

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM ROGER DEAN, :

Plaintiff, :

-against- :

JAMES CAMERON, TWENTIETH : 13-cv-4479
CENTURY FOX FILM CORPORATION, :
TWENTIETH CENTURY FOX HOME : Furman, J.
ENTERTAINMENT and LIGHTSTORM :
ENTERTAINMENT, :

Defendants. :

:

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**REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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37 C.F.R. § 202.119

4 Nimmer on Copyright § 13.03[B][1][A], at 13-68.5-13-6913

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Defendants respectfully submit this memorandum of law in further support of their motion to dismiss Plaintiff's Amended Complaint.

PRELIMINARY STATEMENT

Plaintiff does not dispute that a Court can dismiss a copyright infringement claim at the pleading stage for lack of substantial similarity between the protectible elements of the works. Instead, Plaintiff recites the unremarkable proposition that only a "modicum of creativity" is necessary for a work to be copyrightable. (Pl. Br. at 2). This misses the point entirely. It is undisputed that Plaintiff's works are copyrightable. However, the question of whether a work is deserving of or has copyright protection is distinct from the question of whether a defendant has infringed the *protectible* elements of a plaintiff's work. To establish copyright infringement, a plaintiff must prove *both* (i) ownership of a valid copyright *and* (ii) improper copying of protectible elements. (Def. Br. at 7). Lack of similarity between protectible elements warrants dismissal, even where a plaintiff's works are creative and copyrightable. (*See* Def. Br. at 7-10).¹

Nor does Plaintiff dispute that, as set forth in Defendants' moving brief, (i) the works themselves control and supersede contrary descriptions of them contained in Plaintiff's papers, and (ii) the Court must assess each subject work as a whole, rather than focus on isolated, scattered similarities between and among them. This is especially true in the case of "graphic or three-dimensional work[s]" such as those at issue here, which are "created to be perceived as an entirety." (Def. Br. at 9-10).²

¹ References to "Def. Br." are to the Memorandum of Law in Support of Defendants' Motion to Dismiss (Doc. No. 13).

² Plaintiff recites the general principle that "dissimilarity between some aspects of the works will not automatically relieve the infringer of liability" (Pl. Br. at 3), but cannot escape the Second Circuit's holding that, particularly in the case of graphic works, "numerous differences" between the works "inevitably lessen the similarity that would otherwise exist between the total

Nevertheless, Plaintiff attempts to avoid dismissal by submitting a memorandum of law and a lengthy declaration that are rife with mischaracterizations of the subject works.³ Plaintiff not only takes isolated screen grabs from *Avatar* out of context for purposes of his “comparisons,” he manipulates, crops and distorts those images (and sometimes his own paintings) in order to create a false impression of similarity and obscure obvious differences, often without informing the Court. Recognizing that even his impermissible alterations cannot demonstrate a legally cognizable similarity between any of Plaintiff’s paintings and Defendants’ film, Plaintiff attempts to identify “similarities” between his works and images from books that Plaintiff himself acknowledges are “not part of the claims in this case.” (Pl. Decl. ¶ 7). Plaintiff then goes a step further; he also manipulates those images.

Plaintiff’s mischaracterizations and manipulations cannot create a legally sufficient claim where none exists. Copyright infringement requires a legally cognizable “substantial similarity” between works as they actually exist, not as manipulated by a plaintiff. When the Court reviews the actual works, it will be clear that there is no protectible similarity between *Avatar* and any of Plaintiff’s paintings. Accordingly, Plaintiff’s infringement claim must be dismissed.

perceptions of the two works” and “tend to undercut substantial similarity.” *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 241 (2d Cir. 1983).

³ The Declaration does not simply introduce Plaintiff’s (largely improper) exhibits—it contains substantive argument which should have been included in the brief itself, and should be disregarded as a clear attempt to circumvent this Court’s 25-page limit on opposition briefs. *See Urban v. Capital Fitness*, No. 08-3858-WDW, 2010 U.S. Dist. LEXIS 124307, at *15 n.3 (E.D.N.Y. Nov. 23, 2010); *Clerc v. Cantoni, Inc.*, No. 01-2481-RO, 2002 U.S. Dist. LEXIS 12402, at *10 n.5 (S.D.N.Y. Jul. 10, 2002). It is hornbook law that substantive factual declarations may not be considered on a Rule 12(b)(6) motion. *See Fonte v. Bd. of Managers of Continental Towers*, 848 F.2d 24, 25 (2d Cir. 1988).

ARGUMENT

I. **Plaintiff's Lengthy Declaration and Exhibits are Irrelevant and Improper, and Should be Disregarded for Purposes of This Motion**

A. **Plaintiff Improperly Manipulates Images in an Attempt to Create a False Appearance of Similarity**

As explained in Defendants' moving brief, the very act of isolating a single screen grab from a dynamic, cinematic work made up of thousands of individual frames and visual effects shots is misleading in itself. (*See* Def. Br. at 14). But Plaintiff in his opposition does far worse than that. Plaintiff manipulates individual frames from *Avatar* (often without telling the Court), severely cropping them or blowing up minor elements to highlight supposed "similarities" completely out of context and rotating images, all to obscure differences and artificially create the appearance of a "similarity" that otherwise would not exist.

Attached as exhibit 1 to the accompanying Declaration of Jonathan Strauss ("Strauss Decl.") is a DVD that contains the actual excerpts from *Avatar* from which Plaintiff's exhibits are culled. As readily seen in the DVD, the so-called "screen grabs" from *Avatar* which Plaintiff claims are infringing are, in fact, only portions of the actual images that appear on screen in the movie. By isolating and cropping the images as he has, the images on which Plaintiff relies are taken completely out of context. Indeed, as the DVD demonstrates, frequently the purported infringing images are buried deep in the background of a scene or occupy only a fraction of the actual on-screen image. When Plaintiff's paintings are compared to the actual, full scenes and images in *Avatar*, it becomes readily apparent that there is no similarity of protectible expression.

Such distortions cannot be used to state a claim for copyright infringement. *See Gordon v. McGinley*, No. 11 Civ. 1001 (RJS) 2011 U.S. Dist. LEXIS 92470, at *10-12 (S.D.N.Y. Aug. 18, 2011) (rejecting plaintiff's efforts to "alter[] the images at issue in order to bolster her infringement claims" and "obscure . . . differences," which included "cropping and rotating"

images, converting images to black and white, flipping images horizontally and “superimposing color-coded outlines of the shapes and figures that purportedly correspond”).⁴ Both the “ordinary observer” and “more discerning” observer tests require a comparison of the works as they actually exist, not as altered or manipulated by Plaintiff, and the Court must assess the works as a whole, taking into consideration their numerous differences—not zoom in on a small details specifically selected from only a part of one frame out of thousands. The altered and manipulated images attached to Plaintiff’s Declaration should be disregarded.

The actual comparison that the Court must conduct is quite simple. With their moving brief, Defendants provided the Court with a DVD (Zavin Decl. Ex. C)⁵ showing excerpts from *Avatar* which depict how the primary features of Pandora’s landscape and ecosystem that are the subject of Plaintiff’s claims—the Hallelujah Mountains, stone arches, Hometree, and the Tree of Voices and Tree of Souls—actually appear in the film.⁶ The Court need only view these excerpts, and compare them against each of the paintings identified in the Complaint, individually. When this comparison is done, it is plain that, apart from unprotectable concepts that must be extracted from consideration, there is no substantial similarity.

⁴ See also, e.g. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434 n.2 (S.D.N.Y. 1985) (declining to review plaintiff’s voice-over analysis of the first scenes of defendants’ film, and stating that “[i]n determining substantial similarity, the court must only consider the works in their entirety and final form”), *aff’d* 784 F.2d 44 (2d Cir. 1986); *Gilbert v. New Line Prods.*, Case No. 09-02231-RGK, 2010 U.S. Dist. LEXIS 141516, at *12 (C.D. Cal. Aug. 13, 2010) (“The works must be assessed individually and not manipulated for any parties’ own benefit.”), *aff’d in relevant part*, 490 F. App’x 34 (9th Cir. 2012).

⁵ References to “Zavin Decl.” are to the Declaration of Jonathan Zavin dated November 14, 2013 that accompanied Defendants’ motion to dismiss.

⁶ While Plaintiff did not specify in his Complaint which portions of *Avatar* are purportedly infringing, virtually all of the screen grab exhibits in Plaintiff’s Declaration are taken from scenes that are included in Defendants’ excerpts.

B. Alleged Similarities Between Plaintiff’s Works and Books That Are Not Part of the Complaint are Irrelevant

The Complaint does not identify any allegedly infringing work other than the film *Avatar*. (Am. Compl. ¶¶ 1, 26); *see, e.g., Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992) (copyright infringement complaint must allege, *inter alia*, “by what acts during what time the defendant infringed the copyright”), *aff’d*, 23 F.3d 398 (2d Cir. 1994). Nevertheless, almost all of the “comparison” exhibits attached to Plaintiff’s Declaration purport to compare his paintings not only to (manipulated) screen grabs from the film, but also to pictures which do not appear in the film, and which instead are taken from four books about *Avatar* (the “Avatar Books,” Pl. Decl. Exs. 3-6),⁷ despite Plaintiff acknowledging, as he must, that “these books are not part of the claims in this case . . .” (Pl. Decl. ¶ 7) (emphasis added). In fact, some of Plaintiff’s purported “comparisons” do not identify any allegedly infringing images from the film, and only compare Plaintiff’s works to images from the Avatar Books. (*See* Pl. Decl. Exs. 16, 20, 22). As he does with screen grabs taken from the film, Plaintiff again, without informing the Court, manipulates and distorts the pictures taken from the Avatar Books to create a false appearance of similarity (*see* Strauss Decl. ¶¶ 6-10), even going so far as to change the colors in the images so that they more closely resemble his work (*see infra* at 15, 18).

Purported similarities between Plaintiff’s paintings and works that, by Plaintiff’s own admission, are “not part of the claims in this case” are completely irrelevant to the substantial similarity analysis, notwithstanding Plaintiff’s claim that the books “relate to the creative process of the film” (Pl. Decl. ¶ 7). *See, e.g., Flaherty v. Filardi*, No. 03 Civ. 2167, 2009 U.S. Dist. LEXIS 22641, at *31 (S.D.N.Y. Mar. 20, 2009) (“[T]he contents of screenplay drafts that are not

⁷ *See* Pl. Decl. Exs. 8 p. 5 (bottom); 11 (middle left); 12 (bottom), 13; 14 p.23; 16, 17 p. 29 (bottom) p. 31 (middle and bottom) and p.33 (silhouette of Hometree, based on book, drawn by Plaintiff); 18 (bottom); 20, and 22.

reflected in the finished motion picture are not relevant to the substantial similarity analysis with respect to the motion picture.”); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 724 n.9 (S.D.N.Y. 1982) (“Since the ultimate test of infringement must be the film as produced and broadcast, we do not consider the preliminary scripts.”). Accordingly, all of the comparisons of Plaintiff’s paintings to the Avatar Books must be disregarded entirely.

C. Plaintiff May Not Copyright His “Artistic Style”

Plaintiff spends the first three pages of his Declaration reciting his biography and describing his general artistic “style” or “signature.” (Pl. Decl. p. 1-3). Similarly, in his brief, Plaintiff accuses *Avatar* of “utiliz[ing] Dean’s artistic style.” (Pl. Br. at 10). However, Plaintiff may not establish infringement by “aggregating” similarities from various separate works (Def. Br. at 10) or by accusing Defendants of copying his artistic style. *See Kroencke v. Gen. Motors Corp.*, 270 F. Supp. 2d 441, 444 (S.D.N.Y. 2003) (“[N]othing in the Copyright Act . . . or in the precedents of this Circuit supports the view that a plaintiff’s entire *oeuvre*, or even an aggregated portion of it, may be used as the point of comparison where the works included therein bear little or no relation to one another beyond ‘style.’”), *aff’d*, 99 F. App’x 339 (2d Cir. 2004); *see also*, *e.g.*, *Douglas v. Osteen*, 317 F. App’x 97, 99 (3d Cir. 2009) (“writing style” not protected by Copyright Act); *Judith Ripka Designs, Ltd. v. Preville*, 935 F. Supp. 237, 248 (S.D.N.Y. 1996) (“The copyright laws do not protect styles, but only particular original designs.”). And while Plaintiff claims that he is an accomplished artist, so too are the hundreds of artists and designers who created *Avatar*—which is also not relevant to the substantial similarity analysis.

D. Internet Comments and Articles Are Irrelevant to Substantial Similarity

Plaintiff also attaches to his Declaration purported articles and anonymous Internet postings, which he suggests “are, in a sense, lay observers noting substantial similarities between” his works and *Avatar*. (Pl. Decl. ¶ 6, Exs. 1, 2A-2F). These purported statements are

hearsay and irrelevant. “[T]he opinions of third parties in secondary materials . . . cannot prove substantial similarity under the copyright laws . . . because the works themselves, not descriptions or impressions of them, are the real test for claims of infringement.” *Crane v. Poetic Prods. Ltd.*, 593 F. Supp. 2d 585, 595 (S.D.N.Y.) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1986) (refusing to consider “articles or interviews by third parties who assumed that [counterclaim defendant’s work] was based on [counterclaim plaintiff’s work]” as irrelevant to substantial similarity inquiry), *aff’d*, 351 F. App’x 516 (2d Cir. 2009)).⁸ Accordingly, the extrajudicial, third-party statements proffered by Plaintiff must be disregarded for purposes of determining substantial similarity.⁹

Further, to the extent Plaintiff attaches articles containing purported quotes from James Cameron and *Avatar* production designer Robert Stromberg (Pl. Decl. Exs. 2D, 2F) to suggest that Cameron and Stromberg were aware of his work, this is only relevant to the issue of “access,” not substantial similarity, and is irrelevant on a motion to dismiss. (*See* Def. Br. at 7 n.4) (on a motion to dismiss, courts assume that “access” and “actual copying” has occurred and address only the issue of substantial similarity).¹⁰ Even if a plaintiff can establish “access” or

⁸ *See also, e.g., Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 204 n.4 (S.D.N.Y. 2010) (opinions of third parties irrelevant to substantial similarity determination); *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 567 (C.D. Cal. 2005) (striking portions of complaint quoting industry commenters’ comparisons of the subject works as “legally irrelevant to the issue of substantial similarity”).

⁹ In any case, the various Internet postings submitted by Plaintiff simply suggest, at most, that some people (including anonymous Internet commenters) believe that the *idea* for *Avatar*’s Hallelujah Mountains may have been inspired by Plaintiff’s works. (*See, e.g.,* Pl. Decl. Ex. 2A (blogger surmises about various possible inspirations for *Avatar*); 2B (article “ponders what the influences behind the film might have been” and lists ten possible “inspirations”); 2C (article surmises about potential “influences”); 2F (article questions “[w]here did Cameron get the idea for the floating mountains?”)). But it is a fundamental tenet that *ideas* are free for the taking, and “inspiration” has nothing to do with copyright infringement.

¹⁰ In the referenced articles Stromberg makes “crystal clear” that Plaintiff “wasn’t a direct influence,” and Cameron merely responded to a question about whether the *idea* for *Avatar*’s

even “actual copying,” this is insufficient to impose liability—a plaintiff must also demonstrate that the requisite substantial similarity between protectible elements exists. (Def. Br. at 7).

Plaintiff’s “respectful[] suggest[ion]” that the Court deny Defendants’ motion to dismiss so that he may take discovery concerning Defendants’ access to his artwork (Pl. Decl. ¶¶ 14, 18), is also irrelevant on a motion to dismiss for the same reason. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (“When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because what is required is only a visual comparison of the works.”).

II. Plaintiff Fails to Distinguish the Numerous Cases Rejecting Infringement Claims Involving Significant, Yet Non-Protectible, Similarities Between Graphic Works

In their moving brief, Defendants cited numerous cases demonstrating that courts in this Circuit frequently reject infringement claims involving graphic works that bear far greater surface similarities than those at issue here, attaching copies of the images at issue. (Def. Br. at 15-18, Zavin Decl. ¶¶ 14-20). Plaintiff appears to accept the principals set forth in those cases and completely fails to distinguish them on the facts.¹¹ Plaintiff argues that in three of them—*Mattel, Inc. v. Azrak-Hamway Int’l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983), *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005) and *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317, 322-23 (S.D.N.Y. 2001)—the plaintiff’s work involved “no creativity” or “no independent artistic expression.” (Pl. Br. at 10-11). This is

Hallelujah Mountains came from a “Yes album cover” with a joking reference to his “pot-smoking days.” (*Id.*).

¹¹ Plaintiff cursorily notes that some of those cases involved summary judgment decisions, not motions to dismiss. (*See* Pl. Br. at 9-11). This is irrelevant. *See Peter F. Gaito*, 602 F.3d at 63-64 (noting that the Second Circuit has repeatedly dismissed infringement claims for lack of substantial similarity as a matter of law on summary judgment, and the “same principles hold true when a defendant raises the question of substantial similarity at the pleadings stage on a motion to dismiss.”).

preposterous. The plaintiffs' works in the aforementioned cases were plainly creative, and none of the courts in those cases said otherwise. In the cited cases, infringement claims were dismissed not because the works were not copyrightable, but because, like here, the similarities between the works arose from shared, unprotectible ideas.

Plaintiff also conclusorily asserts that the graphic works in other cases cited by Defendants "are clearly not sufficiently similar" to justify a claim (Pl. Br. at 7, 9), but again, viewing the actual images at issue in those cases (Zavin Decl. ¶¶ 14-20), it is clear that they bear similarities far greater than similarities that Plaintiff claims here. Plaintiff fails to identify a single case in which a court refused to dismiss an infringement claim involving graphic or visual works bearing purported "similarities" comparable to those at issue here.

III. **When the Works as a Whole are Compared, Rather than Plaintiff's Manipulated Images, It is Clear That There Are No Legally Cognizable Similarities**

When the full versions of Plaintiff's individual paintings contained in the books annexed to the Zavin Declaration—rather than the smaller versions and carefully dissected portions thereof attached to Plaintiff's Declaration—are actually compared against the relevant scenes in *Avatar*, it is plain that no substantial similarity between protectible elements exists. Plaintiff's efforts to mischaracterize the works, relying on manipulated screen grabs from the film and irrelevant images from the Avatar Books, do not change this result.

A. There is No Legally Cognizable Similarity Between *Avatar*'s Hallelujah Mountains and Plaintiff's "Floating Islands"

Plaintiff does not, and cannot, dispute that the concept of floating land masses is not protectable (Def. Br. at 11-12), but argues that *Avatar* copies not merely this "idea," but specific protectible expression from his paintings featuring "floating islands." However, when the actual works are considered, rather than Plaintiff's mischaracterizations and manipulated images, this is clearly untrue. As explained in Defendants' moving brief, *Avatar*'s enormous, hyper-

realistically depicted Hallelujah Mountain—which are densely blanketed in their own forests, comprise a wide variety of shapes and sizes, and are plentiful (with hundreds of such mountains filling the Pandoran sky)—are markedly different in expression than Plaintiff’s “Floating Islands” painting. In response, Plaintiff argues that both “Floating Islands” and *Avatar* feature “very similar groups and rocks in twos and threes with more elongated triangular shapes and much more space around them” (Pl. Br. at 5), but this does not remotely correctly describe either Plaintiff’s painting (which features egg-shaped boulders, not “triangular” rocks), or *Avatar* (which features hundreds of mountains of various shapes and sizes). To bolster this false description, Plaintiff attempts to compare his paintings to a grouping of mountains that appear for a fraction of a second, in a fraction of the background, of a single frame from a pitched battle scene in *Avatar*. (Pl. Decl. Ex. 9; Strauss Decl. Ex. 1, at 3:50-4:06). Even this false comparison does not suggest any legally cognizable similarity in protectible expression.

Likewise, when the actual works, rather than Plaintiff’s manipulated images, are considered, there is no comparison between the small, mossy, land masses in Plaintiff’s “The 1st of April” painting and the massive, rocky and heavily forested (with trees, not moss) Hallelujah Mountains. Plaintiff attempts to obfuscate overwhelming dissimilarities by (i) comparing his painting to a picture from one of the *Avatar* Books, which is not at issue in this litigation (*see* Pl. Decl. Ex. 8, p. 5 bottom), (ii) zooming in on small, isolated fractions of individual frames in a futile effort to find portions of one Hallelujah mountain, out of hundreds appearing in the film, that bears some superficial resemblance to Plaintiff’s mossy land masses (*see* Strauss Decl. Ex. 1 at 00:26-1:13, 1:33-3:50), and (iii) even zooming in on small portions of *his own painting* in order to create a false appearance of similarity (*see* Pl. Decl. Ex. 8, p. 6). When the works as a whole are compared, it is plain that Plaintiff’s assertions that the Hallelujah Mountains and “The

1st of April” share the same “approximate number of large forms,” “proportional range” of sizes, “clustering and choreography,” “narrow atmospheric zone,” “broadly triangular” shape and “texture and patterns of mounds in . . . foliage” (Pl. Br. at 4-5) are complete nonsense.¹²

Plaintiff also argues that *Avatar* infringes “The 1st of April” because some of the Hallelujah Mountains have waterfalls. But there is no similarity between the waterfall in “The 1st of April,” which depicts water leaking in separate strands over the side of one land mass from an overflowing and prominent pond contained therein, and those in *Avatar*, which resemble upside-down geysers that spray straight down the vertical edges of some mountains and disperse into mist in midair. (See Zavin Decl. Ex. C, “Hallelujah Mountains,” at 1:55:44-56:11). The mere fact that both works contain different expressions of waterfalls does not alter the fact that the small, mossy land masses in “The 1st of April” simply do not resemble *Avatar*’s massive, rocky Hallelujah Mountains. See *Belair v. MGA Entm’t, Inc.*, 503 F. App’x 65, 67 (2d Cir. 2012) (general similarities were “outweighed and overshadowed by significant distinctions”). And because Plaintiff may not “mix and match” similarities across multiple works, he may not use the presence of a waterfall in “The 1st of April” as grounds for a purported similarity between *Avatar* and any other paintings of “floating islands,” which do not contain waterfalls.

Finally, Plaintiff denies that his “Stairway to Heaven” painting features “small, yellow, unconnected rocks . . . barren except for a single tree” (Pl. Br. at 5-6), but the works themselves control, not Plaintiff’s contrary description of them. “Stairway to Heaven” plainly features small, barren yellow rocks, which float in proximity to each other with no explanation, forming an easily-navigable, stepping-stone spiral staircase. (Zavin Decl. Ex. D p. 126). Plaintiff

¹² Similarly, Plaintiff claims that both works “have the same hanging foliage” (Pl. Br. at 5), but any “hanging foliage” in “The 1st of April” is virtually imperceptible (see Zavin Decl. Ex. D pp. 172-73) and does not suffice to establish a legally cognizable “substantial similarity” between markedly different landforms.

attempts to concoct a similarity by selecting a screen grab from a scene in *Avatar* in which the Na'vi climb to the banshees' aerie (Strauss Decl. Ex. 1 at 4:07-4:31), but when the scene is viewed as a whole there is no basis for a comparison. The rocks that the Na'vi climb are not barren, flat-stepping stones—they are large round boulders, covered in green foliage. They do not simply float next to each other, forming an easily-navigable staircase—they are tied together by the enormous stalks and vines. Contrary to Plaintiff's allegations, they do not form a "stairway" which "twist[s] and turn[s] upwards"—they extend vertically into the sky requiring the Na'vi to climb them like a mountain. (Zavin Decl. Ex. C "Hallelujah Mountains" at 2:05:12-2:06:00). The images in *Avatar* resemble not a stairway, but a beanstalk. Different expressions of floating rocks that are traversable in some sense do not constitute copyright infringement.

Plaintiff resorts to focusing on small plants that are a minor part of his paintings—a palm-like tree in "The 1st of April" and a piece of wheat-like grass in "Stairway to Heaven"—and argues that similar vegetation appears in *Avatar*. (Pl. Decl. Exs. 8 p. 7, Ex. 10). Once again, Plaintiff manipulates the images. While Plaintiff provides a heavily-cropped screen grab from *Avatar* featuring wheat-like stalks (directly underneath an image of the "beanstalk" structure discussed above) (Pl. Decl. Ex. 10), in fact these stalks appear on-screen for less than three seconds in *Avatar* (see Strauss Decl. Ex. 1 at 00:00-00:19), and more importantly, when the full frame in which they appear is examined, it does not remotely resemble Plaintiff's "Stairway to Heaven." (Compare *id.* and Strauss Decl. ¶ 3 with Zavin Decl. Ex. D p. 126 ("Stairway to Heaven")). Similarly, in *Avatar*, some plants with palm-like fronds appear on solid ground, not on floating Hallelujah Mountains (as implied by Plaintiff's heavily-cropped exhibit). (See Strauss Decl. Ex. 1 at 1:34-2:14; Zavin Decl. Ex. C "Hallelujah Mountains" at 1:56:11-15). Further, these short plants—which have extremely fat, thick stems covered with fleshy, succulent

leaves (*see id.*, Strauss Decl. ¶ 4) do not resemble the long, thin-trunked tree that forms a minor part of Plaintiff’s painting “The 1st of April.” Obviously, palm-trees and wheat stalks appear in nature, and “[w]here the quantum of originality is slight and the resulting copyright is ‘thin,’ infringement will be established only by very close copying because the majority of the work is unprotectable.” *Beaudin v. Ben and Jerry’s Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996).

In any event, even if Plaintiff were able to identify a plant among Pandora’s vast biosphere that somewhat resembles one of the myriad plants that has appeared in Plaintiff’s paintings over the years, such “random scattered similarities throughout the works . . . cannot [by themselves] support a finding of substantial similarity.” *Allen v. Scholastic, Inc.*, 739 F. Supp. 2d 642, 663 (S.D.N.Y. 2011) (quoting *Williams v. Crichton*, 84 F.3d 581, 591 (2d Cir. 1996)); *see also* 4 Nimmer on Copyright § 13.03[B][1][A], at 13-68.5-13-69 (“If the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are, within the context of plaintiff’s work, of minimal importance, either quantitatively or qualitatively, then no infringement results.”); *Williams*, 84 F.3d at 588 (same); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 913 n.11 (2d Cir. 1980) (same).

B. There is No Substantial Similarity Between *Avatar* and Plaintiff’s Paintings Featuring Stone Arches

Plaintiff claims that the “stone arches” that appear in his paintings differ from those that appear in nature, and thus that he has a copyrightable interest in his paintings. (Pl. Br. at 11-12). This is undisputed, and misses the point—while Plaintiff has a copyrightable interest in his paintings, the concept of stone arches is unprotectible, and, in order to state a claim, Plaintiff must demonstrate a substantial similarity between the protectible, expressive elements of his paintings and *Avatar*, beyond that mere concept.

As explained in Defendants’ moving brief (Def. Br. at 19), three of Plaintiffs’ paintings at

issue do not even feature “arches.” “Aftermath” (Zavin Decl. Ex. D. p. 69) and “The Guardians” (*id.* p. 100-01) feature thin, rounded vertical structures, unlike the thick, jagged horizontal arches in *Avatar*, and “Red Dragon Landscape” (*id.* p. 63) features small, smooth stone structures pointing upwards. Plaintiff attempts to manufacture similarities between these paintings and *Avatar* not merely by isolating selected screen grabs out of context, but by (i) zooming in on a fraction of the relevant screen grabs and rotating these isolated elements 90 degrees (Pl. Decl. Exs. 14 p.21; 15; *see* Strauss Decl. Ex. 1 at 5:43-6:55), and (ii) comparing his paintings to images from the Avatar Books—which are not part of this case—which Plaintiff then flips horizontally, and from which Plaintiff creates his own drawings of silhouettes (Pl. Decl. Ex.14 p. 23). Such manipulations cannot demonstrate that an “ordinary observer,” much less a “more discerning” observer, would overlook the vast disparities between the subject works.

Plaintiff does not even attempt to compare his painting “Ascension City” to any image from the film. Instead, he compares this painting solely to an image from the Avatar Books—which Plaintiff again alters. (*See* Strauss Decl. ¶ 9). This “comparison” is irrelevant to the issue of whether a substantial similarity exists between “Ascension City” and the *film*.

With respect to “Arches Mist” (Zavin Decl. Ex. D pp. 108-09), Plaintiff cannot dispute that, unlike the thin, polished and rounded structures in Plaintiff’s painting, the arches in *Avatar* are thick, jagged and craggy, and covered in trees and moss. (Def. Br. at 19; *see* Zavin Decl. Ex. C, “Arches”). What Plaintiff refers to as “laminated or extruded grooves” on the arches in *Avatar* (Pl. Br. at 13) are actually jagged crags in the rough, uneven rock face. (*See* Zavin Decl. ¶ 10). Plaintiffs’ statement that both “Arches Mist” and *Avatar*’s arches feature “fine finger like ‘stumps’ [and] have the look of a hand” and “the same ratio of complete to incomplete arches” (Pl. Br. at 13) does not accurately describe either of the works themselves, which control over

Plaintiff's descriptions.¹³ And Plaintiff's claim that the "mood and color pallet is the same" (Pl. Br. at 13) appears to be based not on any arches appearing in the film, but instead on a distorted image taken from one of the *Avatar* Books; not only does Plaintiff focus on outlines of arches that appear in the distant background of a far larger image, he changes the color of the image to support his (false) claim of a similar "color pallet." (Strauss Decl. ¶ 7).

All that remains is Plaintiff's argument that "Arches Mist" and *Avatar* both feature arches "clustered" together. But again, there is no resemblance. "Arches Mist" features a large number of heavily interlocked arches, the ends of which emerge from common bases. The arches in *Avatar* do not interlock; rather, a smaller number of arches forms a protective natural bandshell, encasing the sacred Tree of Souls, with several arches laying almost flat against the ground. (Zavin Decl. Ex. C at 2:14:19—2:14:39).

If Plaintiff has to so manipulate images to suggest a "similarity" between his paintings and any of the arches appearing in *Avatar*, there was no legally cognizable similarity to begin with.

C. There Are No Protectable Similarities Between *Avatar*'s Hometree and Plaintiff's "Pathways"

Whether the "ordinary observer" or "more discerning" observer standard is applied, there is no cognizable similarity between *Avatar*'s Hometree—an enormous tree—and what appears to be a stone structure in Plaintiff's "Pathways" painting. (Def. Br. at 20-21).¹⁴ Plaintiff does not, and cannot, cite a single case suggesting that copyright infringement can be found from the mere fact that two very different images share, from some angles, a similar (but not identical) shape.

¹³ "Arches Mist" does not appear to feature a single "incomplete" arch—there is a small cluster of jutting rocks in the middle of the picture, but nothing that resembles an incomplete or broken-off arch.

¹⁴ Nor is there any similarity between Hometree's core structure, a dual spiral stairway formed of the thick and rounded limbs of an enormous tree, and the thin and polished single helix pathway in the foreground of Plaintiff's painting (Def. Br. at 21), regardless of Plaintiff's rigid insistence that what is obviously a single helix is somehow a "double helix." (Pl. Br. at 16).

Plaintiff's exhibits, which again rely on—and manipulate (*see* Strauss Decl. ¶ 10)—pictures from the Avatar Books and “silhouettes” that were “drawn by the plaintiff” for “illustrative purposes” (Pl. Decl. Ex. 17 pp. 29 (bottom), 31, 33 (bottom)) do not change this result.

Plaintiff is left to argue that “barnacle like plant forms” that appear in the foreground of “Pathways,” but are not a substantial part of the painting, are “ubiquitous” on Pandora (based on a single scene from the film, which Plaintiff crops heavily) (Pl. Br. at 16; Strauss Decl. Ex. 1 at 6:54-end). However, the plants in question do not appear anywhere near Hometree in the film, and as explained *supra* at 12-13, even if a single type of plant among Pandora's vast biosphere somewhat resembles one of the myriad plants that has appeared somewhere in Plaintiff's paintings over the decades, such an isolated and scattered similarity does not constitute copyright infringement. Moreover, the plants in question are not the same. Unlike the plants appearing in the foreground of “Pathways,” the plants appearing in *Avatar* do not grow out of water, have neither the leaves nor the mouthlike-openings between them that characterize Plaintiffs' “barnacles”—if anything, the plants in *Avatar* resemble solid, bulbous cacti—and the coloring is different.¹⁵ (*See id.* (cactus-like plants appearing in scene set in banshee aerie)). Particularly where Plaintiff's “barnacles” resemble real-life plants that appear in nature¹⁶ they cannot support an infringement claim here. *See supra* at 13.

D. There is No Similarity Between *Avatar*'s Tree of Souls or Tree of Voices and Plaintiff's “Floating Jungle”

There is simply no resemblance, protectible or otherwise, between *Avatar*'s Tree of Souls or Tree of Voices—willow-like trees with long, thin bioluminescent tendrils that hang straight

¹⁵ The “barnacle” plants appearing in Plaintiff's book “Views” are yellow. (Zavin Decl. Ex. E pp. 116-17). The plants in the version of “Pathways” appearing in Exhibit 17 to the Dean Declaration are green—like many other plants—but a different shade than the cacti in *Avatar*.

¹⁶ *See, e.g.*, <http://www.malag.aes.oregonstate.edu/wildflowers/species.php/id-100070>

down—and Plaintiff’s paintings or pictures of trees covered by a thick, heavy layer of dropping green moss. (Def. Br. at 22). Plaintiff’s argument that his trees contain “hair like branches or tendrils that are very similar to those contained in the *Avatar* movie” (Pl. Br. at 17) is frivolous, and belied by examination of the works themselves (compare Zavin Decl. ¶ 12 (screen grabs) and Ex. C (“Trees”) with Ex. D at 117-19), as is Plaintiff’s confusing claim that these very different images share a so-called “woolly mammoth silhouette.” Indeed, unlike *Avatar*’s trees, the branches in Plaintiff’s works are not even visible under the heavy layer of moss.

E. There are No Similarities Between *Avatar*’s Fantastic and Original Alien Life Forms and the Remaining Paintings Identified by Plaintiff

The remaining works identified in Plaintiff’s Complaint bear no resemblance to anything appearing in *Avatar*, and in preparing their motion to dismiss Defendants could not even determine the purported basis of Plaintiff’s infringement claims. Now that Plaintiff has actually set forth his theories, it is clear that his remaining claims are specious in the extreme.

1. There is No Similarity Between “Morning Dragon” and Pandoran Wildlife

Plaintiff does not dispute that flying dragon-like creatures are not protectible; nor does he deny the numerous and overwhelming differences between his “Morning Dragon” painting and *Avatar*’s banshees. Instead, he argues that the neural antennae through which the Na’vi can connect to all Pandoran wildlife (not just banshees),¹⁷ somehow infringes “the original antennae on the Morning Dragon.” (Pl. Br. at 18). But looking at Plaintiff’s painting, rather than his misleading description, it is clear that the “Morning Dragon” does not even have “antennae”—it has two long, thin tails! Antennae, by definition, extend from an animal’s head, not its behind. There is no “substantial similarity” between very different creatures merely because one has

¹⁷ The top screen grab from *Avatar* appearing in exhibit 19 to the Dean Declaration features one of *Avatar*’s six-legged horse-like creatures, not a banshee. (Zavin Decl. Ex. A at 1:51:48-53:18).

neural antennae and the other has thin tails.

2. “Magician’s Birthday” Does Not Resemble Any Aspect of *Avatar*

Plaintiff’s claim that the psychedelic landscape in “Magician’s Birthday” is infringed by scenes in *Avatar* in which the Na’vi traverse vines connecting Hallelujah Mountains (Pl. Br. at 11; Pl. Decl. Ex. 11) is also frivolous. There is no resemblance between the abstract red background shapes in “Magician’s Birthday” and the realistically-depicted vines in *Avatar*. Moreover, one need only look at the painting (Zavin Decl. Ex. E pp. 74-75) to see that the description of it in Plaintiff’s brief has no basis in reality. Among other things, Plaintiff claims that the “subject of the painting” is “a number of boulders and rock formations in midair, straining against massive vine and root systems” (Pl. Br. at 11). In reality, there is only one rock (which is not the “subject” of the painting), which appears to sit in a tree—it does not “strain against” any nonexistent “vine and root systems.” Plaintiff distorts his own painting and the relevant scenes from *Avatar* in an effort to feign some sort of similarity. Most outrageously, and without disclosing that he did so, Plaintiff appears to have changed the coloring of the central figure in his painting, increasing the blues in a futile effort to make it resemble *Avatar*’s Na’vi. (See Strauss Decl. ¶ 11).

3. Plaintiff’s Artworks Depicting Real-Life Lizards and Dragonflies Do Not Resemble *Avatar*’s Alien Wildlife

Plaintiff now claims that his images of real-life gecko lizards with different color schemes are somehow “infringed” by *Avatar*’s banshees, not because there is any resemblance between Plaintiff’s gecko and the banshee—there is not (*see* Strauss Decl. ¶ 5 for comparison of Plaintiff’s geckos and *Avatar* banshees)—but because, according to an *Avatar* documentary, the banshee’s coloration is based on a real-life poison dart frog, and Plaintiff claims that his geckos use patterns from the same frog. (Pl. Br. at 18-19). Even setting aside that (i) nowhere in his

works does Plaintiff indicate that coloration is taken from “poison dart frogs” (undermining any theory of actual copying), (ii) colors are not subject to copyright protection (37 C.F.R. § 202.1), (iii) Plaintiff plainly has no protectible interest in the public domain color patterns of real-life animals (*see* Def. Br. at 9, 18), and (iv) the banshees appearing in the film have a wide variety of color patterns, but Plaintiff does not, and cannot, identify a single banshee actually appearing in *Avatar* that shares the same pattern as any of his geckos,¹⁸ Plaintiff’s infringement claim must fail because no “ordinary observer,” no matter how discerning, would be disposed to “overlook” the manifest dissimilarities between Plaintiff’s small geckos and *Avatar*’s giant flying creatures and “regard [their] aesthetic appeal as the same.” *Peter F. Gaito*, 602 F.3d at 66.

Finally, Plaintiff claims that the colorings and markings on his dragonfly logos somehow render them substantially similar to creature that appears in *Avatar* called a “tetrapteron”—a birdlike creature with a 4.5-foot wingspan. (Pl. Decl. Ex. 22). But again, Plaintiff only compares his dragonflies to images from the Avatar Books—which are irrelevant (and do not resemble Plaintiff’s dragonflies in any event). The tetrapterons that actually appear in the film are entirely purple, and they bear even less resemblance to Plaintiff’s dragonflies (if that is possible). (*See* Zavin Decl. Ex. A at 1:23:58-1:24:14).

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that Plaintiff’s Amended Complaint be dismissed in its entirety, with prejudice.

¹⁸ Plaintiff again relies on an image taken from one of the Avatar Books, not the film (Pl. Decl. Ex. 20), but even this image bears no resemblance to any of Plaintiff’s geckos.

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