

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

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF
RANDOM HOUSE'S AND CERTAIN COUNTERCLAIM DEFENDANTS'
MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS**

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Plaintiff Random House, Inc. ("Random House") and 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 five entities collectively, "Movants") respectfully move pursuant to the Copyright Act, 17 U.S.C. § 505, and Federal Rule of Civil Procedure 54(d) for an award of costs and attorney's fees, as prevailing parties in the above-captioned action. Because the Court has reviewed the record in this case in granting summary judgment in Plaintiffs' and Counterclaim Defendants' favor, this Memorandum will assume general familiarity with the facts of this case.

PRELIMINARY STATEMENT

Based on trivial alleged similarities and vast overstatement of the breadth of copyright protection, Lewis Perdue ("Perdue") claimed in this action that Dan Brown's bestselling thriller *The Da Vinci Code* ("*Da Vinci Code*") infringed on his copyrights in two books, *Daughter of God* ("*Daughter*") and *The Da Vinci Legacy* ("*Legacy*"). Well before and throughout the litigation, Movants made crystal clear to Perdue that *Da Vinci Code*'s author, Dan Brown ("Brown") had never heard of Perdue nor read his books, and that – even if he had – Perdue could not come close to showing the requisite "substantial similarity" in protectible expression between his books and Brown's. Well aware of the case law, Perdue nonetheless actively pursued his accusations of copyright infringement in a widespread publicity campaign and in this Court despite the evident fact that the *only* alleged similarities were abstract ideas, historical facts and stock elements common to the genre, expressed by the two authors in strikingly different ways. On August 4, 2005, this Court followed well-established case law, granting summary judgment to Movants in all respects without the need for any discovery, and issuing a declaratory judgment that "plaintiffs' authorship, publication and exploitation of rights in and to

The Da Vinci Code do not infringe any copyrights owned by defendant.” August 4, 2005 Memorandum Opinion and Order (“Decision”), pp. 25-26.

The Copyright Act provides that the Court may award full costs, including reasonable attorney’s fees, to the prevailing party in a copyright action. In deciding a motion for attorney’s fees under the Copyright Act, courts consider the objective unreasonableness of the non-prevailing party’s position, as well as other factors such as any improper motives on the part of the non-prevailing party. Here, both features are strongly present. The only similarities between Perdue’s two books and *Da Vinci Code* were either grossly overstated by Perdue and/or related to clearly non-copyrightable elements, rendering his claim objectively unreasonable. As this Court firmly concluded after listing the key alleged similarities highlighted by Perdue, “[a]ll of these similarities... are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue’s work.” Decision, p. 14.

Moreover, it is clear that Perdue exploited his frivolous accusations as a powerful marketing tool for his own books, *Daughter* and *Legacy*. Rather than simply file his claims in court, where he faced likely dismissal, Perdue first launched a 14-month publicity campaign, complete with press releases, web sites, and bulletin boards – all of which simultaneously aired his exaggerated accusations and touted his own books. These efforts to exploit his flimsy allegations for his own gain continued after Random House was forced to file suit against Perdue. As a result of Perdue’s successful publicity campaign to link his books with Brown’s, Perdue secured the re-issue of *Legacy*, saw unprecedented sales of his two titles, and sold the movie rights in both books. Movants respectfully request an order awarding recovery of all of their fees and recoverable costs based on Perdue’s objectively unreasonable claims and the ulterior motives which characterized his public campaign against Brown. Perdue profited

handsomely by claiming that his books were the source of Brown's clever, provocative work, and it is only fitting that he should forfeit these ill-gotten gains to reimburse Movants' legal fees.

ARGUMENT

I.

THE COPYRIGHT ACT AUTHORIZES THE COURT TO AWARD ATTORNEY'S FEES TO PREVAILING PARTIES

The Copyright Act expressly provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.¹ The decision to award attorney's fees to the prevailing party under this statute rests within the sound discretion of the Court. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994); *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 120-21 (2d Cir. 2001).

Prior to *Fogerty*, prevailing plaintiffs were routinely awarded attorney's fees but prevailing defendants (including plaintiffs such as Brown and Random House obtaining declarations of non-infringement) were required to establish plaintiff's bad faith. The *Fogerty* Court erased this distinction, and held that "prevailing plaintiffs and prevailing defendants are to be treated alike." 510 U.S. at 534. The U.S. Supreme Court emphasized that both prevailing plaintiffs and defendants uphold the purposes of the Copyright Act, albeit in different ways. As

¹ In addition to this statutory language, costs may be awarded under F. R. Civ. P. 54(d), which provides for an award of costs "as of course unless the court directs otherwise". The allowable costs under 17 U.S.C. § 505 and Rule 54 are the same (*see United States Media Corp. v. Edde Entm't, Inc.*, No. 94 Civ. 4849 (MHD) 1999 WL 498216 (S.D.N.Y. Jul. 14, 1999)) and include but are not limited to fees payable to the court clerk and for transcripts, printing, and docketing. 28 U.S.C. § 1920; *see also, NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458 (S.D.N.Y. 2001). While § 505 allows for the discretionary award of costs, such awards are routinely granted. *See Antenna Television, A.E. v. Aegean Video, Inc.*, No. 95-CV-2328 ERK 1996 WL 298252 (E.D.N.Y. Apr. 23, 1996); *NFL, supra*, 131 F. Supp. 2d at 458.

the Court emphasized:

The primary purpose of copyright is not to reward the labor of authors, but [t]o promote the “Progress of Science and the useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

Fogerty, 510 U.S. at 527. As a necessary corollary, “defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.* Thus, the Supreme Court specifically held that “a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright,” and should have the same right to recover its attorney’s fees and costs. *Id.* This reasoning is directly applicable to this case, where Perdue sought to monopolize ideas and information freely available for all to use, such as notions of the divine feminine, the teachings of the Gnostic Gospels, and the history of Emperor Constantine.

The *Fogerty* Court identified certain non-exclusive factors to guide courts in the exercise of their discretion, including: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 535 n.19. *See also Crescent Publ’g Group, Inc. v. Playboy Enterprises, Inc.*, 246 F.3d 142, 147 (2d Cir. 2001); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1011 (2d Cir. 1995). Application of these factors must be faithful to the purposes of the Copyright Act. *Id.*

Courts in the Southern District of New York have frequently awarded fees to prevailing defendants since *Fogerty*. *E.g., Arclightz and Films v. Video Palace Inc.*, No. 01 Civ. 10135 (SAS), 2003 WL 22434153, at *8 (S.D.N.Y. Oct. 24, 2003); *Torah Soft Ltd. v. Drosnin*, No. 00 Civ. 5650 (JCF), 2001 WL 1506013, at *6 (S.D.N.Y. Nov. 27, 2001); *Earth Flag Ltd. v. Alamo*

Flag Co., 154 F. Supp. 2d 663, 670 (S.D.N.Y. 2001); *Adsani v. Miller*, No. 94 Civ. 9131 (DLC), 1996 WL 531858, at *17 (S.D.N.Y. Sept. 19, 1996); *Littel v. Twentieth Century Fox Film Corp.*, No. 89 Civ. 8526 (DLC), 1996 WL 18819 at *4 (S.D.N.Y. Jan. 18, 1996), *aff'd sub nom. DeStefano v. Twentieth Century Fox Film Corp.*, 110 F.3d 943 (2d Cir. 1996); *Screenlife Establishment v. Tower Video, Inc.*, 868 F. Supp. 47, 53 (S.D.N.Y. 1994).

The “objective reasonableness” of the losing party’s positions is entitled to “substantial weight” in this Circuit. *Matthew Bender*, 240 F.3d at 122; *Earth Flag*, 154 F. Supp. 2d at 666. A claim may be “objectively unreasonable” even if it is not so weak as to be frivolous; the “infirmity of the claim” need only be “pronounced.” *Torah Soft*, 2001 WL 1506013 at *4. Courts have routinely granted fees to prevailing defendants solely upon a showing of objective unreasonableness, even absent other factors. *E.g.*, *Earth Flag*, 154 F. Supp. 2d at 666; *Adsani*, 1996 WL 531858, at *14-15; *Littel*, 1996 WL 18819, at *3-4; *Screenlife*, 868 F. Supp. at 52.

Even where the nonprevailing party’s position is objectively reasonable, the presence of other factors may justify an award of fees. *Matthew Bender*, 240 F.3d at 122. For instance, Second Circuit courts have granted fees based on plaintiff’s bad faith in bringing his claims. *Torah Soft*, 2001 WL 1506013, at *5. Ultimately, all of the relevant factors are subservient to the broader issue of whether an award of fees furthers the policies of the Copyright Act. *Matthew Bender*, 740 F.3d at 121.

II.

THE COURT SHOULD AWARD MOVANTS REASONABLE ATTORNEY’S FEES

Since the Court granted Movants’ motion for summary judgment and for a declaratory judgment, they are prevailing parties. *E.g.*, *Arclightz*, 2003 WL 22434153 at *2; *Screenlife*, 886 F. Supp. at 50. Moreover, this case is exactly what the Supreme Court envisioned when it held in *Fogerty* that awarding attorney’s fees to prevailing defendants may be necessary to promote

the policies of the Copyright Act. By propounding copyright claims predicated on nothing more than unprotected ideas, historical facts and stock elements common to thrillers – all indisputably unprotected under the Copyright Act – Perdue’s claims were patently unreasonable and sought to undermine core principles of copyright. Thus, Movants’ stance in this action furthered the policies of the Copyright Act because there is a strong public interest in vigorously defending against meritless copyright claims which seek to extend an author’s monopoly far beyond the protections afforded under the Act. Moreover, given the manner in which Perdue launched, publicized and litigated his flimsy accusations, he was clearly motivated in large part by a desire to boost the sales and licensing opportunities for his own books. In short, all of the factors relevant to this motion strongly favor awarding fees.

A. Perdue’s Claims were Objectively Unreasonable

As set forth above, the factor of objective reasonableness is entitled to substantial weight. *Matthew Bender*, 240 F.3d at 122. Indeed, this Court has held that, where a case presented “a straightforward copyright claim that was objectively unreasonable” and did not involve complicated issues:

an award of attorney’s fees in such a case would beneficially deter, rather than excessively chill, future lawsuits. Failing to award attorney’s fees in such situations would invite others to bring similarly unreasonable actions without fear of any consequences. Under the circumstances of this case, and ‘to advance considerations of compensation and deterrence, defendants must be compensated for being forced to defend against such a baseless action.

Earth Flag, 154 F. Supp. 2d at 668. Accordingly, courts have routinely awarded substantial attorney’s fees in such circumstances. *See, e.g., Arclightz*, 2003 WL 22434153, at *8 (awarding \$171,137 in attorney’s fees after grant of summary judgment, based on objective unreasonableness of plaintiff’s claims); *Earth Flag*, 154 F. Supp. 2d at 669 (same, awarding

\$106,126); *Adsani*, 1996 WL 531858, at *17 (same, awarding \$107,993).

Specifically where, as here, the Court grants summary judgment based on the lack of substantial similarity between the parties' respective creative works, and the issue is not "a close one," it is appropriate to award attorney's fees. *Torah Soft*, 2001 WL 1506013, at *4 (awarding fees where similarities related to "obvious, garden variety or routine selections," "commonplace or stock features," ideas and other unprotectible elements); *see also Earth Flag*, 154 F. Supp. 2d at 667 (awarding fees where similarities between works concerned only non-copyrightable elements); *Adsani*, 1996 WL 531858, at *15-16 (awarding fees where, after analyzing plaintiff's various inaccuracies and "extravagant allegations of substantial similarity," Court concluded that, beyond the most general similarities, the books bore almost no relationship to each other); *Littel*, 1996 WL 18819, at *2-3 (awarding fees where, although book and movie were both titled "Predator" and were "action-packed," they bore no resemblance to one another in terms of setting, plot, sequence or individual scenes).

The instant case fits squarely within this line of precedent in two key respects.

First, this case turned on the straightforward legal issue of substantial similarity. As courts in this circuit have often held, substantial similarity is not a novel or complex legal issue. *Torah Soft Ltd. v. Drosnin*, No. 00 Civ. 5650(JCF), 2001 WL 1506013, at *5 (case turning on issue of substantial similarity did not raise novel or complex issues); *Adsani*, 1996 WL 531858, at *16 (same); *Littel*, 1996 WL 18819, at *3 (same). *Compare NFL v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458 (S.D.N.Y. 2001) at 484-85 (fees denied where case had presented complex issue of first impression in Second Circuit, involving application of Copyright law to secondary transmission of programs by satellite to other countries). It is not significant that comparing two works to assess substantial similarity requires extensive analysis, as this analysis

is not complex: “the sum of many zeroes is still zero.” *Torah Soft*, 2001 WL 1506013, at *5.

Second, the only similarities between Brown’s and Perdue’s works were vastly overstated by Perdue and/or related to non-copyrightable elements such as historical facts, ideas and *scenes a faire*, rendering Perdue’s claims objectively unreasonable. *Torah Soft*, 2001 WL 1506013, at *4; *Earth Flag*, 154 F. Supp. 2d at 667; *Adsani*, 1996 WL 531858, at *16; *Littel*, 1996 WL 18819, at *2-3. As the Court concluded after reviewing Perdue’s litany of key alleged similarities, “[a]ll of these similarities... are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue’s work.” Decision, p. 14.

The many overstatements and inaccuracies contained in Perdue’s submissions are critically relevant to the determination of objective reasonableness. *Adsani*, 1996 WL 531858, at *14 n.16 (in assessing objective reasonableness, “it is appropriate to take notice of various inaccurate statements” in the report of an expert retained by plaintiff to assess the substantial similarity of the parties’ books). In *Adsani*, the Court catalogued numerous errors, exaggerations and “extravagant allegations of substantial similarity” in plaintiff’s expert’s report and a 32-page exhibit further detailing the comparison. *Id.* at 14-15. “Generally,” the Court concluded, “where the [expert] report’s description is accurate, it is because it describes the books in such general terms as to render the comparison, from a legal point of view, meaningless.” *Id.* at 15.

Perdue’s submissions bore a striking resemblance to those described in *Adsani*. Perdue’s answer and counterclaim contained a 36-page comparison of the two authors’ books, replete with numerous charts.² His answering papers in response to Movants’ motion relied on two expert

² Courts consistently reject such catalogues of random similarities, rendering Perdue’s approach even more objectively unreasonable. See *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996) (describing lists of specific similarities as “inherently subjective and unreliable”); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (noting the “difficulty of comparing unified artistic works on the basis of such scattered analogies”).

reports with pages and pages of additional scattershot comparisons. As set forth in Plaintiffs'/Counterclaim Defendants summary judgment papers, incorporated herein, Perdue's counterclaim and motion papers were, as in *Admani*, chock full of inaccuracies³ and "extravagant allegations of substantial similarity."⁴ The only real similarities were so general as to be legally meaningless.⁵ As this Court concluded, "Perdue has not alleged that his unique *expression* of these ideas and themes were copied." Decision, p. 15.

Thus, for example, Perdue repeatedly argued that Brown copied his use of the "divine feminine" when, as this Court found, *Da Vinci Code*'s "expression of the divine feminine and its related themes differ markedly from their expression in *Daughter of God*" since in *Da Vinci Code*, Mary Magdalene, a historical figure and the supposed wife of Christ, represents the divine feminine and in *Daughter of God*, Perdue creates a fictional second messiah born in a remote

³ Perdue persistently fabricated similarities where none existed, from large points (*e.g.*, his claims that the books featured "an identical hero and an identical heroine," Counterclaim ¶ 71) to small ones (*e.g.*, his much emphasized claim that the novels both feature gold keys, when *Daughter* contains a gold "ingot" hiding an ordinary safe deposit key, but no gold key, Decision, p. 15 n.7). Movants have already listed these and other inaccuracies in detail in their summary judgment papers and will not belabor them further here.

⁴ To take one glaring example, Perdue presented the plots of *Da Vinci Code* and *Daughter of God* as nearly parallel, offering pages and pages of supposed similarities. Some of those alleged parallels were falsely manufactured by Perdue by plucking characteristics from *Daughter* and characteristics from *Legacy* and then, without indicating that they came from different books, asserting that *Da Vinci Code* shares those same elements. *See, e.g.*, Counterclaim, ¶¶ 71-82. As should have been readily apparent to Perdue, "[t]he fundamental essence and structure of the plots are not substantially similar and offer no support to Perdue's infringement claim." Decision, p. 21. As this Court succinctly put it and any reader would recognize: "*Da Vinci Code* is simply a different story than that told by *Daughter of God*." *Id.*

⁵ For instance, as the Court discussed in its Decision, many of the allegedly common themes or plot developments were stock themes obviously common in literature, such as "the wolf in sheep's clothing," "history is relative and is controlled by victors, not losers," and "through [the union of the hero and heroine], they become much more than the sum of their parts." Decision, pp. 14, 15. Of note, although Perdue argued before this Court at length that *Code* and *Daughter* were substantially similar because of their allegedly parallel uses of Swiss banks, Perdue himself admitted in an unguarded moment that, "You would expect to find a Swiss bank and a safe deposit box in a thriller." McNamara Aff. Ex. J, p. 4.

mountain village near the Anatolian city of Smyrna. Decision, p. 18 (emphasis added). Further, Perdue argued extensively that *Da Vinci Code* infringed upon his works because they both discussed early Christian history and beliefs, including Emperor Constantine and the Council of Nicea – whereas, as this Court reiterated, “it is without question that references to historical figures and events constitute unprotectible elements under the laws, as ‘no claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items.’” Decision at 14, quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (emphasis added). Indeed, prior to this action, Perdue had even conceded in the Author’s Note to *Daughter* that these events were based on historical facts. Moreover, despite the clarity of the law regarding the use of historical material, almost every one of the 23 sections in Perdue’s Statement of Facts in his Opposing Memo of Law referenced religion and religious facts. Further yet, Perdue cited 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*.

The objective unreasonableness of Perdue’s pursuit of this litigation is also illustrated by his handling of the claims regarding *Legacy*. In Perdue’s public accusations against Brown and in his counterclaim filed in this Court, Perdue repeatedly alleged that Brown had copied extensively from *Legacy*. Yet when Movants challenged that assertion in their motion papers, pointing out the complete lack of similarity between *Code* and *Legacy* in all their essential features, Perdue essentially abandoned his claim regarding *Legacy*, completing failing to undergo the analysis of plot, characters, themes, etc. required by the Second Circuit. As this Court succinctly summarized, “Although Perdue also asserts infringement of his earlier novel,

The Da Vinci Legacy, he offers no arguments in his moving papers in support of his claims.”

Decision, p. 9, n. 4. Nonetheless, when this Court questioned Perdue’s counsel at oral argument about whether Perdue had abandoned his claims regarding *Legacy*, counsel insisted that those claims remained part of Perdue’s case – cementing just how unreasonable his posture has been in this whole matter. In short, Perdue required both Movants, and this Court, to expend significant time and effort reading and analyzing *Legacy* although Perdue had no even passable arguments to put before this Court. In sum, as the Movants’ previously submitted briefs and this Court’s recent decision vividly demonstrate, Perdue’s arguments in support of a finding of substantial similarity were patently unreasonable.

Finally, it was objectively unreasonable for Perdue to name Columbia, Sony Entertainment, Sony Releasing and Imagine – obviously licensees of Brown and/or Random House – as counterclaim defendants. *See Ortner Aff.* ¶ 5. There was no reasonable basis to conclude that, had the Court found *Da Vinci Code* to be infringing, these parties would have been so irresponsible as to have incorporated allegedly protectible elements into their planned motion picture without proper licenses or authorizations. Indeed, Perdue had no basis to believe that the contemplated motion picture version of *Da Vinci Code* would contain any of the elements which he claimed were protectible from his works. Joining these parties served no justifiable purpose whatsoever, and it is difficult to escape the conclusion that they were named in order to harass them, cause them to incur legal fees and feed into Perdue’s publicity campaign. A fee award would deter Perdue and other claimants from recklessly dragging unnecessary parties into litigation in this manner.

B. Perdue’s Motivation in Pursuing His Allegations of Infringement Supports an Award of Attorney’s Fees

Improper motivations in the conduct of a litigation are also a valid ground for awarding

fees. *Matthew Bender*, 240 F.3d at 125. In *Torah Soft*, for example, the Court relied on the fact that – even though plaintiff’s copyright claim was, “if not frivolous ... extremely tenuous” – its conduct “provide[d] strong circumstantial evidence that the copyright claim was not brought because of its inherent merit but because of its value in settlement negotiations....” *Torah Soft*, 2001 WL 1506013, at *5. The Court concluded that “a party that knowingly gambles on an unreasonable legal theory in order to achieve a secondary gain – in this case, the leveraging of settlement – is indeed improperly motivated.” *Id.*

This case is strikingly similar. As set forth more fully in the Affidavit of Elizabeth McNamara, *Da Vinci Code* instantly became a mega-bestseller, shooting to the top of *The New York Times* bestseller list in its first week of publication. McNamara Aff. ¶ 5. Like Michael Crichton and John Grisham before him⁶, Brown’s stunning success brought out an opportunist willing to accuse him of copyright infringement for his or her own gain. Here, it was Perdue who made myriad attempts to exploit his frivolous allegations of copyright infringement in order to draw attention to and promote his own books, *Daughter* and *Legacy*, neither of which had achieved significant commercial success prior to the publication of *Da Vinci Code*. *Legacy*, in fact, was long out of print. Thus, shortly after *Da Vinci Code* appeared on the bestseller list, Perdue embarked on his campaign by publicly asserting that Brown had duplicated all of the important elements of *Daughter*, as well as *Legacy*. *Id.* ¶ 9. Rather than pursue his supposed grievances in court, where he faced likely dismissal, he launched a 14-month publicity effort to link his books to *Da Vinci Code* based on his exaggerated claims – a campaign that subsequently continued in full force after Brown and Random House were forced to sue Perdue in September 2004. *Id.* ¶¶ 9, 12-13. As an apparent result of his publicity campaign identifying his works as

⁶ *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996); *Nelson v. Grisham*, 942 F. Supp. 649 (D.D.C. 1996), *aff’d*, 132 F.3d 1481 (D.C. Cir. 1997).

the supposed source of Brown's hugely successful work, Perdue succeeded in securing a relaunch of *Legacy*, obtained sales of *Daughter* and *Legacy* beyond anything his books had ever achieved, and sold motion picture rights in both novels. *Id.* ¶ 14. Perdue's website for *Legacy* is telling evidence of his ulterior motives in publicizing his accusations; there, Perdue and his publisher forthrightly proclaim that one of the two "KEY SELLING POINTS" for the re-issued book is that "Perdue has received major publicity for comparisons between his novel *Daughter of God* and David [sic] Brown's bestseller *The Da Vinci Code*, including an article in *Newsweek* (6/9/03). *Id.* ¶ 9.

More specifically, Perdue first wrote to Doubleday, a division of Random House, in May, 2003, asserting his allegations of copying. *Id.* ¶ 10. In response, Random House's General Counsel stated unequivocally that Brown had never heard of Perdue nor read his books, including *Daughter* or *Legacy*. Nor did Random House see any similarity between the respective books that could possibly give rise to a copyright claim. *Id.* ¶ 11. Despite Random House's representation, echoed repeatedly by Brown's counsel, Perdue mounted a prolonged press campaign – involving press releases, interviews and other contacts with the media – in a concerted effort to widely disseminate his tenuous claims of plagiarism and boost interest in his books. *Id.* ¶ 12. His claims were wildly inflated; as *The New York Sun* reported, "He . . . claims that the basic setup of the two books – including the protagonist, the antagonist, the female love interest, the antagonist organization, and the MacGuffin – is . . . remarkably similar." *Id.* As a result of his concerted campaign, articles recounting Perdue's charges and threats of litigation appeared in *Newsweek*, *The New York Post*, *The International Herald Tribune*, *San Francisco Chronicle*, *The New York Times* and other publications. *Id.*

As a companion to his press accusations, Perdue also launched an Internet campaign to

further disseminate his accusations and trumpet his own works, creating his own websites, posting entries on other websites, and posting the list of exaggerated similarities previously sent to Random House, which made patently false comparisons. *Id.* ¶ 13. He even created a “Daughter of God Message Board” (“Did The Da Vinci Code Borrow Too Much From Daughter of God? Read This and You Decide”), containing plugs for his books and a link to his biography, and a “Reading Group Guide” comparing *Daughter* and *Da Vinci Code*. In these various fora, Perdue catalogued various supposed developments in the controversy – while simultaneously touting his own books. *Id.*

As an apparent result of Perdue’s concerted campaign to link *Da Vinci Code* and his two books, and thereby increase interest in his books, Perdue was able to secure the reissue of a mass market edition of *Da Vinci Legacy* in January 2004 by Tor, a publisher affiliated with Holtzbrink. *Id.* ¶ 14. Despite the fact that, as revealed in this litigation, there are almost no parallels between *Da Vinci Code* and *Legacy* except for their very different uses of Da Vinci,⁷ the publicity for the new edition was shameless in its attempt to capitalize on the success of Brown’s *Da Vinci Code*. Perdue’s website for *Legacy* boldly proclaims, “The Da Vinci Legacy: The ORIGINAL Leonardo and Religion Thriller” and contains explicit references to *Da Vinci Code*, including a quote from Perdue’s expert John Olsson (“This is the most blatant example of in-your-face plagiarism I’ve ever seen. There are literally hundreds of parallels.”) and Perdue’s own self-serving allegations in the *San Francisco Chronicle* (“One ‘Da Vinci’ has sold millions, the other is little known. Lewis Perdue alleges the popular novel has his book to thank.”). *Id.* As noted above, the publisher’s sell-sheet, posted on Perdue’s website for the book, revealed that

⁷ As noted above, the utter lack of any similarities between the two works is underscored by the fact that in opposition to Movant’s motion for summary judgment, Perdue did not even pursue his argument that the books were substantially similar.

the key selling point was Perdue's attention-getting campaign against Brown. *Id.*

On information and belief, Perdue's campaign to improperly associate his works with *The Da Vinci Code* and to trade on its phenomenal success had its intended effect: *Daughter* and the reissued *Legacy* saw significant increases in sales, and, on information and belief, for the first time a Perdue work even reached *The New York Times* bestseller list. *Id.* ¶ 15. As his publishing house admitted, "The publicity is helping," says his editor at Tor, Natalie Aponte, of the published reports on the controversy." *Id.* In addition, as a result of his campaign, Perdue successfully sold an option to acquire film rights to his two books. *Id.* It is entirely appropriate for the Court to award significant legal fees to Movants given the ill-gotten gains Perdue reaped by using his flimsy accusations of copyright infringement to draw attention to his works.

After Perdue's publicity campaign had successfully gained significant attention for his books, but had apparently run its course, he turned to extracting a settlement payment from Random House. On or about September 2, 2004, counsel for Perdue wrote to Random House and Brown's attorney giving notice of Perdue's intention to commence an action for copyright infringement in the immediate future if Random House and Brown declined to settle the matter by September 13, 2004. *Id.* ¶ 16. Instead, Random House was forced to bring this action for a declaratory judgment.

Thus, this is exactly the kind of case that warrants an award of fees and costs to the prevailing defendants. In this case, it was "important that the boundaries of copyright law be demarcated as clearly as possible," in order to further the goals of the Copyright Act and deter others from trying to use similarly weak allegations of infringement to ride on the coattails of bestselling authors. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 at 527. As this Court recognized, *Da Vinci Code* had not infringed Perdue's copyrights. Thus, it was appropriate for

Plaintiffs/Counterclaim Defendants to seek a declaration to that effect and advance their meritorious defenses. *Id.* An attorney's fee award would affirm these important principles.

III.

MOVANTS' ACTUAL ATTORNEY'S FEES IN THIS CASE ARE REASONABLE

It is well established that, in determining the amount of reasonable attorney's fees, courts should consider the amount of legal work performed by the prevailing party's attorneys, the skill of the attorneys and the results achieved. *Earth Flag*, 154 F. Supp. 2d at 668-69, *Screenlife*, 868 F. Supp. at 53. The work performed by Movants' counsel in responding to Perdue's groundless claims of infringement, filing a complaint and preparing and arguing a dispositive motion was substantial. *See* McNamara Aff. ¶¶ 28-30; Ortner Aff. ¶ 7. Because of the immense value of the intellectual property rights at stake – Perdue sought not only to enjoin distribution of the book, still an international bestseller, but to block the release of a multimillion dollar movie – the parties' retained highly experienced litigators with extensive copyright expertise. McNamara Aff., ¶ 27; Ortner Aff., ¶ 10. And, of course, Movants achieved completely successful results, succeeding in every respect.

A prevailing party's actual billing arrangement with its counsel is a significant, although not necessarily controlling, factor in determining what magnitude of fee award is "reasonable". *Crescent Publ'g Group, Inc. v. Playboy Enterprises, Inc.*, 246 F.3d 142, 151 (2d Cir. 2001). Here, Movants have billed at reasonable rates which were in line with prevailing rates for experienced intellectual property litigators in this market. *Yurman Designs, Inc. v. PAJ, Inc.*, 125 F. Supp. 2d 54, 57-58 (S.D.N.Y. 2000) (comparing requested rates of "sophisticated mid-sized New York City law firms involved in an intellectual property case" to those of large or specialty New York City firms; approving rates "commensurate with the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and

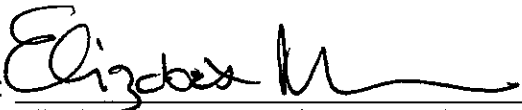
reputation”), *aff’d*, Nos.01-7043, 01-7093, 2002 WL 200242 (2d Cir. Feb. 8, 2002). *See* McNamara Aff. ¶ 31; Ortner Aff. ¶¶ 8-9. Having prevailed completely, Movants are entitled to recover their full attorney’s fees of \$310,324.11, with recoverable costs of \$256.13. McNamara Aff. ¶¶ 33-36; Ortner Aff. ¶¶ 11-14.

CONCLUSION

Movants prevailed in every sense. Perdue’s legal and factual arguments were baseless and improperly motivated. Movants respectfully submit that the Court should grant their motion for costs and attorney’s fees under 17 U.S.C. § 505 and Federal Rule of Civil Procedure 54(d).

Dated: New York, New York
September 2, 2005

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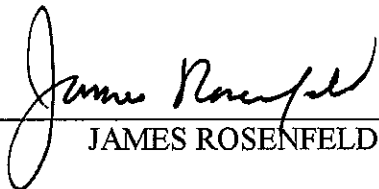
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CERTIFICATE OF SERVICE

I, James Rosenfeld, hereby certify that on the 2nd day of September, 2005,
I caused to be served by first class mail, a true and correct copy of the NOTICE OF MOTION,
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF RANDOM HOUSE'S AND
CERTAIN COUNTERCLAIM DEFENDANTS' MOTION FOR PREVAILING PARTY
ATTORNEY'S FEES AND COSTS, AFFIDAVIT OF ELIZABETH A. MCNAMARA IN
SUPPORT OF MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS
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