter, Sophie Neveu, in order to unlock what we come to realize is the true secret of the Holy Grail: that Jesus and Mary Magdalene were a married couple and their descendants are alive today. SOF, ¶ 64. The clues are masterfully conceived by Brown using Da Vinci’s art, complex mathematical principles, and other bodies of esoteric knowledge, and much of the book’s richness lies in its fascinating descriptions of history and art as the reader is led through the challenging clues. As the clues unravel,

⁷ Courts consistently reject such efforts. “Such a scattershot approach cannot support a finding of substantial similarity because it fails to address the underlying issue: whether a lay observer would consider the works *as a whole* substantially similar to one another.” *Williams*, 84 F.3d at 590 (emphasis added) (describing lists of specific similarities as “inherently subjective and unreliable”); *Walker*, 784 F.2d at 50 (noting the “difficulty of comparing unified artistic works on the basis of such scattered analogies”).

⁸ Written almost a decade apart and sharing no characters or plot developments – except an abstract use of a religion – *Daughter* and *Legacy* are two entirely distinct books. When, as here, two works are not expressly connected to each other, Perdue is required to compare the protected elements of each of his works individually to *Da Vinci Code*, rather than aggregating their similarities. *Kroencke v. GM Corp.*, 270 F. Supp.2d 441, 443-44 (S.D.N.Y. 2003) (rejecting plaintiff’s effort to aggregate her works for substantial similarity analysis where they were not expressly connected to one another), *aff’d*, 99 Fed. Appx. 339 (2d Cir. 2004). The apparent parallels set forth in Paragraphs 71 through 82 of the Counterclaim fall apart once one disentangles the plot elements for each book.

it becomes clear that Saunière was the Grand Master of the Priory of Sion, that the Priority kept alive the secret of the holy bloodline over centuries, and that Sophie Neveu is a descendant of Mary Magdalene and Jesus. *Id.*

In *Daughter*, the overarching plot structure and sequence revolve around the hero's quest to find his beloved wife, who has been kidnapped by Russian mafia. In searching for Zoe, Seth learns that the Nazis found and hid documents containing a startling religious secret – the existence centuries before of a female Messiah – which they used to bribe the Vatican into secrecy regarding Hitler's atrocities. Seth and Zoe (once freed), join forces with Father Hans Morgen, the zealous Vatican reformer, to find the documents and expose this secret. To do so, they must battle an ultranationalist Russian leader in cahoots with the Russian mafia and a megalomaniacal Cardinal. As even this brief description demonstrates, the global plot structures of the two books – their basic skeletal form – are fundamentally different. *Id.*, ¶ 65.

The Ultimate Villain: In any thriller, the most critical structural aspect of the plot is, “Who is the ultimate villain and what are his/her motivations?” This is the heart of the mystery, the driving force that keeps the reader turning the pages. *Daughter* has two ultimate villains, both of whom are identified as villains from early in the book. *Id.*, ¶ 66. They are the Russian leader Zhirinovsky, motivated by a desire to neutralize the Russian Orthodox Church so that he can consolidate his power and engage in ethnic cleansing, and Cardinal Braun, who at first appears to be motivated by highly conservative religious values but is in fact motivated by fantasies to be Pope and ruler of all the world's religions and government: “He saw nothing less than a return to the Holy Roman Empire, where emperors and Popes appointed each other and where each ruled with the authority of the other.” The two villains in *Daughter* are locked in battle to be the first to find the evidence of the second Messiah and to use such evidence to further their evil designs. *Id.*, ¶ 66-68.

The ultimate villain in *Da Vinci Code* shares not a single trait with *Daughter*'s villains. At the beginning, the reader suspects that Bishop Aringarosa may be the villain but instead, as revealed in the

book's last chapters, it turns out to be Sir Leigh Teabing, the eccentric, former British Royal Historian and Grail scholar with a strong anti-religious bent. Teabing first appears to be the protagonists' teacher and protector, but is ultimately exposed as being obsessed with discovering and revealing to the public the Holy Grail. Teabing shares none of Cardinal Braun's desires to be the ruler of the world, nor does he die. *Id.*, ¶ 69.

The Moral Hero: *Daughter* has a strong moral hero, a very important figure in the book's structure. Although Seth and Zoe are the protagonists, Father Morgen is the moral hero. A former Nazi resister and priest, he is the determined Vatican reformer who has known about Sophia's Passion since the war and who leads the protagonists and his fellow reformers into the dangerous salt mines to recover it. *Id.*, ¶ 70. Morgen must also struggle with the fact that Cardinal Braun, the embodiment of evil incarnate, is his illegitimate son on whom he had pinned great hopes. *Id.*, ¶ 71. There is no parallel to this central moral hero in *Da Vinci Code*. *Id.*, ¶ 72.

The Love Story: The love story is the dramatic motivation in *Daughter* – another key element entirely lacking in *Da Vinci Code*. Perdue includes in his laundry list of alleged similarities the stock feature that “[b]y end of book, [the hero] finds love.” Counterclaim ¶ 84 at 41. This is a classic example of Perdue's penchant for abstract concepts, for there is simply no similarity in the way the authors express this timeless fictional element. *Compare Green v. Lindsey*, 885 F. Supp. 469, 484-85 (S.D.N.Y. 1992) (stock romantic devices were unprotectible and expressed differently). In *Daughter*, the love story between Seth and Zoe drives the plot. They are in a blissful, sexually exciting marriage at the book's open. When Zoe is kidnapped, Seth is despondent and unable to keep his job, and the first two-thirds of the book chronicles his desperate attempt to find her. SOF, ¶ 73. In stark contrast, Langdon is a committed bachelor pining for an ex-girlfriend at the start of *Da Vinci Code*. For the vast majority of the book, he and Sophie Neveu, who he has never met before, work side by side but do not develop a romantic relationship. It is only at the very end that they recognize feelings for each other and even then, they merely kiss on the lips and agree to meet for a week in Florence. *Id.*, ¶ 74.

The Murder and Its Victim: In both books, as in many thrillers, the plot is launched by a murder. But the similarities between the murder and victim in *Daughter* and *Da Vinci Code* end there. Perdue alleges that in each book:

“[t]he quest is launched by the murder of an art expert who is dying when we first see him in the book, and who has a very nice office. The art expert is the fourth member of his group to be killed. The art expert is about the same age and appearance and knows the hero. The hero is accused of the art expert’s murder.”

Counterclaim ¶ 73. The sole kernels of truth in this passel of misstatements is that (a) early in both novels an older man – Saunière in *Da Vinci Code* and Willi Max in *Daughter* – is murdered, although by definition murder mysteries begin with murders, and (b) the hero is, at very different points in the thrillers, accused of the murder – as is also stock fare. SOF, ¶ 76. Moreover, this is a classic case where plot elements “that appear similar in their abstract description prove to be quite dissimilar once examined in any detail.” *Williams*, 84 F.3d at 590 (distinguishing scenes where “characters escape deadly, pack-hunting dinosaurs...when another dinosaur ...intervenes”). *Da Vinci Code* opens with an already fatally wounded curator of the Louvre, found in the galleries where the Mona Lisa is stored. He appears surrounded by an ingenious trail of clues he creates in his last moments, including configuring his body in the form of Da Vinci’s famous Vitruvian Man, and scrawling cryptic poems and numerical sequences with a black light pen invisible to the naked eye. SOF, ¶ 77. In *Daughter*, Willi Max, an ex-Nazi who collected art stolen under Hitler, is alive when the reader first meets him. His murder occurs later that night when Russian ultranationalists torch the estate while he is inside and steal his collection of art. We never see his body and no clues are left at the scene of the crime. *Id.*, ¶ 78.

Even more strikingly, to the extent Perdue avers similarities of detail between these two plot events, his allegations are utterly false – a dishonesty rampant throughout the counterclaim. Thus, (i) Defendant alleges that the two murdered men have the same appearance, but Saunière is muscular and “remarkably fit for a man of his years” (*Da Vinci Code* at 35) while Max is “a wizened old man”

in a wheelchair with “immobile” face whose hand feels “as if the life had already left this part of the man’s body” (*Daughter* at 2); (ii) although both men are knowledgeable about art, Saunière is the head of one of the world’s great museums and Max has hoarded for his personal pleasure roomfuls of stolen Nazi art; (iii) Max does not have “a very nice office” (his office is not described at all); (iv) Max is the first, not the “fourth member of his group to be killed;” (v) Max is ill but certainly alive at the opening of *Daughter* when he meets with Zoe several chapters before he is murdered, whereas we first glimpse Saunière after he has been fatally shot; and (vi) we are not told either man’s age. SOF, ¶¶ 79-80.

The Role of Religion in the Plots: Perdue’s central allegation regarding the alleged parallel plots of the three books turns on the use of religion and is summarized as follows:

The books are about a quest by an identical hero, and an identical heroine, seeking extraordinary documents (158, 73, 73) that prove the divinity of (256, 175, 175) the identical sacred woman who had been wronged by the church and who is a symbol for the Great Goddess. Counterclaim ¶ 71 (emphasis added).

A simple review of the works reveals just how far off the mark this allegation is. While both *Da Vinci Code* and *Daughter* feature the “idea” of a quest for extraordinary religious artifacts that relate, in some fashion, to the concept of the “sacred feminine” – a holy or divine female force – and both include “bad” characters affiliated with the Catholic Church who seek these religious artifacts, the books’ expression of these unprotected ideas, based on unprotectible historical information, could not be more distinct.

In *Da Vinci Code*, the great secret protected by the Priory of Sion is that Jesus and Mary Magdalene were a married couple who had offspring, and that the bloodline of Christ leads via the French Merovingians to Sophie Neveu. Although Brown’s use of the Priory of Sion reflects his creative imagination, his discussions of Mary Magdalene’s life and the sacred feminine are grounded in the Gnostic Gospels and related scholarship, as discussed below. SOF, ¶ 83.

In *Daughter*, in contrast, Perdue’s plot turns, not on Mary Magdalene, but instead on a wholly fictional story of a second, female Messiah named Sophia who lived, and rose, centuries after Christ.

Daughter's Sophia has an elaborate back story: she lived in a remote hamlet in Anatolia in the Fourth Century A.D., performed a series of miracles described in detail by Perdue and became "the focus of a splinter religion." Perdue details her early life, the growth of her popularity, the interviews of her fellow villagers by the Roman authorities, the massacre of her entire village by the Romans, and their joint burial with Sophia, whose imprint mysteriously appeared on her shroud. *Id.*, ¶ 84.

In short, the *only* similarity is that both books involve a religious "secret" that, if revealed, would expose a more prominent role of women in the Catholic Church. This alleged "similarity" is, at most, an abstract idea and is not actionable. See *Walker*, 784 F.2d at 49 (although movie and book both recounted experiences of policemen in the Bronx, "in moving to the next level of specificity, differences in plot and structure far outweigh this general likeness").

Indeed, far from revealing plots where both protagonists seek "extraordinary documents that prove the divinity of the identical sacred woman who had been wronged by the church," the religious stories in the two works are irreconcilably different. Sophia, the fictional second Messiah born in 4th Century Turkey, is anything but the "identical sacred woman" to Mary Magdalene, the actual biblical figure who lived in Palestine in Jesus's time (Counterclaim ¶ 71).

What happens with the documents which hold these secrets in the two books is also starkly different. In *Da Vinci Code*, the protagonists never find any physical documents; they merely learn of the bloodline of Jesus and Mary extending to Neveu and infer that Mary's bones may be hidden beneath I.M. Pei's inverted pyramid at the Louvre. SOF, ¶ 85. In *Daughter*, a bejeweled box containing documents and Sophia's shroud is dramatically retrieved by means of a treacherous expedition into an Austrian salt mine booby-trapped by the Nazis years ago; and in the end, after the box is stolen, the artifacts (and Braun) burn in a conflagration at Braun's chalet. *Id.*, ¶ 86.⁹

Finally, while Perdue alleges that both books feature religious groups and leaders that "view

⁹ It is also a complete falsehood to allege that both sets of artifacts "explode" (Counterclaim ¶ 72): nothing explodes in *Da Vinci Code*, while the objects and documents in *Daughter* burn in a fire. SOF, ¶ 87. Likewise, it is false to allege that the Sophia cache includes the bones of the second Messiah (Counterclaim ¶ 83 at 17). SOF, ¶ 88.

[themselves] as the rightful inheritor of the Papacy, the last bulwark against the abandonment of conservative church values, [and] seek [the documents] for the power it gives them over the Vatican” (Counterclaim ¶ 83 at 17), this abstract (and unprotected) idea flows predictably from the use of protagonists uncovering long-kept secrets of Catholicism. Indeed, such rivals groups within the Church are highly commonplace in thrillers, including Brown’s *Angels and Demons*. Yet, here again, when you look at the groups and their leaders in each work, there is simply no similarity. In *Daughter*, the CDF, which Braun leads, is “the successor to the Holy Inquisition,” a secret and powerful department within the Vatican akin to an internal intelligence agency, with “its own investigators and network of snitches that puts the former East German Stasi to shame.” SOF, ¶ 89. In contrast, *Da Vinci Code*’s Opus Dei is a devout, but disfavored, Catholic sect which is relatively powerless within the Church (and, in fact, is on the verge of being disassociated from the Vatican). It has no element of the Inquisition, no intelligence investigations and no snitches. To the contrary, it has “residence halls, teaching centers and even universities...in almost every major metropolis.” *Id.*, ¶ 90.

Nor are the representatives of these respective organizations in any way similar. In *Daughter*, the CDF’s leader, Cardinal Braun, seeks the valuable documents and artifacts relating to Sophia in order to blackmail the Pope so that Braun himself may steal the Papacy. He directs others to murder in the course of this plot and he dies trying to extract the Sophia documents and shroud from a fire in his chalet. *Id.*, ¶ 92. In *Da Vinci Code*, Bishop Manuel Aringosa, the leader of Opus Dei, is *not* the ultimate villain and does not seek to gain the Papacy; he is not aware of the murders committed by Silas (the albino monk) at Teabing’s instruction and in fact donates Opus Dei’s riches to the victims’ families when he discovers them. *Da Vinci Code* at 430. Aringosa is manipulated by the anti-religious figure, Sir Leigh Teabing, who agrees to sell Aringosa the Holy Grail, and is shot accidentally at the hand of his own faithful follower, Silas, but survives. SOF, ¶ 93.

Not only are the plots as they relate to religion fundamentally different, to the degree there is any overlap, such confluence is anchored in the public domain. Most significantly, as Perdue

expressly admits, both books discuss and rely in some way on 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, and related scholarship. See Counterclaim, ¶ 83 at 34-35; SOF, ¶ 94.¹⁰ The Gnostics were early dissidents from the dominant branch of Christianity. Their gospels, written around 140 A.D, gave a far more prominent role to Mary Magdalene than other Gospels, and suggested that Jesus loved her more than other women. SOF ¶ 97. Moreover, many of these texts referred to God as having both masculine and feminine elements or spoke of the female aspect of God by using the Greek feminine term for "wisdom", *sophia*.¹¹ *Id.* ¶ 98. Many earlier pagan traditions, including the Greeks, had worshipped a "great goddess" and the Gnostic texts reflect a similar aspect of a "sacred feminine." *Id.*

The groundbreaking discovery of the Gnostic Gospels and their publication in English in 1977 led to a flood of writing on their import in both scholarly and more popular publications, including *The Gnostic Gospels* by Princeton professor Elaine Pagels, winner of the National Book Award, and *Holy Blood Holy Grail*, the bestseller which posited that Jesus and Mary may have been married and spawned descendants, and became the subject of front page news articles. *Id.*, ¶ 100. Both Perdue and Brown relied, in part, on facts and theories from published works on the Gnostic Gospels. Counterclaim ¶ 83 at 34-35. Thus, to the degree that both works explore the "sacred feminine" – albeit entirely differently – they are both anchored in historical theory. However, under established

¹⁰ In addition to this key admission, *Daughter's* Author's Note makes plain that its discussions of the Nicean Conference and "the events and religious controversies leading up to it" are true, and that Perdue's creation of a female Messiah is based on his "intriguing research about the early Christian church and the seminal roles that women played in it." Perdue's "Author's Note" in *Daughter* also reflects that, "This is a work of fiction based on fact" and goes on to detail such factual elements as early Christian historical developments; the Church's age-old pattern of discrimination against women; and "many, many more" details of "history, theology, geography, and political science". SOF, ¶¶ 95-96.

¹¹ The Counterclaim stresses that both *Da Vinci Code* and *Daughter* use the term Sophia. Yet even aside from the fact that they use the name very differently, both *Daughter* and *Da Vinci Code* expressly acknowledge that they have used the term precisely because the name Sophia is the feminine Greek term for "wisdom", used to refer to the "divine Mother" in the Gnostic Gospels. See *Da Vinci Code* at 320 (the cryptex is opened by using the password Sophia, which "literally means wisdom in Greek"); *Daughter* at 205 (Thalia explains that Gnostics believed in women as equals, as reflected in certain of the scriptures: "The Book of Proverbs and the Wisdom of Solomon are pretty clear when they refer to Wisdom as female. 'Sophia' is the Greek word for wisdom."). Further, to state the obvious, Sophie Neveu (whose name is Sophie, not Sophia) is a contemporary heroine and Sophia in *Daughter* is a second Messiah who died in the 4th century. SOF, ¶ 99.

copyright doctrine, these much talked-about historical facts and theories are available for any and all to incorporate into their own fictional works. *Hoehling*, 618 F.2d at 974 (facts and theories are in public domain); *Smith*, 578 F. Supp. at 1303.

In sum, when you compare the overall plots of *Daughter* and *Da Vinci Code* – whether in general or specific terms – there are radical differences and virtually no similarities. Perdue’s effort to lay out the key “General Plot Similarities” in paragraphs 71-82 of the Counterclaim tries to make much of the fact that the two books feature “an awesome religious puzzle,” a “hero and heroine [who] need help for the journey and turn to a shapeshifter who joins the Quest” and “a secretive brotherhood with a contentious relationship with the Vatican,” but none of the abstract (and often inaccurate) similarities alleged by Perdue in this central section of his Counterclaim can alter the fundamental structural plot differences outlined above. *Daughter*’s plot turns on the (entirely fictional) revelation of a second Messiah; a Nazi subplot involving hiding the Sophia Passion in Austrian salt mines; a female protagonist who is kidnapped and her husband’s dramatic search for her; the Russian mafia; and a Cardinal seeking to become Pope and willing to condone murder to achieve his end. *Da Vinci Code* shares *none* of these critical elements – no Nazis, no Russian mafia, no corrupt Cardinals willing to authorize murder, no kidnappings, no husband/wife theme. The fundamental essence or structure of the two books is so radically different and the expression of this structure in treatment, details, scenes, and events is so wholly divergent that Perdue’s claim simply dissolves.

Indeed, the *only* minor plot similarities between the two books apart from those that flow from the unprotected idea of a religious secret related to the “sacred feminine” are driven by their genre. Yet, Perdue cannot base his copyright action on the fact that both books involve heroes on a quest; the quest takes them into dangerous situations and pits them against evil characters; they prevail against the evil characters and solve the problem driving the quest – narrative elements at least as old as Greek mythology. The weaving of a “love story” into the plot is likewise a universal fictional element. Chases, confrontations between good and bad characters, murders, mysterious clues, secret religious

societies, Swiss banks, and hidden keys are obviously *scenes a faire* in thrillers, present in untold numbers of such books. SOF ¶ 101.¹² Quite simply, none of these elements can form the basis of a copyright action.

B. Themes

Perdue does not claim that the books share common themes, nor could he. He expressly articulates the themes of *Daughter* in the Author's Note:

[T]he truth I have tried to write is the spiritual imperative to question and to search for a relationship with God. And further, to know that this relationship does not exclude different relationships that others have established. No faith has a monopoly on God....Finally, the Golden Rule rests at the spiritual heart of all major religions, a heart frequently ignored by those who preach and claim to practice it....As the Jewish sage Hillel said, you should love your neighbor as yourself.

Daughter at 421-22. In keeping with this overtly religious theme, the two protagonists go through personal religious journeys: Zoe starts out contemptuous of religion in reaction to her fundamentalist mother and gains a spiritual faith once she reconceives of God as a woman. She relies on God in escaping from captivity and by the end of the book, she is uttering pious statements such as "God has been good to us." *Daughter* at 410-412. Conversely, Seth starts out as a believer but his faith is shaken as he learns about the Church's efforts to suppress the existence of the second Messiah. In the last scene, Seth says, "I've never felt so rudderless my entire life . . .so untethered inside." *Daughter* at 410-412; SOF, ¶ 104.

No comparable gaining and losing of faith exists in *Da Vinci Code*. While it takes a secular

¹² Swiss bank accounts are a standard feature in international thrillers because it is widely known that Swiss banks afford tremendous privacy to account holders. Yet the two authors' treatment of this fact-based and stock feature markedly differ. For example, in *Da Vinci Code*, a manager helps the protagonists escape from the bank in an armored truck. In *Daughter*, the Bank Vice President assisting Seth and Zoe is shot dead as assailants attack them in a blazing gunfight. SOF, ¶ 101.

Likewise, in an art thriller, it flows naturally from the topic that a key would be hidden in a painting. Once again, however, the details differ markedly, despite Perdue's blatant distortions of the parallels (see Counterclaim ¶74). In *Daughter*, a regular safe deposit key (owned by none other than Herman Goering) is hidden under a gold ingot fixed into the front of a mediocre painting of a salt mine by a friend of Hitler's painted to depict the "Home" of "the Lady our Redeemer" (i.e., the home or resting place of the Sophia cache); to find the ingot requires applying turpentine to wipe off the paint. In *Da Vinci Code*, a remarkable key with the symbols of the Priory and a series of laser-burned pockmarks is tucked into the slit where the canvas met the wood frame in the back of Da Vinci's Madonna of the Rocks. Note that Da Vinci's painting is not described as being on wood, as Perdue alleges. SOF, ¶ 102.

interest in the history of religion, it does not in any way suggest any imperative to search for a relationship with God. Nor does the Golden Rule play any role in the book. SOF, ¶ 105.

C. Characters

Both *Daughter* and *Da Vinci Code* have archetypal “good guys” and “bad guys”. In comparing characters, it is necessary to go beyond such categories to consider the “totality of their attributes and traits” and “the extent to which the defendants’ characters capture the total concept and feel” of plaintiff’s characters. *Walker*, 784 F.2d at 50. Here, Perdue stretches any similarities past the breaking point and cannot conceal that, beyond stock attributes, the characters are fundamentally dissimilar. *See Williams*, 84 F.3d at 589 (although both works featured groups of characters, including boys who were “dinosaur enthusiasts”, children who were siblings and intelligent guides at the dinosaur zoo, characters were not substantially similar).

1. The Heroes

Despite Perdue’s allegation that the books at issue feature “an identical hero” (Counterclaim ¶ 71), Robert Langdon and Seth Ridgeway are different in essence and detail. Ridgeway of *Daughter* is an ex-policeman with several gunshot scars. He is “down to earth” and his friends are “SWAT team commanders” and “beefy squad commanders”. A classic adventure hero, he engages in many gunfights and other physical exploits. After injuries forced his retirement from the police force, he became a mid-level professor of philosophy and religion at UCLA. Before the events in the novel shake his faith, he is very religious. He is married, deeply in love and very sexually active with his wife. SOF, ¶ 107.

Langdon, the hero of *Da Vinci Code*, is also an attractive male professor, but the similarity ends there. He is bookish and erudite, not macho, wearing professorial attire of Burberry turtlenecks and Harris tweed. He operates by wits, not brawn. His field at Harvard is religious symbology (a made up discipline involving the study of religious symbols) and he is quite renowned. He is secular, not religious and has no crisis of faith in the novel. Unlike the married Ridgeway, Langdon has a “life

long affinity for bachelorhood and the simple freedoms it allowed,” although he develops a relationship with Sophie Neveu by the end of *Da Vinci Code*. SOF, ¶ 108.

Contrary to Perdue’s allegation that Sophie Neveu is “physically *identical* to the heroines in Perdue’s books and also shares a *near-identical* educational background and other close parallels” (Counterclaim ¶ 20 (emphasis added)), Neveu has nothing in common with Zoe Ridgeway. There is very little physical description of Zoe in *Daughter*; we are only told she is a “pale, athletically trim American” with a “quiet beauty that didn’t advertise itself.” *Daughter* at 120, 200. As for her background, she grew up in Southern California in a blue collar household. Her father, a welder and mechanic who later became a sculptor, refused to go to the “small brick church” with her mother, a “strict fundamentalist Protestant”; the gap drove her parents apart, leading her mother eventually to run away with a baritone in the church choir. SOF, ¶ 110. Zoe went to UCLA for college and during a summer internship at a museum in Amsterdam had a fling with a forger of paintings who taught her the tricks of the trade. She became a self-employed appraiser, expert in detecting forgeries (not a “detective” as the Counterclaim falsely alleges). Counterclaim ¶ 85 at 42. Zoe’s work is aided by her synaesthesia, a neurological condition which allows her to hear sounds when she see colors. SOF, ¶ 111.

Neveu has thick burgundy hair and green eyes. Unlike Zoe, she is French, not American, and comes from an extremely privileged family. She was raised and educated by her grandfather, curator of the Louvre. Her parents were killed in a car crash (an event Perdue desperately seeks to analogize to Zoe’s mother’s abandonment by characterizing both as “childhood tragedies”, *id.*, ¶ 85 at 43); because Saunière thought this was caused by enemies of the Priory of Sion, he sent her brother and grandmother away to Scotland, telling Zoe they had died as well. Far from UCLA, Neveu studied cryptography at Royal Holloway in England. When we meet her, she is a cryptographer working for the French Judicial Police. SOF, ¶ 112.

Finally, *Daughter* has an important moral hero, Hans Morgen, a reformist priest, who has a

familial conflict as a good father with his evil, illegitimate son, Braun. *Da Vinci Code* has no parallel figure or conflict. *Id.*, ¶ 113.

2. The Villains

Perdue attempts to draw a comparison between Sir Leigh Teabing of *Da Vinci Code* and George Stratton of *Daughter* by labeling both “shapeshifters” – characters who are apparently good but turn out to be evil. Such characters are a standard literary ploy in mysteries and thrillers to build suspense. SOF, ¶ 114. Beyond these stock qualities, there is absolutely no similarity between the two men.

The eccentric Teabing is portly and crippled from polio. He is a former British Royal Historian, a knight and a descendant of Britain’s First Duke of Lancaster – and the “Teacher” who manipulates all of the other evil forces in *Da Vinci Code*. He is also extremely wealthy, owning a palace and a private jet. His obsession is the Holy Grail, about which he “spent his life trying to broadcast the truth,” SOF, ¶ 115. Stratton does not share Teabing’s style, station, nationality, riches or obsession. More important, Stratton is a pawn in *Daughter*’s evil plot rather than its leader. He is a fair skinned, preppy American who wears loafers, khakis, oxford shirts and a Yale school tie. Unlike the crippled Teabing, Stratton plays tennis. He works for the NSA, poses as an American diplomat to gain Ridgeway’s trust and is a secret ally of Cardinal Braun in Braun’s attempt to usurp the Papacy. *Id.*, ¶ 116.

Nor are the books’ respective religious leaders similar. Aringosa has an awkward, dark and oblong face, dominated by a crooked nose flattened in a fight; Braun is sturdy, wiry, chiseled and in great shape. While Cardinal Braun is a megalomaniac who controls the evildoers in *Daughter*, directing others to kill in service to his own agenda of becoming Pope, Bishop Aringosa is the head of Opus Dei, an order which is about to be disassociated from the Catholic Church. He succumbs to the Teacher’s manipulation so that he can find the Holy Grail, but he is kept unaware of, and horrified by, the murders Teabing instructs Silas to commit. Braun is ultimately destroyed in a fire as a result of his

thirst for power, while Aringosa is somewhat redeemed by his faith. *Id.*, ¶ 118.

Other characters also differ markedly, despite Perdue's labored efforts to draw analogies between them. Saunière, the curator of the Louvre, head of the Priory of Sion and Sophie Neveu's grandfather in *Da Vinci Code*, is compared to Willi Max, a former Nazi in *Daughter* who owns a collection of stolen art, merely because both were murdered and both reveal information of some sort. *Id.*, ¶ 119. Incredibly, Silas, the albino monk assassin, is compared to George Stratton, the preppy American who poses as an NSA official, because they both do bad things in service to a religious figure. *Id.*, ¶ 120. Finally, the Counterclaim concedes there are no counterparts to major characters in *Da Vinci Code*, including Bezu Fache, the police captain who pursues Langdon; Sophie Neveu's grandmother and brother, who play brief but significant roles at the conclusion of *Da Vinci Code*; and Rémy, Leigh Teabing's chauffeur and accomplice. *Id.*, ¶ 121.

D. Setting

Another critical factor in assessing substantial similarity is the setting of the works at issue. In *Reyner*, for example, the Second Circuit examined two children's books with highly similar plots, both of which involved a child who is separated from her mother and describes her mother to the villagers as the "most beautiful woman in the world." After much searching, the child and mother – who is actually quite unattractive – are reunited. 533 F.2d at 92. Despite the obvious plot parallels, the Second Circuit found no substantial similarity between the works based in large part on the differences in setting. The setting of the first book in the Ukraine was found to be an important component of the work, whereas the second book was set in Africa, and did not include much textual detail about African life. *Id.*

In this case, *Da Vinci Code* is vividly cast against the backdrop of Paris and many of its iconic locations, including the Louvre, Tuileries, and Saint Sulpice. Later scenes in the book take place in London and Scotland, also at well known landmarks. SOF, ¶ 122. In contrast, *Daughter* is set all over the world – that is, everywhere *except* Paris, London and Scotland. Many of the scenes in the first

third of the book occur in California, where Seth is attacked on his sailboat and one of his colleagues at UCLA is murdered. The chase scenes race through Amsterdam, Zurich, and Italy, among other locales. *Id.*, ¶ 123. Finally, the climax to the work takes place in Austria, in the vividly described mountains and salt mines of the Austrian Tyrol.

E. Time Sequence

While both works have the fast pace of thrillers, the “time sequence” of the novels is dramatically different. *Williams*, 84 F.3d at 589. In keeping with its tight structure, *Da Vinci Code* takes place over about one week, whereas *Daughter* stretches out over six months. *See Williams, supra* (finding that different “time sequence” cut against finding of substantial similarity where, although works shared a quickly moving pace, plaintiff’s works took place over space of one day, while defendants’ involved a longer period); SOF, ¶ 124.

F. Style and Tone

The books differ markedly in style, tone and “total concept and feel”. *Daughter* is a run-of-the-mill thriller, filled with violent gunfights, bloody deaths and other daring physical feats, as well as hackneyed sex scenes. The book’s descriptions of art and religious history are brief and simplistic. The writing is pedestrian. *Id.*, ¶ 126. In contrast, *Da Vinci Code* is far more cerebral. The reader and protagonists are focused more on the brain-teasing clues leading to the Grail – codes, number sequences, cryptexes, messages written in invisible ink and symbols – than on physical fights or gun battles that are routine in *Daughter*. *Id.*, ¶ 127. *Da Vinci Code* also has a far more literary quality. It is distinguished by its detailed, scholarly discussions of art, history and religion, which add an unusual richness to the thriller and largely account for its astonishing success. *See, e.g.*, Janet Maslin, “Spinning A Thriller From A Gallery at the Louvre”, *New York Times*, March 17, 2003, (describing *Da Vinci Code* as an “exhilaratingly brainy thriller” and “gleefully erudite suspense novel”); SOF, ¶ 128. McNamara Aff’t, Ex. G. There are no sex scenes, just a simple kiss. SOF, ¶ 129. Such differences in style and tone preclude a finding of substantial similarity. *See, e.g., Smith*, 578 F. Supp. at 1303

(dismissing claim where defendant's work was "subtle, witty, well-written, . . . credible enough to be good humor" and has no "overt and tasteless sexual scenes" whereas plaintiff's "heavy-handed" scripts "lack all these qualities").

III.

LEGACY AND DA VINCI CODE ARE COMPLETELY DISSIMILAR

If possible, the similarities between *Da Vinci Code* and *Legacy* – a book which lacks the religious plotlines and ideas discussed above – are even more tenuous. Indeed, *Legacy*'s role in Perdue's claims seems to largely turn on creating a veneer of similarity because of the role of Da Vinci. However, Brown and Perdue's uses of Da Vinci – perhaps the most famous artist in the world – are fundamentally different. In *Legacy*, missing pages from Da Vinci's notebooks contain information necessary to build a charged-particle beam weapon – the "ultimate death ray" with a force that "dwarf[s] even nuclear blasts." *Legacy* at 355. The hero's efforts to locate the missing pages pit him against the corrupt Bremen Legation and the evil Elect Brothers, who both seek to construct the weapon. In sum, Da Vinci's writings (not his artworks or devices) contain information (not clues to be deciphered) about a powerful weapon (not the marriage of Jesus and Mary). SOF, ¶ 131.¹³

A. Plot

As reflected above, the books' central quests are entirely different and share nothing more than stock thriller elements. The protagonists' quest in *Legacy* to obtain the pages from Da Vinci's notebook before the bomb-making information can be used to ill effect is an entirely different quest than *Da Vinci Code*'s quest for the information about the Holy Grail.

Although both books feature religious brotherhoods on the side of the villains, this commonplace idea could not be expressed more differently. In *Legacy*, the evil Elect Brothers, who purport to be descendants of St. Peter, have been plotting for centuries to regain the Papacy. To the

¹³ Perdue alleges that *Da Vinci Code* duplicates a mistake of fact in *Legacy* by stating that Leonardo's Codex Leicester is on parchment – a "mistake" Perdue claims is unique to these two books. Counterclaim ¶ 78. However, many publications describe the Codex as being on parchment, including an article by the Chief of Information Technology of the Seattle Art Museum on its recent conservation there. SOF ¶ 138.

extent they have any purported laudable goal, it is to reverse the Church's "substitut[ion of] icons and sacred images for the true faith." SOF, ¶ 134. A secret organization with a fortress-like headquarters in Lake Como, they have banded together with Hitler in the past, and are now allied with the Bremen Legation, a coalition of power-hungry corporate leaders (with no counterpart at all in *Da Vinci Code*). In the course of these alliances, they have systematically kidnapped famous artists, scientists and scholars useful to their cause (ranging from Galileo to Amelia Earhart), and kept them captive by surgically implanting deposits of drugs under their skin which necessitate daily injections of an antidote held only by the Brothers. During the course of the book, they seek the charged-particle beam weapon to advance their cause and ultimately hire an assassin to kill the Pope. In sum, the Elect Brothers are a secret, religious brotherhood who use violence, drugs and any other means to reclaim the Papacy. *Id.*

The fictional Elect Brothers bear not even a remote resemblance to Opus Dei. Brown's Opus Dei does not condone any murders, seek to kill off the Pope or kidnap famous individuals and implant drugs. Instead, motivated by the desire to suppress the secrets concerning Mary Magdalene, it is manipulated by the secular "Teacher." *Id.*, ¶ 135.

Nor is there any similarity in the romance. When *Legacy* begins, Suzanne Storm is rude toward Curtis Davis and critical of his expertise regarding Da Vinci. Although she has borne this grudge for years, the two characters fall in love early in the novel and the sexy romance plays out throughout the work. Even these rudimentary basics do not apply to Langdon and Sophie Neveu. *Id.*, ¶ 136.¹⁴

B. Themes

There is no overlap in the books' themes. *Legacy*'s theme seems to be that corruption, greed, and hypocrisy are destructive forces whether in religion (as demonstrated by the Elect Brothers),

¹⁴ Perdue tries to create a plot similarity by alleging that in both books, "The art expert, who is the fourth of his type [to be murdered], writes his last message on his own body in his own blood." Counterclaim ¶ 74. While messages in blood written by murder victims are a stock element in thrillers and mysteries, the depictions here differ significantly. Sauniere draws a pentacle on his body, a multifaceted symbol reflecting pagan worship of nature as well as the sacred feminine – which ties into his other clues and messages – while Perdue's Martini just writes another victim's name. SOF, ¶ 137.

business (as exemplified by the Bremen Legation, Merriam Larsen, and certain back-stabbing employees in Davis's company) or government (the C.I.A. and other government agencies are revealed to be under the sway of the Bremen Legation). Davis, the renegade with an anti-establishment spirit, is the embodiment of good and fights all of these forces, exposing one after another corrupt executive and official. No correlation exists in *Da Vinci Code*. SOF, ¶¶ 139-40.

C. Characters

Robert Langdon and Curtis Davis are opposite heroes. Davis is a tough man of action, much unlike the cerebral Langdon. In contrast to Langdon's tweedy style, Davis wears jeans and a leather jacket and rides a motorcycle. While both Langdon and Davis are knowledgeable about Da Vinci, Langdon is a polished, much published and renowned Harvard professor while Curtis Davis is an "exploration geologist" for an oil company with a self-taught knowledge of Da Vinci. *Id.*, ¶ 142.

Sophie Neveu and Suzanne Storm are also unlike. Storm had a protected childhood as the daughter of prestigious, upper-class American parents who only want her to get married to a wealthy man. Neveu, who is raised in France by her grandfather when the rest of her family dies, has an unconventional childhood in which Saunière exposes her to all sorts of rarefied knowledge. Storm is a journalist with a fashion magazine and secret agent skilled in combat and marksmanship; Neveu is a cryptologist adept at deciphering codes. Most significantly, Neveu, unlike Storm, is a descendant of Jesus and Mary. *Id.*, ¶ 143.

The evil characters in *Legacy* comprise an alliance of the Bremen Legation and the Elect Brothers. There is no counterpart in *Da Vinci Code* to *Legacy*'s secular villains – the Bremen Legation or its ruthless agent, Elliott Kimball (nor to the book's Nazis and KGB agents) and few similarities between the novels' evil religious figures. Brother Gregory of *Legacy* is a Machiavellian leader with no compunction about killing and poisoning in order to gain power, who meets his demise at the end of *Legacy*. Aringosa of *Da Vinci Code* vehemently opposes the murders orchestrated by Teabing when he learns of them, and is somewhat redeemed at the end of *Da Vinci Code*. *Id.*, ¶¶ 144-45. Gregory

and the Elect Brothers willingly ally with the Nazis and the despicable Bremen Legation to achieve their centuries-old agenda, while Aringosa allies with the “Teacher” only because he fears that Opus Dei’s internal scandals will lead to their disassociation from Rome, and Teabing manipulates him into believing that they will find and keep secret the Holy Grail, which will reelevate Opus Dei’s status. *Id.*, ¶ 146.¹⁵

D. Other Elements

Both books are fast-paced thrillers, but beyond the conventions of this genre they vary in setting, time sequence, and tone and style. While *Da Vinci Code* rings with its Parisian backdrop, *Legacy* hops all over Italy, with key opening and closing scenes in California, and takes place over 6 to 7 weeks. *Id.*, ¶ 150. *Legacy* is a much more of a standard, violent action-packed thriller than *Da Vinci Code*. *Legacy* lacks the progression of puzzling intellectual clues, or the scholarly, detailed discussions of art and religion that distinguish *Da Vinci Code*. *Id.*, ¶ 151. In sum, there is absolutely no similarity of protectible expression between *Da Vinci Code* and *Legacy*.

IV.

DEFENDANT’S OTHER COUNTERCLAIMS MUST ALSO FAIL

In addition to its infringement counterclaim, Defendant asserts three other frivolous counterclaims, namely a claim for an accounting, an unjust enrichment claim, and a claim seeking an injunction of any movie based on *Da Vinci Code*.

A claim is completely preempted by the Copyright Act when “(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.” *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004); *see also* 17

¹⁵ Defendant further posits some absurdly inapt parallels between characters in the two books such as comparisons of Teabing with Kimball – a physically fit mercenary who kills out of sadism and greed – and Teabing (the “Teacher”) and the “Schoolmaster,” a “hulking” low-level assassin who appears for just two pages before Kimball kills him. SOF, ¶ 147.

U.S.C. § 301(a).

The unjust enrichment claim is preempted. Literary works fall within the types of works protected under 17 U.S.C. §102 and 103. Moreover, courts have categorically held that unjust enrichment claims seek to vindicate an “equivalent right” to those protected by copyright law. *See* 1 Nimmer § 1.01[B][1][g] at 1-41 (“a state law cause of action for unjust enrichment or *quasi* contract should be regarded as an ‘equivalent right’ and hence, pre-empted insofar as it applies to copyright subject matter”) & *id.* n.164.2 (listing cases); *Briarpatch Limited*, 373 F.3d at 307.

While the accounting counterclaim is pled as a distinct cause of action, Perdue merely seeks an accounting as an additional remedy for copyright infringement rather than as a separate claim – on the ground that he is unable to ascertain the amount of money owed by Plaintiffs without an accounting. Counterclaim ¶¶ 103-05. Because his infringement claim lacks merit, however, he is not entitled to an accounting. Alternatively, if Defendant does intend to assert a separate cause of action for an accounting under state law, this claim is also preempted. *Carrell v. The Shubert Organization, Inc.*, 104 F. Supp.2d 236, 249 n.9 (S.D.N.Y. 2000) (accounting claims are equivalent claims falling within the scope of Copyright Act, and are preempted); *Richard Feiner & Co. v. H.R. Indus., Inc.*, 10 F. Supp.2d 310, 316 (S.D.N.Y. 1998) (same), *vacated on other grounds*, 182 F.3d 901 (2d Cir. 1999).

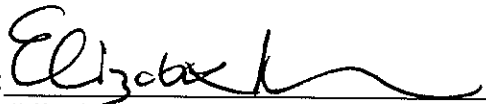
Defendant’s claim for an injunction against the motion picture is premised on his underlying copyright claim and must be dismissed along with it. Perdue merely alleges that, “As Plaintiffs, in connection with *Da Vinci Code*, have infringed on Defendant’s copyrights in Defendant’s works, Plaintiffs could not properly or legally transfer licenses or any other rights in or to the *Da Vinci Code* to any third parties” (Counterclaim ¶113). Thus, the motion picture claim is merely derivative of the main claim against the book, which cannot stand. Because Perdue’s meritless claims have placed a cloud over the motion picture project, it is in the interests of justice that this case be disposed of quickly.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully submit that the Court should grant their motion for judgment on the pleadings under Rule 12(c) and, in the alternative, for summary judgment, as to their claim for a declaratory judgment of non-infringement. In addition, Plaintiffs and additional Counterclaim Defendants respectfully submit that the Court should grant their motion to dismiss under Rule 12(b)(6), or in the alternative for summary judgment, on all of Defendant's counterclaims.

Dated: New York, New York
February 25, 2005

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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 February 25, 2005, I caused to be served the within AFFIDAVIT OF ELIZABETH A. MCNAMARA, RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT ON PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AND IN SUPPORT OF PLAINTIFFS' AND COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS THE COUNTERCLAIMS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS, MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT ON PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AND IN SUPPORT OF PLAINTIFFS' AND COUNTERCLAIMS DEFENDANTS' MOTION TO DISMISS THE COUNTERCLAIMS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS and NOTICE OF MOTION 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:

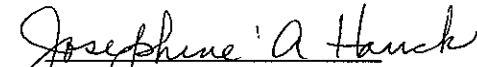
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Leslie Majer

Sworn to before me this
25th day of February, 2005



Notary Public

155266

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Qualified in Nassau County
Term Expires April 30, 20 07