

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 :
 WILLIAM ROGER DEAN,
 :
 Plaintiff,
 :
 -against-
 :
 JAMES CAMERON, TWENTIETH
 CENTURY FOX FILM CORPORATION, :
 TWENTIETH CENTURY FOX HOME :
 ENTERTAINMENT and LIGHTSTORM :
 ENTERTAINMENT; :
 Defendants. :
 -----X

13-CV-4479 (JMF)

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

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Plaintiff, William Roger Dean, (“Plaintiff” or “Dean”) respectfully submits this memorandum of law in opposition to Defendants’ motion to dismiss Dean’s Amended Complaint for failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

Dean is an artist and designer whose work has appeared in numerous gallery shows and on the covers of approximately 100 albums which have sold in the many millions of copies. Dean has undergraduate and graduate degrees in art and received a special award while a graduate student. He has been producing paintings, drawings, and album covers for many years. His work has been exhibited in numerous galleries and other shows. Dean has work in a collection at the Victoria and Albert Museum in London, England. This is an action for copyright infringement arising out of Defendants’ willful copying and exploitation of elements of 14 original images created by Dean and used without a license in the motion picture *Avatar* (and related exploitation such as *Avatar* official books) without any compensation to Dean. Dean submits that Defendants’ motion to dismiss the Complaint lacks any basis in fact or law and should be denied in all respects.

Defendants’ motion properly states the general standard for a motion to dismiss a copyright claim at the pleading stage in that the Second Circuit has held that copyright claims can and will only be dismissed either because the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010). However, in the circumstances of this case, a reasonable jury could find that there is substantial similarity between Dean’s work and portions of the film *Avatar*. Therefore, this motion should be denied, discovery should proceed and the action be submitted to a jury.

ARGUMENT

I. PLAINTIFF'S COPYRIGHT INFRINGEMENT CLAIMS SHOULD NOT BE DISMISSED BECAUSE THERE IS SUBSTANTIAL SIMILARITY BETWEEN THE COPYRIGHTABLE ELEMENTS OF PLAINTIFF'S WORK AND THE AVATAR FILM

In order to establish copyright infringement, Plaintiff must prove two elements: (1) ownership of a valid copyright (not an issue here), and (2) copying of elements of the work that are original. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). The question on this motion is whether there were protectable elements of Dean's work which were taken by the film *Avatar*. *Peter F. Gaito*, 602 F.3d at 63 (2d. Cir. 2010). However, the issue of copyrightability demonstrating creative expression is an issue for the jury. *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 674 (2d Cir. 1998). Such copyrightability only requires a "modicum of creativity." *Feist*, supra at 346. Thus, any question of whether Dean's work is sufficiently original to be copyrightable is a jury issue and cannot be resolved on this motion. Plaintiff submits that the issues raised by Defendants on this motion intertwine issues of substantial similarity and copyrightability in a manner which means that these issues should be resolved by a jury.

The applicable standard in this Circuit for substantial similarity is that of a hypothetical "ordinary observer". If the Court determines that one or more works contain both protectable and unprotectable elements a "more discerning ordinary observer test may be used." *Id* at 66. As demonstrated below, and in the declaration of Dean submitted herewith ("Dean Dec."), there is evidence of substantial similarity sufficient for the case to go to a jury and thus this motion should be denied. In addition to the direct analysis of the similarities between Dean's work and *Avatar*, the Dean Declaration attaches (Dean Dec., Exhs. 1 - 2F) Google searches of popular reaction and press reports of similarities between Dean's images and *Avatar*, including comments by Defendant Cameron, the film's production designer Robert Stromberg, and Terry

Gilliam, a prominent movie director. Because the comparison is visual in this case, the Dean Dec. compares (in annotated and un-annotated form) each of Dean's works in issue and compares them to the portions of the film *Avatar*, and several books which utilize Dean's work issued by one or more of Defendants in connection with the exploitation of the film. These four (4) books (*The Making of Avatar (TMOA)*, *The Art of Avatar (TAOA)*, *Avatar: A Confidential Report on the Biological and Social History of Pandora*, *James Cameron's Avatar (AACR)*, *The Movie Scrapbook Paperback (JCATMS)*) are referenced in Paragraph 7 of the Dean Declaration and defined therein as the "Avatar Official Books." The Avatar Official Books are annexed as Exhibit 3 through 6 to the Dean Declaration.

The essence of Defendants' argument is that Dean's work contains elements drawn from nature and other public domain source material, *scènes à faire* and unprotectable elements, which are not subject to copyright protection. However, as it relates to the question of protectable and unprotectable elements, the Second Circuit has held that:

"When we determine that a work contains both protectible and unprotectible elements, we must take care to inquire only whether "the *protectible elements, standing alone*, are substantially similar." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir.1995); *see also Fisher-Price*, 25 F.3d at 123. We also must recognize that *dissimilarity* between some aspects of the works will not automatically relieve the infringer of liability, for "no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated." *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.), *cert. denied*, 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992). It is only when the similarities between the protected elements of plaintiff's work and the allegedly infringing work are of "small import quantitatively or qualitatively" that the defendant will be found innocent of infringement. *Id.*; *see also 3 Nimmer on Copyrights, supra*, § 13.03[B][1][a]."

Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996).

As also stated by the Second Circuit in *Peter F. Gaito*:

“No matter which test we apply, however, we have disavowed any notion that “we are required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.” *Id.* at 1003; *see Boisson*, 273 F.3d at 272-73. Instead, we are principally guided “by comparing the contested design’s ‘total concept and overall feel’ with that of the allegedly infringed work,” *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133 (2d Cir.2003); *see Boisson*, 273 F.3d at 272; *Knitwaves Inc.*, 71 F.3d at 1003, as instructed by our “good eyes and common sense,” *Hamil Am.*, 193 F.3d at 102 (alteration omitted). This is so because “the defendant may infringe on the plaintiff’s work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work of art—the excerpting, modifying, and arranging of [unprotectible components] ...—are considered in relation to one another.” *Tufenkian Import/Export Ventures, Inc.*, 338 F.3d at 134. Thus, in the end, our inquiry necessarily focuses on whether the alleged infringer has misappropriated “the original way in which the author has ‘selected, coordinated, and arranged’ the elements of his or her work.” *Knitwaves Inc.*, 71 F.3d at 1004 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)).”

Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010).

Under applicable case law, and the demonstrable similarities between Plaintiff’s work and *Avatar*, Plaintiff submits this motion should be denied.

II. THERE ARE SIGNIFICANT SIMILARITIES BETWEEN PLAINTIFF’S “FLOATING ISLANDS” PAINTINGS AND AVATAR’S HALLELUJAH MOUNTAINS

Defendants’ claim that any similarities between the three paintings by Dean involving the expression of “Floating Islands” are results of the shared concepts of airborne land masses and *scènes à faire*. However, this ignores the significant, original, protectable expression from Dean’s work that appear in *Avatar*. For example, the similarities between the painting, “The 1st of April” and the film *Avatar* and the *Avatar* official books are dramatic. The Hallelujah Mountains have the same approximate number of large forms as the painting and the proportional range from the biggest to the smallest is the same. The clustering and choreography

of the forms are the same and they occupy a narrow atmospheric zone, in distant views, appearing as a line parallel to the horizon. In the case of the film *Avatar*, it utilizes the “First of April” signature rock forms, broadly triangular, with the points of the rocks facing downward and some that are slightly sway backed. They also have the same color, texture and patterns of mounds in the foliage covering them and each, in the same size and proportion, has the same hanging foliage beneath. Significantly, many have paradoxical perpetual waterfalls, like the painting, which flow from near the top of the formations and without a source to replenish, creating the same aesthetic appeal. These do not occur in nature. (Dean Dec., ¶9, Exhs. 8 and 8A). These similarities are significant and a jury could reasonably find they are substantially similar.

Comparison of the painting “Floating Islands” with the *Avatar* frame grabs (Dean Dec., ¶10, Exhs. 9 and 9A) demonstrates further the clear similarity between Dean’s work and the utilization of that work in *Avatar*. This painting and the screen grabs show a different family of shapes textures and groupings than “The 1st of April”. Both, the painting and the film contain very similar groups of rocks in twos and threes with more elongated triangular shapes and much more space around them in a fashion which is very unlikely to have been created independently.

The similarities continue between Dean’s painting “Stairway to Heaven” and in the *Avatar* film (Dean Dec., ¶11, Exhs. 10 and 10A). As the Court can see, both the Dean painting and the *Avatar* film frame grab have the same range of sizes and shapes of rocks which twist and turn upwards. Defendants claim “Stairway to Heaven”:

“depicts small, yellow, unconnected rocks, floating in near proximity to each other, barren except for a single tree set against a black backdrop. There is no similarity between these works and the massive rocky and heavily forested Hallelujah Mountains, beyond the bare concept of levitating land masses”.

(Def. Memo, pg. 14)

However, the fact is that there is a substantial similarity with *Avatar*'s much smaller rocks in their own version of a stairway, this time up to the 'banshees eyrie'. The yellow orange color in "Stairway to Heaven" is that of the evening light against a stormy sky. The rocks are not barren but have trees, lichen and grass - grass that is nearly identical to the *Avatar* version.

The *Avatar* rocks have the same range of shapes, sizes and spacing. The *Avatar* rocks have grass blowing in the wind, identical to the grass blowing in the wind in 'Stairway to Heaven' with the same level of maturity, the same degree of curve in the stem and the same seed heads. (Dean Dec., ¶11, Exhs. 10 and 10A).

Defendants claim the these similarities are only *scènes à faire*. However, the cases they cite are inapplicable to this case. For example, in *Cabell v. Sony Pictures Entm't, Inc.*, 425 F. App'x 42 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 1797, 182 L. Ed. 2d 619 (2012) it was determined the only similarities were:

"Aside from the unprotectable ideas of (1) brandishing a blow dryer as a weapon, and (2) the characters' fighting poses, there is no plausible basis for a reasonable jury to find that the parties' respective expressions of the concept of a crime-fighting hairdresser are substantially similar. See *43 *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir.2010); see also *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.1986) ("The copyright protection granted to appellant's book extends only to its particular expression of ideas, not to the ideas themselves...."); *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 360 (2d Cir.1983) (holding that "superhuman musclemans crouching in what since Neanderthal times has been a traditional fighting pose" was unprotectable idea). [footnote omitted]"

Cabell v. Sony Pictures Entm't, Inc., 425 F. App'x 42 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 1797, 182 L. Ed. 2d 619 (U.S. 2012).

The similarities between Dean's paintings and images from *Avatar* go far beyond pure ideas and include concrete expression as detailed above, far more than the simplistic similarities of pure idea in *Cabell*. *Id.* Similarly, in *Silberstein v. Fox Entm't Grp., Inc.*, 424 F. Supp. 2d 616

(S.D.N.Y. 2004) *aff'd sub nom. Silberstein v. John Does 1-10*, 242 F. App'x 720 (2d Cir. 2007)

the court found:

“The only original element of Sqrart that resembles the Scrat in any meaningful way is its round ear, which on each character is perched atop its head, cresting behind the eyeball. A round ear on a rodent is hardly a novel feature, and under the doctrine of “*scènes à faire*,” which excludes from copyright protection features of a work that are “indispensable, or at least standard, in the treatment of a given topic,” *Hogan*, 48 F.Supp.2d at 309 (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.1986)), there are limited possibilities in the placement of an ear on *632 a rodent's head unless one ventures into the realms of surrealism or cubism. Substantial similarity cannot be established by this common feature. Because no reasonable jury could conclude that Sqrart and Scrat are substantially similar with respect to protectible (and, indeed, non-protectible) elements, summary judgment must be granted as to plaintiff's copyright infringement claim.”

Silberstein v. Fox Entm't Grp., Inc., 424 F. Supp. 2d 616, 631-32 (S.D.N.Y. 2004) *aff'd sub nom. Silberstein v. John Does 1-10*, 242 F. App'x 720 (2d Cir. 2007).

However, the similarities between Dean's paintings and *Avatar* go far beyond something as simple as a round rodent ear and that case is therefore inapplicable here. The creativity involved in the portions of Dean's images go well beyond the “modicum of creativity” required by *Feist*, *supra* at 346 and the issue of whether portions of Dean's works are protectable is a jury issue. *See Matthew Bender, supra* at 674.

In *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996), the court held that the total concept and feel, as well as specific claims relating to theme, setting, characters, time sequence and other aspects were not substantially similar. The court also held, when considering William's contention that the decision could undercut copyright protection for children's books, that:

“We answer Williams's concern in two ways. First, the copyright law is to be uniformly applied across a variety of media and audiences; *see, e.g., Smith v. Little, Brown & Co.*, 245 F.Supp. 451 (S.D.N.Y.1965) (adult-audience work allegedly infringed by children's work), *aff'd*, 360 F.2d 928 (2d Cir.1966); *Rogers*, 960

F.2d at 308, 312 (photograph allegedly infringed by sculpture); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir.1986) (ballet choreography allegedly infringed by photographs of ballet). The law takes into account Williams's concern by requiring the lay observer to focus on similarities rather than differences when evaluating a work. Only when the similarities are insubstantial or unprotectible will a claim fail.”

Williams v. Crichton, 84 F.3d 581, 590 (2d Cir. 1996).

Similarly, in *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982) the court found that the totally different shapes by snowmen rendered them not substantially similar.

Id.

Here there are telling similarities between Dean’s work and *Avatar*. Thus Defendants’ argue that *Avatar* as a film in a different media undercuts Dean’s claims (Def. Memo, pg. 14). However, the Second Circuit has held that an infringer cannot escape liability for its actions by using plaintiff’s work in a different medium. In *Belair v. MGA Entm’t, Inc.*, 831 F. Supp. 2d 687 (S.D.N.Y. 2011) *aff’d*, 503 F. App’x 65 (2d Cir. 2012) the court held that:

“[W]hen faced with works ‘that have both protectible and unprotectible elements,’ ” the usual “ordinary observer” test becomes “more discerning,”³⁵ and the Court “must attempt to extract the unprotectible elements from ... consideration and ask whether the protectible elements, standing alone, are substantially similar.”³⁶ “No matter which test we apply, however, we have disavowed any notion that we are required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.”³⁷ The court is also guided “by comparing the contested design’s ‘total concept and overall feel’ with that of the allegedly infringed work,”³⁸ and it recognizes that “ ‘the defendant may infringe on the plaintiff’s work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work ... are considered in relation to one another.’ ”³⁹ It is well established that “substantial similarity may be found even where the protected work and the accused work exist in entirely different media.”⁴⁰ *694 Thus, “a three-dimensional object can infringe a copyright in a two-dimensional object.”

Belair v. MGA Entm't, Inc., 831 F. Supp. 2d 687, 693-94 (S.D.N.Y. 2011) *aff'd*, 503 F. App'x 65 (2d Cir. 2012).

Thus, the fact *Avatar* is a film and Dean's works are paintings and drawings has no bearing on this case. Further, the figures in that case are clearly not sufficiently similar to justify a claim, unlike the facts here. The case of *Gordon v. McGinley*, 11 CIV. 1001 RJS, 2011 WL 3648606 (S.D.N.Y. Aug. 18, 2011) *aff'd in part, vacated in part*, 502 F. App'x 89 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 2742, 186 L. Ed. 2d 199 (2013) (cited by Defendants) does not compel a different result.

In this case the similarities are far more than “unsubstantiated or unprotectable” and the fact that Plaintiff's books are paintings and drawings while *Avatar* is a film does not affect the validity of the claims.

In *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) the Court found that the primary similarities were only in the mechanical aspects (rather than artistic) of the toys in issue and since mechanical aspects are not copyrightable the claims were dismissed. *Id.* The claim herein involves purely artistic expression and thus the result in *Durham* does not apply here.

Finally as to this point, in *Kerr v. New Yorker Magazine, Inc.*, 63 F. Supp. 2d 320 (S.D.N.Y. 1999) the court granted summary judgment (not a motion to dismiss) because:

“This is not a case like *Steinberg*, 663 F.Supp. 706, where the defendant copied the plaintiff's style, as well as copying the actual imaginary buildings which plaintiff depicted. Here, the two figures have an entirely different “concept and feel.” Kerr's pen and ink drawing has a sketchy, edgy feel to it, while Kunz's cool colors and smooth lines gives a more serene and thoughtful impression. These different *326 “feels” are sufficient support for a finding that the two images are not substantially similar.”

Kerr v. New Yorker Magazine, Inc., 63 F. Supp. 2d 320, 325-26 (S.D.N.Y. 1999).

Clearly, *Avatar* utilizes Dean's artistic style and *Kerr* is unpersuasive in this context. Defendants claim (Def. Memo, pg. 14) that Dean's work is expressed at a general level, citing *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147 (E.D.N.Y. 2002) *aff'd sub nom. Well-Made Toy Mfg. Corp v. Goffa Int'l Corp.*, 354 F.3d 112 (2d Cir. 2003) abrogated by *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010). However, in *Well-Made Toy Mfg. Corp.*, the decision was based upon the concept of a "thin" copyright, primarily referring to compilations of facts in the public domain. *Well-Made Toy Mfg. Corp.*, *supra* at 163. In contrast, Dean's artistic works are unique and hardly "thin", so *Well-Made Toy Mfg. Corp.* does not apply to these claims.

Also *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357 (2d Cir. 1983) does not bear on the claim as can be seen by a comparison of the dolls reproduced at ¶ 14 of the Zavin Declaration submitted in support of this motion. In that case there was no creativity in the claimed infringed doll as compared to the plaintiff's doll. A cursory examination of Dean's work demonstrates the utter inapplicability of that case to this. In that case a prior figure was adapted in a minor way. In this case significant original creative expression was taken from Dean by the makers of *Avatar* and they could have gone in numerous different creative directions.

Defendants cite *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382 (S.D.N.Y. 2005) for the proposition that no copyright claims existed for similar photographs. However, the photographs in that case involved no independent artistic expression that was utilized. That case is very different from this situation, where dramatic artistic expression has been taken.

In *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001) the court stated:

In this case, defendants move for summary judgment on Kaplan's copyright claim on the ground that Kaplan cannot satisfy the second part of the test, i.e. that the photographs are not substantially similar as a matter of law.⁹ The determination *322 of whether two objects appear similar is not so demanding; however, assessing whether the protectable elements of two works are substantially similar as a matter of copyright law is “an inexact science.” *Fisher–Price, Inc. v. Well–Made Toy Mfg. Corp.*, 25 F.3d 119, 123 (2d Cir.1994). In making this determination, the Court must bear in mind that substantial similarity does not require literally identical copying of every detail.

Kaplan v. Stock Mkt. Photo Agency, Inc., 133 F. Supp. 2d 317, 321-22 (S.D.N.Y. 2001).

Further, a comparison of the two photographs in issue there demonstrated the lack of any creative expression taken by the alleging infringing photograph unlike here.

III. THERE ARE SIMILARITIES BETWEEN THE PAINTINGS AND “MAGICIAN’S BIRTHDAY” AND THE IMAGES OF THE NA’VI AVATAR.

The Defendants say of their ‘Stairway’ that they are “often connected by enormous stalks and vines dangling between them”. (Def. Memo, pg. 13). This feature is substantially similar to the painting of the ‘Magicians Birthday’. The subject of the painting is a pair of magicians holding a number of boulders and rock formations in midair, straining against massive vine and root systems. The triangular shaped ‘fans’ of root or vine tendrils that connect to the larger rocks of the Avatar stairways, are very similar to those in the painting. The figure on the tethered rock from the painting is quite similar to the figures climbing the tethered rock in the frame grab from *Avatar*. (Dean Dec., ¶12, Exhs. 11 and 11A).

IV. THERE IS SUBSTANTIAL SIMILARITY BETWEEN AVATAR AND PLAINTIFF’S PAINTINGS FEATURING STONE ARCHES

Defendants’ claim that the claims based upon the stone arch paintings: “Arches Mist”, “Red Dragon Landscape”, “Aftermath”, “The Guardians” and “Ascension City” fail because they lack any distinctive creativity other than that, which comes from public domain and *scènes à faire* material. This is demonstrated by a comparison of the paintings “Arches Mist”, “Red

Dragon Landscape” and “Aftermath” with frame grabs from *Avatar*. (Dean Dec., ¶13, Exhs. 12 and 12A). In this regard, they state that the fact that the concept of stone arches, which appear in nature are not copyrightable by Plaintiff. (Defs. Memo, pg. 18). However, it is not the concept of stone arches that Plaintiff has a copyrightable interest in but rather the specific expression which was created by Plaintiff. The arches in *Avatar* bear the same dramatic expression as Plaintiff in that they are large, have a distinctive shape that does not appear in nature and have visible grooves indicating either a laminated or extruded origin, following the curve of the arches, which also do not occur in nature. (Dean Dec., ¶13). There is also a cluster of between 5 and 7 arches spanning a central area which is very similar to that of Plaintiff. The mood and color palette is the same and the positioning of the broken stumps is the same as in Plaintiff’s paintings. There are also clusters that have the look of a hand which is similar and unlike anything identified in nature. (Dean Dec., ¶13, Exhs. 12 and 12A). Thus *Avatar* has copied numerous elements of creative expression which are unique and do not appear in nature in any way identified by Defendants. In their brief Defendants’ claim:

“Plaintiff’s claims that stone arches appearing in Pandora’s landscape infringe his paintings “Arches Mist,” “Red Dragon Landscape,” “Aftermath,” “The Guardians” and “Ascension City” fail for the same reason. (Am. Compl. 22(d-h). Obviously, Plaintiff has no protectable interest in the concept of “stone arches” – such structures appear in nature.”

(Defs. Memo, pg. 18).

It is incorrect that Dean’s images appear in nature – they do not. The Dean arches do not occur in nature nor do they have any precedent in art. They are an original creation and invention. The painting ‘Arches Mist’ was originally called ‘Splash’ based upon its invented geology of it being molten rock frozen in mid splash. In nature stone arches are formed in two common ways, erosion by the action of water, these are typically called ‘bridges’ and by the action of wind and

freezing and in the American deserts these are called ‘arches’. (Dean Dec., ¶13). The Dean arches have a number of features that distinguish them from anything that occurs in nature. The Avatar arches are also unlike anything that occurs in nature because they replicate every one of these distinguishing features of the Dean Arches with great fidelity and they are therefore substantially similar. (Dean Dec., ¶13).

A. *Arches Mist*

The Defendants arches have the same ‘laminated’ or ‘extruded’ grooves as the Dean arches their mood and color pallet is the same, these do not occur in nature. They have the same tight clustering of between five and seven arches spanning one area and the same ratio of complete to incomplete arches, there are no such clusterings in nature. Besides the fine finger like ‘stumps’ there are clusters that have the look of a hand and here are a number of the arches that lean considerably out of vertical, to one side, the same as Dean’s. (Dean Dec., ¶13).

B. *Red Dragon Landscape / Aftermath*

The Avatar arches have occasional gaps in the layers or laminates, like paired bones, there are the same groupings of ‘finger’ stumps and ‘hand’ stumps as do Deans and very tellingly these two paintings of Deans have a unique feature, a small bridge in the curved “V” of two arches these do not occur in nature and have no precedent in art. (Dean Dec., ¶¶ 15 and 16, Exhs. 14-15A).

C. *The Guardians*

This painting shows a detail of the arches where they reach the ground. In the book *Dragons Dream* (Dean, Roger *Dragons Dream* (2008)) at page 100 this painting is described as part of a series based upon rock formations and landscapes of Utah and Arizona but it has been developed to the point where it no longer resembles anything found in nature. In *Avatar* there is

the same clustering, the same ‘grooved’ structure, both hard and soft edged, the same relationship between the complete arches and the stumps. In both cases there is an isolated cluster of stumps a little like the fingers of a hand. The shape, proportions and scale are all the same. (Dean Dec., ¶17, Exhs. 16).

D. Ascension City

This painting shows floating islands joined by two arches forming an “X” when viewed from above. Avatar also has floating islands joined by two arches forming an “X” when viewed from above, in this case their arches are completely covered in foliage. In the foreground of Dean’s painting there are two arches forming an “X” when viewed from above, completely covered in foliage. The “X” formation does not occur in Nature. The position of the cross, to the left of center is nearly identical, the arches look the same and the color, texture and proportions are the same. (Dean Dec., ¶17, Exhs. 17 and 17A). In their brief Defendants claim:

“Indeed, Plaintiff acknowledges in his book “Dragons Dream” that his paintings of stone arches are ‘based upon rock formations in the ancient seabeds of Utah and Arizona’”.

(Defs. Memo pg. 18).

In fact, the statement referred to is on page 104 of the book *Dragons Dream* refers to the three paintings on that spread and others including ‘The Guardians’ but in none of the cases are they literal paintings of actual rocks, they do not resemble anything found in nature. To put it simply you cannot go to Arizona or Utah and find those scenes. (Dean Dec., ¶18).

The Defendants say “Avatar’s “arches” appear on screen for less than four minutes.” (Defs. Memo, pg. 18). Nevertheless, they describe “arches” as one of their two **signature landform** features and their impact is disproportionate to their time on screen. (AACR page 21).

The Defendants describe a number of features of the Avatar arches that purport to make them different to Dean’s, but in each case they are incorrect and the features described are shared

with Dean's. Defendants describe the *Avatar* arches as "massive and thick dwarfing the helicopters and ..." . *Id.* However, their proportions are remarkably similar to Dean's with the same ratio of thick and thin, complete and incomplete arches as to scale, in Dean's painting In "The Guardians" the arches were imagined as massive and although there are no helicopters to give scale there is aerial perspective and this is a very good indicator of their massive size. The huge scale of the arches in "Red Dragon" can be seen from the horse backed figures by the bridge, at the top of the waterfall. Defendants also describe *Avatar*'s arches as "jagged and craggy, with rough uneven surfaces, with lateral faces connected by sharp squared angles". *Id.* These features are only really apparent in a close up and whereas Dean's painting 'Arches Mist' is softer in many of the views theirs are remarkably similar to his. However in Dean's paintings "The Guardians" and "Aftermath" there are edges that are much sharper, harder and fractured. Defendants' claim that *Avatar*'s arches have foliage while "unlike *Avatar*'s arches [Dean's] are virtually barren." *Id.* Many of the scenes in the film, *Avatar*'s arches appear barren or only have minimal foliage. Dean's foreground arches in 'Ascension City' are covered in foliage. (Dean Dec. ¶18, Exhs. 17 and 17A).

In *Belair v. MGA Entm't, Inc.*, 831 F. Supp. 2d 687 (S.D.N.Y. 2011) *aff'd*, 503 F. App'x 65 (2d C. 2012) (cited by Defendants) the District Court held that the dolls in issue were dissimilar because:

"The fact that the Bratz sculpt is similar to the Belair image is not dispositive because the physical differences between Belair's women and the model sculpt pale in comparison to the differences between Belair's women and the painted, clothed, and made-up Bratz dolls that are packaged and sold as finished products. No reasonable juror could find that those final products are substantially similar to Belair's image."

Belair v. MGA Entm't, Inc., 831 F. Supp. 2d 687, 696 (S.D.N.Y. 2011) *aff'd*, 503 F. App'x 65 (2d Cir. 2012).

Nor are these works based upon structures that appear in nature and thus the cases cited by Defendants for that contention are inappropriate. (Def. Memo, pg. 18). These substantial differences are not present here and this case is not applicable to this action.

In short, *Avatar* and the aforementioned paintings have a great many crucial similarities in common. These are similarities which are sufficient to go to a jury and for a jury to be able to evaluate whether they constitute copying similarity in the context of this case.

V. THERE ARE SUBSTANTIAL PROTECTABLE SIMILARITIES BETWEEN AVATAR'S HOMETREE AND PLAINTIFF'S "PATHWAYS (YESSONGS)".

The images contained in "Pathways (Yessongs)" are powerful artistic creations which have been well-known to the public and contain dramatic similarities to the image of the Hometree in *Avatar*. First, the silhouette is nearly identical from the cuttlefish crown in the division of the trunk. The unusual scale is the same. In the foreground of the painting there are clusters of barnacle like plant forms which have become ubiquitous in Pandora. (Dean Dec., ¶19, Exhs. 18 and 18A). These plant forms are the same size, containing the same scale and configuration of clustering and have the same shape and color. The painting also has a very unusual asymmetrical double-helix pathway (not a single helix as claimed by Defendants) which is present in the Hometree in a double-helix in its trunk. (Dean Dec., ¶19). Defendants rely upon *Eden, supra* at 500 to distance their Hometree from the image contained in "Pathways". They also cite the case of *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F. Supp. 2d 178 (S.D.N.Y. 2000) for a similar conclusion. (Def. Memo, pg. 21). However, neither of those cases support this contention. In fact in *Eden Toys*, the bases for the decision was primarily a lack of a total concept and feel:

"While the two snowmen are roughly the same size, their "total concept and feel" are substantially different. See *Warner Brothers v. American Broadcasting Companies, supra*, 654 F.2d at 211. The head and body of plaintiff's snowman are shaped substantially in

block form, with the stitching ribs at the four perpendicular edges of each block. The head and body of defendant's snowman are in the traditional rounded shape of snowballs, with stitching on each side and the back. Because of this difference in shapes, plaintiff's snowman has a flat face, while the face of defendant's is rounded.”

Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 500 (2d Cir. 1982).

Similarly in the case of *Queenie, Ltd.*, *supra* at 178, the court, in deciding a motion for summary judgment (not a motion to dismiss), found that the Queenie copyright was quite limited and that there were significant differences in the color, fabric, and size of the boxes printed on the garments and appearance or tears and rips. *Id* at 180. Neither of these cases provide any basis for a finding that in this case the similarities between Dean’s paintings and *Avatar* are so *de minimis* to preclude submitting the question of substantial similarity to a jury.

VI. THERE IS SIMILARITY BETWEEN PLAINTIFF’S “FLOATING JUNGLE” AND AVATAR’S TREE OF SOULS OR TREE OF VOICES.

Defendants’ claim incorrectly that there are no similarities between Plaintiff’s drawing “Floating Jungle” sketch and the Tree of Souls and/or the Tree of Voices in *Avatar*. This is not the fact. Defendants’ incorrectly characterize the “Floating Jungle” sketch as floating in the air and drooping covered green moss. (Def. Memo, pg. 22). Although there is a tree like structure floating in the air the tree at issue in “Floating Jungle”, painting and sketch, is connected to the ground and the green moss referred to are actually — hair like branches or tendrils that are very similar to those contained in the *Avatar* movie. In addition, the woolly mammoth silhouette and the basic structure of the tree in the “Floating Jungle” sketch is quite similar to that contained *Avatar*. (Dean Dec., ¶20, Exhs. 19 and 19A). These are similarities which are evident and should be resolved by a jury.

VII. THERE ARE SIMILARITIES BETWEEN THE PAINTINGS “MORNING DRAGON” AND THE IMAGES OF THE NA’VI AVATAR.

The reptiles in the painting “Morning Dragon” contains long probe or antennae like extremities with a spear shaped end which are very similar to the antennae-like structure on the banshees in *Avatar*, used to connect a rider to the banshee.

The neural antennae, common to several Avatar creatures and playing an important role in the movie, particularly in how it facilitates Na’vi communication with them, is virtually identical to the original antennae on the Morning Dragon. It is the same shape, the same size and has the same spear shaped tip. (Dean Dec., ¶21, Exhs. 20 and 20A). The filament-type extremity clearly demonstrates the “modicum of creativity” required by *Feist, supra* at 436 for copyright protection.

VIII. THERE ARE SUBSTANTIAL SIMILARITIES BETWEEN DEAN’S “NEARFEST LOGOS” AND AVATAR

There are substantial similarities between Dean’s “NEARFEST Logos” and *Avatar*. The Nearfest Geckos and the Yes logo Dragonflies were included to demonstrate that *Avatar* copied Dean’s work (and in particular Dean’s book *Dragons Dream*).

The Nearfest Geckos at page 77 of Dean’s book *Dragons Dream* shows a black and white drawing of a gecko printed over five different color schemes, done to facilitate choosing patterns. Dean often transposed the markings of one creature onto another, which is a process that looks very natural but adds a degree of the exotic. In this case He transposed the markings of the Dendrobates Azureus poison dart frog onto the gecko. This (Dendrobates Azureus), chosen for the Mountain Banshee, to quote James Cameron “but it also has the jaw mechanism of a barracuda, the coloring of poison dart frog and the hinged jaw of a viper”.

Defendants had many alternative options, and the chances of this being a coincidence are low. In the movie, *Capturing Avatar* (Disc 3 of Exhibit 6A) a voice over (possibly James Cameron) talks about the coloration of the poison dart frogs in the context of the coloration of the banshees. The film then displays an image of an orange poison dart frog (Time code 7:25/7:27). Dean's work (on Exhibit 20 left hand side) is an orange gecko next to a blue gecko. The blue gecko has the same markings as the banshee in *Avatar* while the orange gecko has the same markings as the poison dart frog pictured in *Capturing Avatar*. The chance of both images being grouped together are significantly lower.

IX. THERE ARE SUBSTANTIAL SIMILARITIES BETWEEN DEAN'S DEMONSTRATES THAT "YES DRAGONFLY LOGOS" AND AVATAR

The wing shapes of the dragonflies which were designed by Dean for a series of logos for the music performing group Yes are taken from nature. However, the markings which are applied to them are not from dragonfly markings but from moths which, in turn have been modified to a significant degree in that two of them have coloring taken from tropical fish making it two steps removed from nature. In particular the colorings and markings on the Tetrapteron are very similar to those the markings on "Yes Dragonfly Logo" (Dean Dec., ¶23, Exhibit 22) and therefore there are substantial similarities sufficient to go to a jury for these images as well.

CONCLUSION

For the reasons stated herein, and in the accompanying Roger Dean Declaration, Plaintiff respectfully submits that Defendants' motion to dismiss should be denied in all respects.

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