UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| DAN BROWN and RANDOM HOUSE, INC., | : | |
| Plaintiffs, | : | Civil Action No. 04 CV 7417 (GBD) |
| - vs. - | : | |
| LEWIS PERDUE, | : | |
| Defendant. | : | |
| 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 | : | |

**REPLY 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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## PRELIMINARY STATEMENT

By this motion, Plaintiffs Dan Brown and Random House, Inc., along with the additional Counterclaim Defendants (collectively "Plaintiffs" or "Brown"), ask the Court to make a straightforward comparison of two novels, and – based solely on that comparison and on the lone legal issue of substantial similarity – to dispose of Lewis Perdue's specious copyright claims.

Perdue alleges similarities between the two books ranging from unprotectible historical facts (such as the role of Constantine in shaping Christianity) to trivial details, which are often misrepresented (such as the incorrect assertion that both books contain a gold key), to the broadest of abstract ideas, which are not copyrightable (such as the fact that both books contain a secret related to the Divine Feminine), but he has altogether failed to make the straightforward analysis required under Second Circuit law. The well-established standard governing motions like this one is much more simple and clear than Perdue would have it: the only issue is whether, from the perspective of a discerning lay observer, the protectible elements of the two works – not historical facts, ideas or *scenes a faire* – are substantially similar. This comparison looks to whether the alleged infringer has copied the "fundamental essence or structure" of the claimant's work, which, in the context of novels, focuses the inquiry on major elements such as plot, themes, characters, setting, sequence, pace and "total concept and feel." Because this comparison dooms Perdue's claim, he largely ignores these elements – paying scant attention to the two, starkly different stories the novels tell, the very different characters that the two authors have created, and the other essential literary elements – and instead focuses on abstract generalities concerning historical facts and theories, which are not copyrightable.

Unable to meet the Second Circuit's substantial similarity standard, Perdue seeks to create a new standard directly at odds with unbroken precedent. As evidenced in his expert reports, Perdue suggests that as long as a comparison of the works yields "some" or "suspicious" isolated similarities,[1]

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[1] *See* Declaration of Gary Goshgarian ("Goshgarian Decl."), ¶ 6 (concluding that the two books contain "some similar elements" that are not generic, as well as "sequencing" of both generic and non-generic elements which is "suspicious"); Declaration of John Gabriel Olsson ("Olsson Decl."), ¶ 4 ("As a result of my analysis, I

the Court should rule in the claimant's favor and allow burdensome lay and "expert" discovery and trial. This standard, of course, is a radical and unwarranted departure from controlling law.

Before performing the *correct* analysis, we note what Perdue has not argued: (i) Perdue has understandably abandoned his claim that *Da Vinci Code* infringes his other novel, *The Da Vinci Legacy* ("*Legacy*")[2]; (ii) Perdue has not responded at all to Brown's motion with respect to his three other counterclaims, which must fail along with his copyright claim for the reasons stated in Brown's opening memorandum of law, including that the claim against the movie Counterclaim Defendants is entirely derivative of his claim against Brown ("Moving Br.") (pp. 37-38); and (iii) Perdue has abandoned pages and pages of unsustainable character similarities alleged in his Counterclaim. However, the remaining components of Perdue's arguments are equally meritless.

Under the correct law, this Court must read both *Da Vinci Code* and *Daughter* but is not required to look beyond them. Second Circuit law requires the Court to inquire whether "the protectible elements, standing alone, are substantially similar." *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (quoting *Knitwaves v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). In the context of novels, this analysis calls for a detailed comparison of plot, characters, scenes, themes, setting, sequence, pace and "total concept and feel." *Williams*, 84 F.3d at 588. Addressing this standard, Brown provided this Court with just such an analysis in his moving brief, outlining the respective books' plots (including their structure, sequence, villains, love stories, and murders), themes, characters, settings, time sequences, and tone and style. *See* Moving Br. at 18-34. And the comparison revealed – as any reader can readily see – that *Da Vinci Code* and *Daughter* are totally different. Perdue does not dispute virtually *any* of these controlling distinctions. Instead, Perdue resorts to a litany of supposed similarities that address the works at such a remote level of abstraction

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have concluded that there are similarities among the three novels.").

[2] Perdue states that his claims are based "primarily" on *Daughter of God* ("*Daughter*") and only compares the components of that work, not *Legacy*, to *Da Vinci Code*. Nevertheless, one of Defendant's expert affiants, Mr. Olsson, continues to improperly pluck out isolated aspects of *Legacy* to bolster his claims of similarity between *Daughter* and *Da Vinci Code*, referring repeatedly to *Legacy* as he grasps for supposed similarities.

that the books are no longer even recognizable. Yet, this type of abstract inquiry is precisely what the Second Circuit cautions against. Absent a taking of protected expression, namely of the literary components outlined above, Perdue's claim of infringement utterly fails. *See* Point I, A.

When not dealing in abstractions, and in an attempt to mask how fundamentally distinct *Daughter* and *Da Vinci Code* are, Perdue's arguments otherwise rest on the supposed religious overlap between the books. Thus, for example, he argues both works address the concept of the "Divine Feminine" and include "critical" analyses of the Emperor Constantine, the Nicaean conference and the incorporation of pagan practices into the Catholic faith. Yet, this argument conveniently ignores that virtually all of these alleged similarities stem from common historical facts and theories – indisputably unprotected in any copyright analysis. Perdue's own Author's Note represents that his novel is "based on fact," that "[t]he sections of the book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and [well] documented," and that "there is no question that for the vast part of human existence, God was viewed as a woman." (*Daughter*, p. 420-21). Even more significantly, any overlap in the concept of a "Divine Feminine" ignores how the two works *express* this abstract concept in completely different ways – Mary Magdalene as the wife of Jesus, versus an entirely fictional second Messiah named Sophia. *See*, Point I, B.

Apparently recognizing that the various religious facts and theories that he relies on are not protectible, Perdue attempts to argue that Brown has copied his unique "selection and arrangement" of such unprotectible elements. But, this Court is not asked to compare rugs or telephone directories where the originality lies in a particular arrangement of unprotected facts. Rather, this Court is looking at two complex novels. Any common facts have been interwoven in the novels in an entirely distinct fashion in the context of strikingly different characters, story lines, scenes and plots. These circumstances bear no resemblance to the type of narrow protection offered certain "selections and arrangements." *See* Point I, C.

Finally, this case can and should be disposed of at this juncture. The Second Circuit repeatedly

has made clear that the court in the first instance should perform a comparative analysis to determine if there are any substantial similarities in protectible expression. After such a review, courts in this Circuit and others routinely grant pre-discovery motions to dismiss or for summary judgment. This result stems from the fact that looking at the books themselves, and nothing more, it is a question of law for the court, not a jury function, to determine whether the alleged similarities are protected expression or instead unprotectible abstractions, ideas, stock elements and/or historical facts. Perdue's efforts to dream up necessary areas for discovery virtually all relate to "access" – which is conceded (solely) for purposes of this motion – or to other fundamental misconstructions of the law. *See* Point II.

In short, a simple reading of the two books that remain at issue reveals a clear lack of substantial similarity in protectible expression. This Court should grant Perdue's declaratory judgment and find as a matter of law that *Da Vinci Code* does not infringe Perdue's *Daughter of God.*

## I.

## PERDUE BLATANTLY DISREGARDS, AND CANNOT POSSIBLY MEET, THE CONTROLLING LEGAL STANDARD OF SUBSTANTIAL SIMILARITY

It is well established in this Circuit that substantial similarity analysis turns on similarities of the "fundamental essence or structure" of the two works as a whole. *See* Moving Br. at 16. For novels, this means that after separating out the unprotected elements – abstract ideas, facts and stock elements – it is necessary to analyze in detail each of the major elements constituting the "fundamental essence or structure." *Id.* "[T]he essence of infringement lies in taking not a general theme but its particular expression through similarities in treatment, details, scenes, events and characterization." *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976). In his moving brief Brown's motion addressed each of these elements in turn, pointing out significant differences between the works. Yet, Perdue – mired in abstractions and religious/historical concepts – has either failed to address or given only the most cursory treatment to the vast majority of these key elements, and the few comparisons he does make regarding details of plot and characterization are trivial and

misleading.[3]

Critically, Perdue does not dispute the fundamental differences in plot, characters, themes, setting and "total concept and feel" between the books outlined in Brown's opening brief. Instead of grappling with these fundamental differences – which are not incidental, but are the driving plot and character forces – Perdue's entire claim rests on unprotected, noncopyrightable material. Thus, he does not challenge any of these controlling distinctions: (1) the fundamental difference in the secret repressed by the Church, namely the existence of an entirely fictional second female Messiah from a hamlet in Anatolia, as opposed to the notion that Mary Magdalene was married to Jesus and had descendants – a startling difference which has a significant impact on the books' basic plots; (2) the radical differences in the ultimate villain, a key structural element in any thriller (Cardinal Braun, a religiously conservative Cardinal determined to rule the world versus Leigh Teabing, an erudite Royal Historian obsessed with making public the secret of the Holy Grail); (3) the absence in *Da Vinci Code* of Nazis and Russian mafia, central components of Perdue's plot structure, including in the development of the moral hero, Hans Morgen, the Nazi resister; (4) the clear differences in both the opening murder and the initial quests of the main characters, both of which are components essential to the structure of a thriller (Seth Ridgeway's quest for the first third of *Daughter* is to find his captured wife and Zoe's mission is to escape her kidnappers, whereas Robert Langdon's primary mission is to clear his name and Sophie Neveu's mission is to discern the message sent to her by her beloved but estranged murdered grandfather); (5) the radical differences between the interplay of the hero and heroine (a married couple versus two people who have just met and do not become romantically involved until the final pages of *Da Vinci Code*); (6) the different treatment of religion in the characters' lives and the two books (religion is an important element in Perdue's characters' lives and

[3] Perdue repeatedly refers to the "remarkably similar hero and heroine" in both novels (Defendant's memorandum in opposition to Plaintiffs'/Counterclaim Defendants' motion ("Opp. Br.") at 3, 6), yet notably never explains any real similarities between Robert Langdon and Sophie Neveu, from *Da Vinci Code*, and Seth and Zoe Ridgeway, from *Daughter*. To the contrary, as established in the opening brief, the characters have almost no, let alone "remarkable," similarities. *See* Moving Br., at 29-32.

each takes a personal religious journey, whereas Brown's book and characters are more secular and express no imperative to search for a relationship with God); and (7) the absence in *Daughter* of the detailed history of Da Vinci's art and life, and his link to secrets of the Holy Grail and goddess worship, a unifying element running through *Da Vinci Code*.

## A. PERDUE'S ALLEGED "SIMILARITIES" ARE BASED ON UNPROTECTED IDEAS, STOCK ELEMENTS AND FACTS

Contrary to established Second Circuit law, Perdue's alleged similarities are based almost entirely on unprotectible material. The Court must give these elements no weight in analyzing substantial similarity.

### 1. Abstract Ideas

At its heart, Perdue's theory of infringement relies on vague and abstract comparisons. He abstracts the plots of *Daughter* and *Da Vinci Code* to such a high level of generalization that they are far removed from the actual works. Thus, it is general ideas, not their expression, which form the basis for this comparison. While this tactic is everywhere in Perdue's papers, it is perhaps best seen in his Preliminary Statement, where Perdue claims that "[b]oth novels tell the same story" and then provides a litany of supposed similarities:

> They are stories about religion and religious discovery. They both involve anthropomorphic notions as to the sexuality of God. They both involve the belief that predominated in earlier times, which belief still exists today, that God is a union of the male and female. They both involve the efforts of the Roman Emperor Constantine and the Catholic Church in the fourth century to change the notion of God from one having both male and female components to one that is male only. Both novels involve a woman who is a symbol of the Great Goddess....

Opp. Br. at 2. He continues:

> In both novels, the hero and heroine are guided by obscure, artistic, historically based and other clues and are called upon to solve mysteries in furtherance of the quest for the physical evidence. Works of art are very important in both novels.

*Id.* at 3. The list goes on and on, identifying one unprotectible, abstract idea after another. Most troubling, Perdue never moves to the next stage, and never explains in any concrete way that goes to

the expressive qualities of the works how, for example, the stories are about religious discovery or how the heroes are guided by artistic clues. He never takes on concrete plot and character comparisons because when one does, any comparison slips away. Yet, abstract ideas of "religion and religious discovery," of "rival groups or organizations seeking to obtain" "physical evidence [that] will rock the foundations of the Catholic Church" and heroes and heroines "becom[ing] aware of the male/female nature of God" (*id.*) "are no more susceptible of copyright" than "a comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters" or "the outline of Romeo and Juliet." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

"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). Indeed, Perdue's litany of abstract similarities between *Daughter* and *Da Vinci Code* bears a striking resemblance to the list of supposed similarities that were soundly rejected by Judge Scheindlin in *Hogan v. DC Comics*, 48 F. Supp.2d 298 (S.D.N.Y. 1999). There, the two works involved a "half-human, half-vampire character named Nicholas Gaunt." *Id.* at 310. Starting with that premise – which is more strikingly similar than any comparison of *Daughter* and *Da Vinci Code* – the plaintiff relied on comparisons like "both characters seek to uncover the truth about their origins and both learn about their origins through flashbacks and memories; both characters are faced with the choice of pursuing good or evil…; [and] both works use similar imagery, such as religious symbolism, biblical allusions and the use of doors to see into the past." *Id.* Notwithstanding this degree of overlap, the court had no trouble concluding that these abstractions were nothing more than "unprotectible ideas and themes." *Id.*

Similarly, in the seminal case of *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, Learned Hand compared two comedies about Jewish and Irish families in which the children fall in love despite clashes in religion and culture. In both books, the children secretly marry contrary to the wishes of the parents; the Jewish fathers learn of the marriage, become infuriated and essentially disown the child;

the young couple has a baby; and the families reconcile. Despite the obvious parallels, Learned Hand found these similarities to be mere unprotected ideas. As he stated:

> 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,* 45 F.2d at 121. *Nichols* emphasizes that even if the defendant directly borrowed the plaintiff's general plot, "there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only part of her 'ideas.'" *Id.* at 122; *see also Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir. 1986) ("At the most general level, the movie and the book tell the same story. Both recount the experiences of policemen battling the hostile environment of the 41st precinct. But, in moving to the next level of specificity, differences in plot and structure far outweigh this general likeness.").

In all these cases, as here, abstract concepts cannot substitute for an analysis of the actual work. "[T]he work themselves, not descriptions or impressions of them, are the real test for claims of infringement." *Walker*, 784 F.2d at 51.

**2. Stock Elements**

When not addressing utter abstractions, Perdue steps directly into classic *scenes a faire* that are "standard" in the treatment of, or "follow from," the books' genre and the ideas at issue. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d. Cir. 1980); *Reyher*, 533 F.2d at 91. Perdue fails to explain how the involvement of the main characters in a struggle that is "not of their making" (Opp. Br. at 18), male and female protagonists who depend on each other (*id.* at 19), and "two organizations of people who would stop at nothing, including murder, to obtain the physical evidence," (*id.* at 17), are anything but tried and true features common in novels or thrillers. And just as "electrified fences, automated tours, dinosaur nurseries, and uniformed workers...are classic *scenes a faires* that flow from

the non-copyrightable concept of a dinosaur zoo," *Williams*, 84 F.3d at 589, the books' common idea – a murder somehow related to a secret which poses a challenge to established church doctrine – logically leads to such *scenes a faire* as Church authorities trying to suppress this information, competition between rival groups to obtain physical evidence of the secrets, and attempts by someone to harm the protagonists who discover this information. *See* Moving Br. at 15-17.

Perdue's reliance on stock features is perhaps best evidenced by his discussion of "shapeshifters" (Opp. Br. at 19-21). As Perdue acknowledges, the character who "while first appearing to be a friend and an ally of the hero and heroine, later turns out to be a deadly enemy" (*id.* at 19), is a "standard archetype" in fiction (*id.* at 20). From the serpent in the Garden of Eden to the wolf dressed up as Little Red Riding Hood's grandmother, this device has seen many an airing. Having conceded this, it is baffling that Perdue goes on to enumerate nothing more than the inevitable components of this archetype: "They help the hero and heroine escape those pursuing them," "They help to save the lives of the hero and heroine," "They appear to be the allies of the hero and heroine, but actually have their own agendas...." etc. (*id.* at 20-21). Moreover, while Perdue conclusorily contends that the shapeshifters in the two books are used "in similar ways and in the same order and sequence" (*id.*) he fails to explain how this is so. Nor could he. The two "shapeshifter" characters of George Stratton and Leigh Teabing have nothing in common. *See*, Moving Br. at 31. One is a preppy American NSA official working for the Vatican's CDF, the successor to the Inquisition, and the other is a wealthy Brit, an erudite and crippled historian with a strong antipathy for the Church. Moreover, unlike Teabing, Stratton is a pawn in *Daughter's* evil plot rather than its leader.

**3. Facts**

Perdue's claim rests heavily on unprotectible facts or factual theories. This is immediately evident in examining Perdue's charts of alleged similarities, introduced with a discourse on historical religious theory: "In antiquity, the female was believed to have been the ultimate Creator or to have shared in the divinity of God." Opp. Br. at 7. This historical theory is then followed by a recitation of

supposed similarities in the works, with virtually every example being nothing more than a common historical fact or theory. Thus, Perdue spends pages on the allegedly "central" role played in each work by the historical figure Roman Emperor Constantine, and the historical event the Nicaean conference, going so far as to list a number of changes to Christianity that followed the Nicaean conference, and itemizing in detail each novel's reference to either Constantine or the historical integration of pagan practices into Christianity – material in fact found on only a few pages of *Da Vinci Code*. Opp. Br. at 9-13.[4]

Yet, even Perdue recognizes, as he must, the "universally understood" principle that facts are not copyrightable. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 344 (1991). Instead, Perdue tries to carve out an exception to this basic rule by arguing that the historical theories expressed are not "typical" or "common." However, Second Circuit law does not distinguish between better and lesser known facts, or between established facts and theory; it holds that facts and factual theories are categorically uncopyrightable, giving "broad latitude" to "authors who make use of historical subject matter, including theories or plots." *Hoehling*, 618 F.2d at 974. Nevertheless, Perdue argues without a shred of support that he owns a monopoly on *his* historical accounts.[5]

Perdue's argument is flatly barred by the Second Circuit's decision in *Hoehling*. In that case, plaintiff's book and defendant's fictional film both put forward the unusual hypothesis that one Eric Spehl, influenced by his girlfriend, purposefully destroyed the Hindenburg in 1937 by placing a crude bomb in Gas Cell 4, a theory based on an amalgam of historical facts used by both parties One of the writers of an early version of the screen play admittedly consulted plaintiff Hoehling's book for assorted historical details. Like Perdue, Hoehling argued that reliance on his unusual hypothesis

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[4] Perdue's charts actually evidence how very distinct the respective context, phrasing and dialogue is in each work. Further, Perdue's effort to elevate the import of Emperor Constantine and the changes that flowed from the Nicaean Conference to something "central" to *Da Vinci Code* is seriously undermined by the indisputable fact that on the pages of charts documenting these "similarities," he cites to but *two* pages from *Da Vinci Code*. *See* Opp. Br. at 10-13, citing only material from pages 232-233 in *Da Vinci Code*.

[5] Perdue argues his factual theories are somehow worthy of more protection because views concerning the Gnostic Gospels are not monolithic or – incredibly – that the fact that Christianity grew increasingly male dominated was "little known" before Perdue discovered this and Brown allegedly copied it. Opp. Br. at 9, n.9.

rendered the plots substantially similar. The Second Circuit rejected the claim on the ground that, "such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors." 618 F.2d at 979. The Second Circuit emphasized that, "In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another. The principle is justified by the fundamental policy undergirding the copyright laws, the encouragement of contributions to recorded knowledge." *Id.* at 980 (citation omitted). *See also Fuld v. Nat'l Broadcasting Co., Inc.*, 390 F. Supp. 877 (S.D.N.Y. 1975) (holding that, even presuming the plaintiff, author of a screenplay entitled "BUGSY," could claim credit for much of the information conveyed in the defendant's movie about Bugsy Siegel, the material constituted unprotected historical fact).

In short, it is of absolutely no moment that "the unity of the male and female in pagan worship ... [and] the importance of the Roman Emperor Constantine in requiring a transition from a female to a male dominated religion" are "not the type of things common to the mystery thriller genre," as Perdue alleges (Opp. Br. at 5), since these historical facts are simply not protectible and are available for any novelist to use.

In the end, Perdue's heavy reliance on charts of common historical facts discussed in the two books only demonstrates his profound misunderstanding of the copyright law. Copyright infringement requires substantial similarity of protected expression (*i.e.*, actual scenes, dialogue, interplays between characters, etc.), not a similar historic subject matter or common historical facts within a common genre. And "absent wholesale usurpation of another's *expression*, claims of copyright infringement where works of history are at issue are rarely successful." *Hoehling*, 618 F.2d at 974 (emphasis added).

## B. ANY RELIGIOUS OVERLAP BETWEEN THE TWO BOOKS IS UNPROTECTED FACT OR IDEA

Perdue's heavy reliance on these unprotected categories – ideas, stock elements and facts– comes to a head in his discussion of the similarities in religious and historical material underlying both

novels. At the outset, notwithstanding the centrality of the alleged overlap in religion in Perdue's papers, it is worth emphasizing just how little material in the novels deals with this subject matter. Almost every one of the 23 sections in Perdue's Statement of Facts references religion; most of these refer to the "Great Goddess" or "Divine Feminine." Yet, astoundingly, Perdue cites most of this material to a few brief sections comprising 11 pages of *Da Vinci Code* (*i.e.*, Teabing's middle-of-the-night lecture), to the exclusion of the vast majority of plot developments, character traits, character interactions, and details regarding theme, setting and other major elements in the other 443 pages of *Da Vinci Code*.[6]

Moreover, *all* historical facts and theories underlying these religious "similarities" must be separated out before the works are compared – no matter who performed the original research. Indeed, contrary to Perdue's contention, Brown has no obligation to prove that he conducted his own independent research by submitting an affidavit to that effect; even assuming *arguendo* that he relied on Perdue's research in drafting *Da Vinci Code* (which he most definitely did not), Perdue simply has no claim based upon any historical religious facts and theories featured in both books. As this Court has held:

> "One cannot build a story around a historical incident and then claim exclusive right to the use of the incident ... [T]hen all novels, stories and dramas written about the Civil War, opposing Grant and Lee, might never have been written after the first one because the author of the first one could have claimed exclusive right to the product.

*Gardner v. Nizer*, 391 F. Supp. 940, 942 (S.D.N.Y. 1975) (quoting *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935)); *see also Feist*, 499 U.S. at 353-54 (definitively rejecting the notion that copyright protection could arise from a "sweat of the brow" theory).[7]

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[6] Specifically, *nine* of 23 sections in Perdue's Statement of Facts cite two short passages in *Da Vinci Code* addressing the religious background material (*see* Opp. Br., Statement of Facts, Sec. A, B, C, D, I, T, U, V and W; *Da Vinci Code* at 124-26 and 232-39); and nine more have no citation at all, although many of them refer to the same subject matter.

[7] While Brown's affidavit has not been submitted because it is not necessary for purposes of the substantial similarity determination raised by this motion, the Court should not be misled by Perdue's innuendoes: in the event this case progresses past this motion, Brown will unequivocally deny that he ever read

It is simply disingenuous for Perdue to suggest that the material on which he harps – the emphasis on the "Divine Feminine" found in several Gnostic Gospels; Constantine's consolidation of his power through establishing Jesus' divinity at the Council of Nicaea; and the suppression of the Gnostic Gospels by both Church and secular establishments – is copyrightable expression rather than a mélange of unprotected facts and ideas. On its face, it is apparent that the religious material Perdue stakes his copyright claim on is historical fact and theory – and, in fact, very well-tread terrain. Perdue's own affidavit details his 25 years of research, including many books in his own library on the very topics on which he seeks a monopoly here.[8] Even more important, the Author's Note in *Daughter* explicitly concedes that:

> This is a work of fiction based on fact .... All of the other historical shenanigans involving ... emperors is true. And of course, there was an Emperor Constantine who put an end to spiritual squabbling with bureaucratic decrees enforced by the blade of sword. It has been true throughout religious history ... that matters of faith are decided by political expediency rather than matters of the spirit. The sections of the book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and far better documented than any scriptures in the Hebrew or Christian Bible....

*Daughter* at 420 (emphasis added). Further, the Author's Note refers to Perdue's historical "research about the early Christian Church and the seminal roles that woman played in it" and the views of the Gnostics. As Perdue expressly represents to his reader, he is dealing in fact, not original expression: "there is no question that for the vast part of human existence, God was viewed as a woman." *Id.* at 420-21. As the Second Circuit aptly observed, "having expressly represented to the world that [his material is] factual, ... [plaintiff] is not now permitted to make an inconsistent claim so as to better serve its position in litigation." *Arica Institute, Inc. v. Palmer,* 970 F.2d 1067, 1075 (2d Cir. 1992).

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– or copied from – Perdue's books. If Perdue is unable to prove direct access in the face of Brown's unequivocal denial, then Perdue will be required to prove "striking similarity" between the works at issue – an enormously high standard which would be totally impossible to meet based on these two texts. *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988).

[8] These include books titled: *The Gnostic Scriptures, Paganism and Christianity, Sophia: Aspects of the Divine Feminine Past & Present, When God Was a Woman, When Women Were Priests*, and *Women and Christian Origins*.

Likewise, Perdue concedes in his Counterclaim (¶ 83, pp. 34-35), that the underlying history in *Daughter* "is largely adapted from modern interpretations of the relationship between Gnosticism and Christianity; the most influential of these is probably *The Gnostic Gospels* by Elaine Pagels," originally published in 1979. This prominent book, which won the National Book Award, contains several of the religious theories in which Perdue here proclaims a monopoly, and makes clear that Pagels, in turn, often relies directly on the Gnostic Gospels themselves. Thus, prior to Perdue's novel, Pagels established that (i) many of the Gnostic texts conceive God as embracing male and female elements; (ii) the Gnostic texts were omitted from the canonical collection and branded heretical, and feminine imagery was largely excised from the canon; (iii) in some Gnostic texts, Jesus viewed men and women equally; and (iv) Mary Magdalene was described as the most favored disciple and her special role was contested by Peter. *See* Pagels, *Gnostic Gospels* at 48-69, McNamara Aff't Ex. D.[9]

Most importantly, and dispositively, despite both works' reliance on certain historical material, Brown and Perdue fictionalize these unprotected religious elements in completely different ways with completely different expression. The central religious secret in *Da Vinci Code* is that Jesus and Mary Magdalene were married and had a daughter, and their descendants still live in France; the secret in *Daughter* is the existence centuries ago of a second messiah named Sophia for whom Perdue creates a detailed back-story chronicling her life, miraculous works and sensational death. Moving Br. at 8-9. Sophie Neveu, *Da Vinci Code*'s heroine, turns out to be an actual descendant of Jesus and Mary; Zoe Ridgeway, the female protagonist of *Daughter*, is not a descendant of Sophia, the female messiah.

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[9] Perdue also pleads that Brown relied on *Holy Blood, Holy Grail* (1982), which is explicitly cited by Brown in *Da Vinci Code*, along with three other books on these same topics. Counterclaim, ¶ 83, pp. 34-35; *Da Vinci Code* at 253-54. *Holy Blood, Holy Grail*, published long before Perdue's novel, also contains much of the material Perdue now relies on as supposed evidence of "plagiarism" of his work. For example, it states that Constantine incorporated pagan traditions to mollify pagans and consolidate power (including some of the very details mentioned in the two books like the switch to "Sun-day" as the day of rest); and that Constantine was not a fervent believer but a convert for political reasons. *See Holy Blood, Holy Grail* at 360, 365-69, attached to Supplemental Affidavit of Elizabeth McNamara ("McNamara Supp. Aff't"), Ex. A. Even the Encyclopedia Britannica's entry on the Council of Nicaea states that Constantine was unbaptized at the time of the Council, and that it condemned the view that Jesus was created as an earthly being and affirmed his divinity. "Nicaea, Council of." *Encyclopaedia Britannica* from Encyclopaedia Britannica Premium Service. McNamara Supp. Aff't, Ex. B.

Perdue ignores how fundamentally distinct these two stories are, instead falling back on the abstract theory that Zoe "is to be viewed as the daughter of the Great Goddess" (Opp. Br. at 14), and that Sophia, the second Messiah, and Mary Magdalene are both symbols of the "Divine Feminine." First, this far-fetched claim is not cited to or supported in any way by the actual novels, which must be viewed from the eyes of a "discerning ordinary observer." *Hogan*, 48 F. Supp.2d at 309. Second, an analysis of the books at such a high level of abstraction is exactly what is forbidden. No amount of over-intellectualizing and abstract theory can alter the fact that the actual expression in these two books are fundamentally different.

Perdue took the term "Sophia" – a term used in the Gnostic Gospels to signify the female aspect of God – and created a fictional second Messiah who lived at a particular time and particular place within a particular family, was slaughtered by the Romans along with her townspeople, and left her image on her burial shroud. Inventing a second Messiah and her resurrection was his creative "expression" – his creative leap from extensive scholarship on the Divine Feminine. By contrast, Brown focuses on Mary Magdalene, an actual biblical figure, who he imagines in a married relationship with Jesus and as the mother of their child. No amount of convoluted symbolic analysis can change the fact that each author's "expression" is entirely distinct.

Likewise, the role of the heroines is vastly different. Brown's *Da Vinci Code* raises the tantalizing possibility that descendants of Jesus remain alive today. In contrast, Zoe is just a woman who learns about the historical scholarship on the "Divine Feminine" and has a personal religious conversion when she is held as a hostage by the Russian mafia. In short, while abstract principles of the "Divine Feminine" and the evolving impact of women in Christianity may exist in each work, how those ideas are expressed in each work is radically different.

## C. PERDUE'S "SELECTION AND ARRANGEMENT" ARGUMENT FAILS

Tacitly recognizing that the various historical facts and religious theories he relies on are not copyrightable, Perdue next resorts to the strained theory that Brown copied his unique "selection and

arrangement" of these religious facts and theories. In paragraph 55 of his Declaration, he finally "puts the meat on the bones" of this argument and lists nine facts and ideas which he calls his "unique system of theology and history."[10] However, the "selection and arrangement" doctrine has no bearing in a case such as this involving richly textured historical novels.

The "selection and arrangement" doctrine generally arises in the context of compilations, such as telephone directories, or designs. In that setting, courts have established the principle that there may be "thin" copyright protection in the original, actual selection and arrangement of unprotected material, although *never* in the underlying facts or public domain elements themselves. *Feist*, 499 U.S. at 349. Thus, for example, Perdue relies primarily on *Tufenkian Import/Export v. Einstein Moomjy*, 338 F.3d 127 (2d Cir. 2003), which involved two rug designs. The plaintiff took two public domain rugs, combined them, and made several alterations. Most significantly, he took a portion of one of the rug's interiors and made idiosyncratic, un-uniform alterations. "The plaintiff seemed to have engaged in a selective and particularized culling of a leaf here, a complex of leaves and flowers there, and so forth." *Id.* at 136. The defendant "precisely mimic[ked]" these choices, with the end result being that a substantial portion of his rug looked the same as plaintiff's. *Id.* The Second Circuit found that this non-mechanical adaptation of individually unprotectible elements from the public domain is the type of original selection and arrangement protectible under *Feist*. *Id.* at 136-37.

The *Feist* and *Tufenkian* cases do not alter any of copyright's bedrock principles. To the contrary, these cases affirm that the court must first "factor [public domain] materials out. For copying is not unlawful if what was copied from the allegedly infringed work was not protected." *Tufenkian*, 338 F.3d at 135. They also re-affirm that, "The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." *Feist*, 499 U.S. at 349 (quoting Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1868

[10] These nine items include such commonly cited beliefs as the notion that Church scriptures were molded to support those in power. Perdue Decl., ¶ 55(D)(v).

(1990)). The upshot of these principles is that cases in which copying of selection and arrangement constitutes infringement are "relatively unusual" and, the *Tufkenian* Court suggested, require "essentially the same" selection and arrangement to pass the substantial similarity test. 338 F.3d at 136.

Perdue's "selection and arrangement" argument has no application to the novels at issue here. Indeed, the argument ignores the fact that this Court is looking at historical novels – not telephone books, rugs or sweaters, as in his cases. Neither Brown's nor Perdue's book contain a list of Perdue's nine items; rather both books take hundreds of historical facts and theories and interweave them creatively into intricate plots. The religious and historical notions contained in Perdue's book – such as the idea that the decline of Goddess worship was causally linked with the cultural role of women in society – are not free-standing items listed in the same order and context in the two books but rather are broad concepts enmeshed in Brown and Perdue's stories, each with their different characters, story lines, scenes and other aspects. Stated differently, the use of similar historical facts or theories in the context of vastly different plots with significantly different characters is not the exact replication of a design where one takes out the very same leaves and flowers, as in *Tufenkian*. In short, to the extent that Brown incorporates any of the religious facts and ideas contained in Perdue's books,[11] they are "divorced from the context imposed by [Perdue] and restated or reshuffled." *Feist,* 499 U.S. at 349.

Perdue's attempt to radically extend the "selection and arrangement" doctrine clashes directly with all of the cases emphasizing the broad leeway that must be given to authors exploring historical material. As *Hoehling* emphasized, in the context of historically based novels, "[a]bsent *wholesale usurpation of another's expression*, claims of copyright infringement where works of history are at issue are rarely successful" because "the cause of knowledge is best served when history is the common property of all." 618 F.2d at 974 (emphasis added). Despite Perdue's conclusory assertions,

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[11] In fact, *Da Vinci Code* does not even include some of the factual assertions in Perdue's list of nine items, such as the notion that "women were little better than slaves" by the time of the birth of Jesus. Perdue Decl., ¶ 55(B).

there is absolutely no wholesale – or any – usurpation of protected expression in books as different in plot, characters, settings, scenes, themes and time sequence as *Da Vinci Code* and *Daughter of God.*

## D. PERDUE'S VERY FEW ALLEGED SIMILARITIES IN ACTUAL EXPRESSION COME NOWHERE NEAR THE HIGH BAR OF "SUBSTANTIAL SIMILARITY" REQUIRED IN THIS CIRCUIT

Lost in his discourse on the "Great Goddess" and Emperor Constantine, and obsessed with similarities at far too high a level of abstraction, Perdue rarely focuses on any similarities that would actually qualify as protected expression. In the very few instances where Perdue attempts to analyze actual similarities of protected expression, these fail to hold up when scrutinized and only evidence Perdue's tendency to mislead this Court. This is perhaps best seen in Perdue's discussion of gold keys and the episodes at the Swiss banks which he describes as being "identical" in events, pacing, tone and sequence in each novel. Opp. Br. at 24-25. However, reviewing the actual texts of the works belies this conclusion.

First, it is indisputable that Swiss banks, safe deposit boxes and keys are classic *scenes a faires* in mysteries/thrillers. Second, the actual expression of the "gold keys" and the bank scenes are entirely distinct. Indeed, Perdue's comparison rests largely on a series of gross distortions. For example, while Perdue makes much of the alleged fact that both books feature gold keys – which he claims is unusual because gold is a soft metal – there is in fact *no* gold key in *Daughter.* Instead, a standard bank key that opens a safe deposit box (which Perdue never describes as silver, gold, steel or otherwise) is hidden under a gold *ingot* the size of a cigarette pack. *Daughter* at 312-314. By contrast, the key in *Da Vinci Code* is itself gold, ornately decorated with symbols of the Priory of Sion and laser-marked.[12] Defendant also argues that the paintings that hide the keys are both painted on wood, but again he is incorrect: the painting in *Da Vinci Code* is depicted as being on canvas. *Da Vinci Code* at 132. Further, the two paintings housing the keys are diametrically different and are not – as Perdue suggests

[12] Perdue's expert Gary Goshgarian argues that the expression here is similar because Perdue's ingot, which has Herman Goerring's account number on it, contains a swastika and Brown's key contains the symbol for the Priory of Sion. Goshgarian Decl., ¶ 5(c). The notion that a swastika and the symbol of the Priory of Sion are one and the same is frankly as offensive as it is ridiculous.

– both named for the "divine feminine at the center of the book" (Opp. Br. at 24): the painting in *Da Vinci Code* where Saunière hides the key before his death is Da Vinci's "Madonna of the Rocks" which depicts the Virgin Mary; the Virgin Mary is *not* the divine feminine entity featured in either book. By contrast, *Daughter* features a mundane painting of the entrance to the salt mine in the Austrian countryside where the Sophia shroud and Passion have been hidden (hence the name, "The Home of the Lady Our Redeemer [*i.e.* Sophia]"), painted for Hitler by an obscure German artist named Frederick Stahl in the 1930's.

The bank scenes are likewise dramatically different in both detail and general effect, as described in Brown's opening papers and as is evident upon a reading of the relevant passages. Plaintiffs'/Counterclaim Defendants' 56.1 Statement, ¶101. Three of the salient differences include the following: In *Da Vinci Code* but not *Daughter*, the bank president engineers the protagonists' escape; in *Da Vinci Code,* there is no shooting in the bank, whereas in *Daughter*, the bank scene is riddled with bullets and dead bodies; in *Daughter*, the bank officials display Nazi sympathies whereas nothing of the sort occurs in *Da Vinci Code*. While Perdue proclaims, in typical exaggerated fashion, that Brown has copied his "unique scene, seen in no other thriller" where "the Protagonists must break OUT of a bank" (Opp. Br. at 25), this conceit is commonplace and can be found, for example, in the bestselling Robert Ludlum thriller *The Bourne Identity* (1980) in which the protagonist also must escape from coincidentally a Swiss bank.[13]

Many other, even less substantial, similarities alleged in Perdue's opposition papers are similarly non-existent or weak. Perdue persists in his arguments that Opus Dei and its leader Bishop Aringosa are almost identical to the CDF and Cardinal Braun without providing an answer to any of the key differences outlined in Brown's opening brief (Opp. Br. at 25, 31-32), including that Aringosa

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[13] Perdue also clings to the assertion that the initial murders in the two books are a point of similarity. Opp. Br. at 6. Although he concedes that the occurrence of an initial murder is a necessary element of a murder mystery, Perdue fails to explain how they are similar, or to respond to any part of the detailed analysis in the opening brief (*id.* at 22-23) of the vast differences between the two murders and their very different connection with the heroines.

never condones any murders and is horrified to learn of them.[14] Despite Defendant's constant refrain of "plagiarism" – which is not in any event the governing standard – his many tables and factual citations do not reveal a single instance of shared expression, only strained and cherry-picked comparisons that, taken alone or cumulatively, altogether fail to show "substantial similarity."

## II.

## THE RECORD NEED NOT BE DEVELOPED ANY FURTHER IN ORDER FOR THE COURT TO GRANT THIS MOTION

The Court needs no additional evidence in order to decide this motion. It is well settled that it may grant the motion based on the pleadings and the documents incorporated therein, and nothing more, if it determines that substantial similarity is lacking.

### A. THIS MOTION MAY AND SHOULD BE DECIDED BASED ON THE INDISPUTABLE LACK OF SUBSTANTIAL SIMILARITY BETWEEN THE TWO NOVELS

Perdue does not rely on a single copyright case in arguing that plaintiffs "must rely upon matters outside the novels themselves" to prevail on this motion. Opp. Br. at 27-33. Contrary to his theory, it is well-settled Second Circuit law that the movant need not provide any additional evidence whatsoever, and, after a review of the respective works at issue, the Court may grant a motion to dismiss a copyright claim without permitting discovery if the alleged similarity concerns only noncopyrightable elements of claimant's work or no reasonable fact-finder could find the works substantially similar. *Williams,* 84 F.3d at 587.

The courts in this circuit very frequently dismiss copyright claims as a matter of law under the

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[14] *See also, e.g.*, Opp. Br. at 11, n.10 (alleging that "the context is exactly the same" in the books' respective description of certain facts concerning Emperor Constantine's death; in reality, the scene in *Daughter* is "set up" at the very beginning of the book when Seth Ridgeway examines a fictional ancient manuscript by Constantine's biographer recounting Sophia's miracles and the threats they posed to Constantine, while the context in *Da Vinci Code* is Teabing's pivotal explanation of the true nature of the Holy Grail to Neveu and Langdon (namely, that Jesus was married to Mary Magdalene and they created a bloodline), in the middle of the night at Teabing's palatial estate, after Langdon and Neveu have escaped from the bank with the cryptex); Opp. Br. at 15 (suggesting that the "keepers of the physical evidence" in both books are a point of similarity, when the Priory of Sion, which maintained the secret of the Holy Grail, is depicted as a fascinating secret society whose grand masters throughout history have included towering figures in the arts and sciences, whereas in *Daughter*, the Sophia Passion was originally hidden in the bowels of the Vatican, disappears during the rule of Heinrick IV in the 11th Century, and turns up in Bavaria in 1935, after which it is hidden by Hitler in the Austrian salt mines (*Daughter,* pp. 76, 175-180)).

"substantial similarity" test based on a comparison of the two works, whether under Rule 12[15] or after converting the motion to one under Rule 56.[16] Even where courts have converted Rule 12 motions into summary judgment motions, they have not hesitated to grant them without discovery.[17] Although Perdue dismisses these well established principles as "woefully oversimplified" (Opp. Br. at 33), beyond this name-calling he does not distinguish the massive authority on point.

Instead, Perdue relies on non-copyright cases to argue that "a summary judgment motion must be denied where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts." Opp. Br. at 29 (citing *Giannullo v. City of New York*, 322 F.3d 139 (2d Cir. 2003)). But in this context, the books themselves fulfill any such burden. [18]

Perdue also raises a host of red herrings. He argues that some of the assertions in Brown's opening brief and Rule 56.1 Statement are not supported by the record. However, the vast majority of the "material facts" set forth in Brown's opening brief and Rule 56.1 Statement come directly from the books at issue. Moreover, contrary to Perdue's suggestion, Brown can certainly rely on facts alleged

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[15] *See Boyle v. Stephens, Inc.*, 1998 WL 80175 (S.D.N.Y. Feb. 25, 1998), *aff'd*, 2001 WL 1313784 (2d Cir. Oct. 24, 2001); *Bell v. Blaze Magazine*, 2001 WL 262718 (S.D.N.Y. Mar. 16, 2001); *Buckman v. Citicorp*, 1996 WL 34185 (S.D.N.Y. Jan. 30, 1996), *aff'd*, 101 F.3d 1393 (2d Cir. 1996).

[16] *See Williams*, 84 F.3d at 587; *Kregos v. Associated Press*, 3 F.3d 656, 663 (2d Cir. 1993); *Arica Institute v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992); *Walker*, 784 F.2d at 48; *Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231, 240 (2d Cir. 1983); *Hoehling*, 618 F.2d at 977; *Hogan*, 48 F. Supp.2d at 310; *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); *Denker v. Uhry*, 820 F. Supp. 722, 729-30 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 301 (2d Cir. 1993). It is the court's function, not the jury's function, to separate out the unprotectible elements in a claim. *Williams*, 84 F.3d at 587-90; *Walker*, 784 F.2d at 48-50.

[17] *Williams*, 84 F.3d at 587; *see also Walker*, 784 F.2d at 48-49; *Arden v. Columbia Pictures Industries, Inc.*, 908 F. Supp. 1248, 1259-60 (S.D.N.Y. 1995) (listing cases). *And see 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"); *Idema v. Dreamworks, Inc.*, 90 Fed. Appx. 496, 498 (9th Cir. 2003); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1213 (11th Cir. 2000).

[18] Moreover, *Perdue* has the burden of proof as to substantial similarity – not just on his copyright counterclaim, but on Brown's claim seeking a declaration of non-infringement (12 *Moore's Federal Practice*, § 57.62 [2][d] (3d ed. 2005)). Under *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), where a non-moving party bears the burden of proof on an issue, it is sufficient for the party moving for summary judgment to "point[] out to the district court...that there is an absence of evidence to support the nonmoving party's case." And Second Circuit courts have recognized that *Giannullo* does not alter this rule: if the non-movant bears the burden of proof, *Celotex,* not *Giannullo*, applies (and thus the movant may merely point out the absence of evidence). *See Feuertado v. City of New York*, 337 F. Supp.2d 593, 599 (S.D.N.Y. 2004).

in Perdue's own pleadings, including Perdue's allegations that "the later ecclesiastical history described in Seth's, Zoe's and Hans Morgen's lengthy soliloquies is largely adapted from modern interpretations of Gnosticism and Christianity; the most influential of these is probably *The Gnostic Gospels* by Elaine Pagels," and his allegations that Brown similarly relied on *Holy Blood, Holy Grail.* Counterclaim ¶ 83, pp. 34-35; *see also Keating v. Carey,* 706 F.2d 377, 380 (2d Cir. 1983) (taking as true allegations in complaint and undisputed facts asserted in affidavits submitted on defendant's summary judgment motion). The relevant sections of Pagels' *The Gnostic Gospels* and *Holy Blood, Holy Grail* – influences expressly referenced in Perdue's Counterclaim and cited not for their truth but simply to underscore that this pre-existing factual information exists apart from the two novels – may be considered by the Court on a Rule 12 motion since they are integral to the parties' pleadings[19] and may undeniably be considered on a Rule 56 motion. Further, with respect to the few remaining facts not based on the books or Perdue's pleadings (including Brown's assertion that he conducted extensive research before writing *Da Vinci Code*), Brown made very clear in his opening brief that these were merely background facts and were not necessary to the disposition of the motion. *See* Moving Br. at 30; Plaintiffs'/Counterclaim Defendants' 56.1 Statement ¶¶ 1, 2, 3 and 5. Finally, almost every single issue on which Perdue purports to need discovery goes not to substantial similarity, but to access – *i.e.*, the degree to which Brown used other historical material and/or copied from Perdue (Opp. Br. at 27-28) – yet access is conceded (solely) for purposes of this motion.[20]

Finally, contrary to Perdue's contentions, courts do not need the guidance of experts to conclude that certain material in the works qualifies as ideas, facts and/or *scenes a faires*. In *Walker*, for instance, the Court on its own identified ideas such as "the experiences of policemen battling the

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[19] *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) ("Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.")

[20] Thus, for example, Perdue raises the issue of whether Leonardo's Codex was written on parchment because he considers it proof of copying, but it has no relevance to the question before this Court concerning substantial similarity. Further, this supposed "error" does not exist solely in Perdue's book, *Legacy*; indeed, the museum official charged with developing a system to preserve the priceless manuscript made the very same statement. *See*, McNamara Aff't, Ex. F.

hostile environment of the 41st precinct"; facts such as "the killing of the two police officers [which] actually occurred and was reported in the news media"; and *scenes a faires* including "drunks, prostitutes, vermin and derelict cars." *Walker*, 784 F.2d at 49-50. Such an approach is commonplace.[21]

This Court is fully equipped to find that murders at the start of a mystery, or competition between religious factions in a thriller involving a religious secret are stock elements. Although Perdue insists that discovery is necessary before the Court considers each work and uses its own judgment and basic common sense to separate idea from expression, identify stock characteristics, or cull out material which is plainly factual or Perdue *admits* is factual, (*see* Points I, A & B, *supra*), the Court is authorized by controlling law to render such decisions. No court need put the parties to the time and expense of discovery on such issues as whether "chases, confrontations between good and bad characters, murders, mysterious clues" and the like are stock elements of thrillers, as Perdue suggests is necessary (Opp. Br. at 32). Indeed, this Circuit vests district courts with the "important responsibility" of determining whether the works are inside the "outer limits within which juries may determine" the issue of substantial similarity. *Warner Bros.*, 720 F.2d at 245; *see also* Moving Br. at 17 & n.5.

## B. EXPERT TESTIMONY IS ROUTINELY EXCLUDED

The one thing that should not be given *any* weight on this motion is the testimony of Perdue's so called experts. As Brown established in his opening brief, and Perdue does not counter, courts routinely exclude the testimony of experts assessing substantial similarity in this context, since the determination is to be made from the viewpoint of a lay observer. *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 724 & n.8 (S.D.N.Y. 1982) (granting summary judgment without consideration of expert's

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[21] *See Williams*, 84 F.3d at 589 (pointing out "the unprotectible idea of a dinosaur zoo" and characterizing "electrified fences, automated tours, dinosaur nurseries, and uniformed workers" as "classic *scenes a faire*" that flow from this idea); *Arden*, 908 F. Supp. at 1262 (identifying *scenes a faire* flowing from the situation of an endlessly repeating day); *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.) (holding that plaintiff's use of the idea of a prison rodeo was noncopyrightable fact, since "the rodeo was a newsworthy event, placed in the public domain through its treatment in various news articles"), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

opinion; stating that where issue is substantial similarity expert's affidavit is not properly considered; listing cases in footnote); *Nelson v. Grisham*, 942 F. Supp. 649, 652-53 (D.D.C. 1996) (expert testimony not relevant to substantial similarity determination), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997). As Judge Learned Hand wrote after evaluating the similarity of the two plays in *Nichols*, expert opinions in this area:

> ought not to be allowed at all...it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded.

45 F.2d at 123. In sum, the Court should evaluate substantial similarity based on "its considered impressions upon its own perusal" of the two novels, rather than the interpretations of experts retained by the parties.[22]

## CONCLUSION

Based on the record before it, we respectfully ask this Court to conclude what any reader of the books at issue will immediately comprehend: that *Da Vinci Code* and *Daughter* share no substantial similarity in protectible expression. Plaintiffs and Counterclaim Defendants respectfully request that the Court grant judgment on the pleadings and dismiss the counterclaims.

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[22] Defendant's experts are particularly ill-suited to assist the Court. First, both experts fail to apply the controlling legal standard, namely whether the works are "substantially similar." *See* n.1, *supra*. Further, each expert does nothing more than compare the characteristics of the books in the exact same fashion that anyone else – including this Court – would do. Finally, Mr. Olsson improperly draws not just on *Daughter* but on Perdue's other books to increase the alleged similarities.

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