No. 20-871

In The

Supreme Court of the United States

IN RE BRYANT MOORE,

Petitioner,

On Petition For A Writ Of Mandamus And Prohibition To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether this Court should use its discretion through 28 U.S.C. § 1651(a) and governing law of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) to provide relief, including default judgment, vacating lower court decisions (including legal fees and costs), which both affirmed summary judgment and concluded that defendants did not commit fraud on the court?

PARTIES TO THE PROCEEDINGS

The following are parties to this proceeding in the United States Supreme Court:

1. Bryant Moore, Petitioner, was the appellant in the United States Court of Appeals for the Fourth Circuit.

2. Judges to whom mandamus is sought are the Honorable Judges of the United States Court of Appeals for the Fourth Circuit, namely, the Honorable Judge Robert B. King, the Honorable Judge Stephanie D. Thacker and the Honorable Judge Andre M. Davis, Senior Circuit Judge.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Opinions or orders of the Fourth Circuit and District Court of Maryland, with the District Court bench ruling, are reproduced at App. 1-47.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1651(a).

RELEVANT STATUTORY PROVISIONS

Article I, Section 8, Clause 8 of the United States Constitution grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

17 U.S.C. § 501 provides, in relevant part, as follows: "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be."

RULE 20.1 STATEMENT

The writ will be in aid of the Court's appellate jurisdiction. Mandamus relief is warranted because

the lower courts exceeded their statutory jurisdiction, while there are exceptional circumstances with respect to summary judgment involving *Hazel-Atlas* violations and authors' Constitutional protections. In *Cheney*, this Court set out three conditions to be satisfied before such an extraordinary writ must issue: (1) the party must have no other adequate means to attain the relief he deserves, (2) the party must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable, and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances. Id. at 380-81. Petitioner Moore satisfies these three conditions.

STATEMENT OF THE CASE

Petitioner Bryant Moore ("Petitioner"), an African-American writer, alleged that defendants Lightstorm Entertainment, Inc. (a production company owned by defendant James Cameron), James Cameron and Twentieth Century Fox Film Corporation ("Fox") incorporated elements from his copyrighted works in AVATAR – among the highest grossing films ever with reported box office earnings of $2,782,275,172 – in violation of the Copyright Act (dkt45). App. 270-274. Petitioner's works were Aquatica (1994) (dkt157-3, 157-4 & 157-5) (dkt 118-78), Descendants: The Pollination ("Pollination") (2003) (dkt118-71), and two drawings (Document 37-5 at 2-3) (dkt118-108) registered in 2005 – each of these works pre-dated all copyright registrations having anything to do with Avatar. App. 48-54. The Declaration of

James Cameron admits that Petitioner's works were submitted to Lightstorm. App. 262. Petitioner's hard copy screenplay submissions were received at Lightstorm's office, logged into Lightstorm's development data base and received coverage. App. 101, 103, 276, 278.

Having denied defendants' motion to dismiss Petitioner's copyright infringement claims (App. 377), the district court granted defendants' motion for summary judgment (dkt175). App. 24-47. The Fourth Circuit affirmed summary judgment based on specific reasons in the opinion, holding that "we affirm for the reasons stated by the district court." App. 22-23. Petitioner filed a motion to set aside the judgment for fraud on the court pursuant to *Hazel-Atlas Glass Co. v. Harford Empire*, 322 U.S. 238 (1944) ("*Hazel-Atlas*") and Federal Rule of Civil Procedure Rule 60(d) (Document 210, 210-1, with exhibits and addendum 210-2 through 210-20), including Examples of Fraud on the Court (Document 210-3), which the District Court denied (App. 4-21.) and was affirmed by the Fourth Circuit. App. 1-3. Defendants were awarded $1,177,520 in legal fees and costs, while the Clerk granted $30,028.25 in costs. Petitioner filed a petition for a writ of certiorari which was denied. Markedly, "denial carries with it no implication whatever regarding the Court's views on the merits of a case." (*Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950)). District court granted defendants' writ of execution concerning Petitioner's copyrights. Subsequently, the U.S. Marshalls Service auctioned petitioner's copyrights to the sole bidder, defendant Fox, which bought 13 titles, including Aquatica and

Pollination for $26,500 (i.e., fire sale). An order confirmed the sale, although 17 U.S.C. § 201(e) prohibits involuntary transfer of copyrights not previously transferred (bankruptcy is the exception which petitioner has not done and never transferred copyrights) App. 55-78.

REASONS FOR GRANTING THE PETITION

I. Exceptional Circumstances Warrant Mandamus and Petitioner Moore Cannot Obtain Relief from Any Other Court or Forum

The All Writs Act, 28 U.S.C. § 1651, authorizes the Supreme Court to issue extraordinary writs in its discretion. Here, governing law is *Hazel-Atlas*. App. 363-376. Mandamus relief is warranted because the lower courts exceeded their statutory jurisdiction, while there are exceptional circumstances with respect to summary judgment involving *Hazel-Atlas* violations and authors' Constitutional protections. In *Hazel-Atlas*, this Court held that relief "will be" granted against a judgment begotten by fraud (*Hazel-Atlas*, supra at 244). This issue goes to the heart of why *Hazel-Atlas* exists as this Court's binding precedent. Under certain circumstances, including *after-discovered* fraud, "relief will be granted against judgments" and such relief will take place "regardless of the term of their entry." *Hazel-Atlas* at 244. As such, circumstances whereby relief will be granted were described in detail by this Court. Notably, GOOGLE SCHOLAR shows 1,592

Hazel-Atlas cites as of December 15, 2020 including recent cites.

Indeed, *Hazel-Atlas* interprets that protection in Article I, Section 8, Clause 8 of the U.S. Constitution "does not concern only private parties." (*Hazel-Atlas*, supra at 246). Specifically, to prevail in a claim for copyright infringement, a plaintiff must show "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Establishing substantial similarity is necessary only when direct evidence of copying is unavailable. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir. 1982), cert. denied, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 145 at 614.

A. Mandamus Aids the Court's Appellate Jurisdiction When It Prevents a Lower Court from Exceeding Its Lawful Authority

A petition for a writ of mandamus under 28 U.S.C. § 1651(a) "must show that the writ will be in aid of the Court's appellate jurisdiction. . . ." Sup. Ct. R. 20.1. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

Petitioners need to show that there was a "clear abuse of discretion," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953), or judicial "usurpation of power." *De Beers*, 325 U.S. at 217. This Court described in *Cheney v. U.S. Dist. Court for the Dist. of Columbia*: [Mandamus] is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947).

B. The Lower Courts Did Not Apply the *Hazel-Atlas* Standard for Fraud on the Court Which Encompasses "Deceptive Attribution"

Fed.R.Civ.P. Rule 60(d), known as the "savings clause" was formerly contained within Rule 60(b), but recent amendments to the Federal Rules of Civil Procedure moved the provision to Rule 60(d). It states in pertinent part that "This rule does not limit a courts power to" "set aside judgment for fraud on the court." The standard for fraud on the court was established by this Court in *Hazel-Atlas* where the attorney for Defendant Hartford wrote an article praising the Defendant's product for advancing the field, then had the article printed in a trade journal under the name of an expert. 322 U.S. at 240. Both the Third Circuit and the Patent Office relied in part on the article when ruling in favor of Hartford in patent application and infringement cases. Id. at 240-41. The United States Supreme Court found conclusive evidence that this article was used for fraudulent purposes and set aside

the judgment. The Court observed that: "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive." Id. at 245-46 (internal citation omitted). Faced with "apparently insurmountable Patent Office opposition," the patentee's attorneys wrote an article describing the invention as a remarkable advance in the art and had William Clarke, a well-known expert, sign it as his own and publish it in a trade journal. Id. The patentee then went to great lengths to conceal the false authorship of the Clarke article. Id. at 242-43. On the basis of such discovered facts, Hazel-Atlas petitioned the Third Circuit to vacate its judgment, but the court refused. Id. at 243-44. The Supreme Court reversed. Id. at 251. Notably, "the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious article and reversing the decree of the District Court . . . " Id. at 242-243. The Circuit Court denied relief to Hazel on the matter that Hartford had perpetrated a fraud on the Patent Office and the Court of Appeals in the infringement suit. In 1944, the Supreme Court vacated the judgment against Hazel-Atlas. Id. at 250-51. In granting relief, this Court expressly held that Hartford "urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to

escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise." Id. at 247. With respect to the Clarke matter, the court's legal description of such acts was "deceptive attribution" or "deceptive attribution of authorship." 322 U.S. at 247. Thus, according to *Hazel-Atlas*, "deceptive attribution of authorship" or "deceptive attribution" that is referenced and relied upon by the court constitutes fraud on the court. In the instant case, defendants claimed that various creators of pre-existing works authored numerous elements which were not in fact contained in those works. Hence, authorship of these elements should not be attributed to such authors. Defendants also deceptively attributed elements to the Petitioner which he did not author as part of their defense. In *Hazel-Atlas*, "deceptive attribution of authorship" encompassing an affidavit to win a judgment constituted "a deliberately planned and carefully executed scheme to defraud." Id. at 245. In the instant case, to win summary judgment and overcome seemingly "insurmountable opposition" (e.g., *Hazel-Atlas*, supra at 242-43) as demonstrated by evidence in the record from the motion to dismiss period (with respect to access, striking similarities, and substantial similarities), defendants and their attorneys urged upon the court "deceptive attribution" and "deceptive attribution of authorship."

C. District Court's Summary Judgment, Affirmed by the Fourth Circuit, References and Relies on Defendants' Deceptive Attributions

The affirmed district court opinion relied upon and referenced defendants' deceptive attributions in the instant case (with respect to access, striking similarities, and substantial similarities), making the court a victim. Defendants' deceptive attributions were referenced in the district court's January 17, 2014 opinion (App. 24-47) which states in pertinent part that: "Although acknowledging that Moore gave him a copy of Aquatica around 1994, Gibson testified in deposition that he only spoke to Cameron once during his employment and never passed the script to Cameron or anyone at Lightstorm. Defs.' Mot., Ex. Williams 25, ECF No. 118-106" (ECF 175 at 6); "the major copyright eligible elements of the work are contained in this early scriptment. See Expert Report of Mark Rose, Defs . . . Expert Report of Jeff Rovin . . . " (dkt175 at 8); " . . . Defendants appropriately rely on expert testimony to show that the works are not substantially similar under the extrinsic test" (ECF 175 at 14); "Cameron submitted a comprehensive declaration that specifically addresses Moore's allegations . . . a story he wrote in college addressed the issue of "transitioning from a disabled body" . . . Cameron Decl. at 10. He introduced a sketch he drew . . . of a large tree on which he modeled the "hometree" in Avatar. Defs.' Mot. at 49 . . . Xenogenesis, featured a similar setting to that in Avatar . . . Cameron Decl. at 12. Cameron's detailed declaration and accompanying exhibits are persuasive" (ECF 175

at 22); "A review of the filings, both parties' expert reports . . . makes clear . . . similarities are limited to general stock themes, scenes a faire and ideas not subject to copyright protection" (ECF 175 at 22). Indeed, it is substantiated that defendants' expert reports and particular declarations included deceptive attributions. See Plaintiff's Memorandum of Points and Authorities (Document 210-1) with exhibits and Addendum (210-2 through 210-20), including select Examples of Fraud on the Court (Document 210-3) which addresses numerous deceptive attributions referenced in defendants' document 118-2, filed in support of their motion for summary judgment. See also Plaintiff's Statement of Disputed Facts (dkt157, 157-1&2). Notably, the Decision (ECF 175 at 15) referenced page 14 of Defendants' Reply that Avatar heroes were not advanced. App. 38. On pages 72-73, the Rovin Report states "characters of the Plaintiff's works and Avatar bear no striking or substantial similarity . . . This archetype, in Avatar, is nothing like the technologically-savvy heroes of the Plaintiff's works." App. 125-126. Factually, Avatar's hero(es) use technologically-savvy tools of automatic weapons, grenades, and genetically engineered bodies which are remotely controlled (dkt118-74) App. 88, 104-105, 144-149, 155. Expert Report of Jeff Rovin (pg. 96) makes "deceptive attribution" concerning "The Bio-Vapor" in Pollination. He falsely claims "it is a nefarious invention of the Pollinators" and attributes this element to Petitioner. Page 65 of the Pollination screenplay states the Bio-Vapor is "released by the microbes in the soil." (see dkt18-6). Petitioner's fraud on the court motion attached other examples, including

defendants' Voyage to the Bottom of the Sea matter. App. 124, 156-174.

Particularly, "For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 U.S. at 94. The Court explained that originality requires independent creation plus a modicum of creativity." *Feist*, supra at 346. Indeed, "even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U.S. at 547. Accord, Nimmer § 3.03." See *Feist*, 499 U.S. at 348.

D. Courts May Infer Access Based on Doctrine of Similarities With "Sufficient Degree Of Intricateness" But Was Made Victim By Defendants' *Hazel-Atlas* Violations

Substantial similarity is a fact-specific inquiry. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* ("*Krofft*"), 562 F.2d 1157, 1164 (9th Cir. 1977). *Hazel-Atlas* violations of fraud on the court make the Court victim in this regard. "The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas*, supra at 246. In the instant case, the court was made victim by Defendants' deceptive attributions that certain elements in Moore's works and numerous similarities

between Moore's works and AVATAR exist in pre-existing works although those certain elements in Petitioners' works are not contained in, cannot be found in or do not appear in public domain or pre-existing works as represented by defendants. See *Cabell v. Zorro Productions Inc.*, Dist. Court, N.D. California, Case No. 15-cv-00771-EJD (VKD) (2018) ("setting of gypsies telling the story of Zorro is not a stock literary device and, as such, illustrates that there is a triable issue of fact as to whether the settings of the ZPI Musical are substantially similar to the settings of the Cabell Musical." at 23). Notably, in *Silverman v. CBS Inc.*, 870 F.2d 40 (2d Cir. 1989), the Second Circuit explained that copyrights "provide protection . . . for the increments of expression" contributed to public domain elements in a copyrighted work. Id. at 49-50. See also id. at 50 (referring to "protectable increments").

When determining access (opportunity to read or view) with respect to the allegedly infringed work, a court may consider whether there are "striking similarities" between the works at issue. *Bouchat*, 241 F.3d at 356. Based on the existence of strikingly similar elements between the works that are so similar as to foreclose any possibility that the defendant independently created the allegedly infringing work, the court may infer the defendant had access to petitioner's work based on the existence of such similarities. Id. *Understanding the Concept Of "Striking Similarity" In Copyright-Infringement Litigation* (https://www.americanbar.org/content/dam/aba/migrated/Forums/entsports/PublicDocuments/understandingstrikingsimilarity.pdf) by

Timothy L. Warnock explains that proof of access "may be the degree of similarity between the two works. If the similarity is striking, then the finder of fact may infer access. This principle regarding striking similarity is nothing more than the application of principles of circumstantial evidence to copyright-infringement litigation. The doctrine of circumstantial evidence generally permits the inference of a fact based upon the existence of another fact." Warnock states that "persuasive evidence of substantial similarity" includes elements between works with "sufficient degree of intricateness." (Id. at 3). Exhibit 1 (dkt18-1) and Exhibit 2 (dkt18-2), incorporated by reference into Petitioner's Second Amended Complaint, included side-by-side comparisons of similarities with "sufficient degree of intricateness." Defendants' "deceptive attribution of authorship" regarding various pre-existing works, which did not include numerous elements that defendants cited, made the court victim with respect to the doctrine of "intricateness." Markedly, the record encompasses this cache: dkt118-95; dkt157-46, Wording Similarities Avatar Scriptment – Aquatica; dkt157-47, Avatar Scriptment & Aquatica Similarities; Ex. 1 and Ex. 2 of First Amended Complaint, Documents 18-1 and 18-2, namely, Striking & Substantial Similarities Between Avatar & Descendants: The Pollination and Substantial And Striking Similarities Between Avatar and Aquatica, respectively; Document 37-3, Avatar Time Code, Avatar Similarities to Aquatica and/or Pollination; dkt157, 157-1&2, dkt157-3, 157-4 & 157-5, Plaintiff's Statement of Disputed Facts; substantial similarities and striking similarities between Avatar, Descendants:

The Pollination and Aquatica (dkt157-16 & 157-17). Indeed, "Because direct evidence of copying is rarely, if ever, available, copying is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectable material in the copyrighted and defendant's works. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980, 97 S.Ct. 492, 50 L.Ed.2d 588 (1976); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)" (quoting *Miller Brewing Co. v. Carling O'Keefe Breweries*, New York (1978) at 438). When defendants make false claims of authorship that elements exist in pre-existing works, while such elements do not appear in or cannot be found in those works and the court opinion references such representations (ECF 175), the court is made victim under the *Hazel-Atlas* test, having been deceived into crediting defendants' deceptive attributions as true (concluding that similarities were based on non-copyrightable elements). This constitutes a "deceptive attribution of authorship" pursuant to *Hazel-Atlas* because the creators of the referenced prior art did not author such elements as per defendants' false "claim of authorship" (*Hazel-Atlas*, supra at 242). In such instances where other copyrightable works did not have these elements, Petitioner was the first and thus, defendants deliberately concocted a scheme to deceive which constitutes fraud on the court pursuant to *Hazel-Atlas* standard.

After referencing defendants' deceptive attributions, the court also concluded that such similarities between petitioner's works and the alleged infringers

were scenes-a-faire. Indeed, "scenes a faire are "incidents, characters, or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic." *Walker v. Time Life Films, Inc.*, 615 F.Supp. 430, 436 (S.D.N.Y.1985), aff'd, 784 F.2d 44 (2d Cir.), cert. denied, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 721 (1986). See *Eaton*, 972 F.Supp. at 1029. To win summary judgment, the instant case defendants endeavored to place Moore's original elements in the shroud of standard, making "deceptive attribution of authorship" which the court relied on. Both Aquatica (see dkt157-5 at 119-132) and Avatar at 65 (see dkt118-74) (see dkt157, Ex. 9, Substantial similarities and striking similarities between Avatar, Descendants: The Pollination and Aquatica, dkt157-16 & 157-17) include the setting of a bioluminescent forest, which is not proven to be a standard device, so it is not predictable that both works would have a number of such details in common. App. 84, 89, 92, 150, 154, 197-205. Jules Verne's *Twenty Thousand Leagues Under the Sea* ("*Leagues*") (dkt118-130) does not contain this setting as deceptively attributed to Verne in the expert report of Mark Rose (dkt118-60) on page 38 and Document 118-2 at 26, No. 120, which refers the court to page 38 of dkt118-60 where Mr. Rose falsely represents that bioluminescent elements in Aquatica appear in *Leagues*. App. 176. In the instant suit, numerous elements represented by defendants as prior art or commonplace do not appear in the prior art cited and thus, are not "standard" as a matter of law. Such deceptive attributions of authorship were relied upon by the district court's summary judgment opinion.

E. Affirmed by the Fourth Circuit, Summary Judgment Reasons Relied on Defendants' Deceptive Attributions & Under *Hazel-Atlas* There is a Duty to Vacate

The party seeking summary judgment must identify evidence that demonstrates an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A court determines "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Under the *Hazel-Atlas* standard for fraud on the court, the lower courts had the duty to vacate summary judgment in the instant case. This Court held that "the Circuit Court, on the record here presented, [Footnote 5] had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions." *Hazel-Atlas* at 249-50. The instant case meets this *Hazel-Atlas* standard based on the reasons summary judgment was both granted and affirmed ("we affirm for the reasons stated by the district court." App. 23), which referenced and relied on defendants' deceptive attributions. App. 34-46. Thus, the lower court did not apply the governing *Hazel-Atlas* standard.

F. Mandamus Is Warranted Because Defendants' Deceptive Attributions Impacted the Courts' Conclusion That Defendants Did Not Have Access To Moore's Works

Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2000), used in the summary judgment opinion, explains access is "an opportunity to view" and thereby copy the work. *Bouchat*, supra at 354. Indeed, "Where direct evidence of copying is lacking, plaintiff may prove copying by circumstantial evidence in the form of proof that the alleged infringer had access to the work and that the supposed copy is substantially similar to the author's original work. See *Towler*, 76 F.3d at 581-82." *Bouchat*, supra at 358. Circumstantial evidence is sufficient to prove access. ("Bouchat was not required to prove that Modell in fact saw the drawings and copied them. Rather, Bouchat was merely required to prove that Modell had access to the drawings by showing Modell had the opportunity to view them. See *Towler*, 76 F.3d at 582.") *Bouchat*, supra at 354. Specifically, "striking similarity is circumstantial evidence of copying, thereby supporting an inference of access. What is important is that the access prong remains intact, but the level of similarity between the contested works can be used as evidence of access . . . " (*Bouchat*, supra at 356). Concerning this copyright infringement doctrine, defendants' deceptive attributions regarding pre-existing works (and petitioner's works) which did not contain particular elements as defendants falsely claimed, rises to the level of fraud on the Court under the *Hazel-Atlas* standard, making the

court victim (e.g., whether Moore was entitled to an inference of access due to striking similarities). Indeed, plaintiff expert Frank Simeone identified striking similarity between Moore's works and AVATAR. App. 343-349. Defendants made strategic, deceptive attributions to refute access, including the Cameron declaration (dkt118-4) which made deceptive attributions of certain allegations falsely attributed to Moore and then proceeded to refute them. The Cameron declaration represented that "I understand that Mr. Moore alleges that someone named Howard Gibson provided me with a copy of Mr. Moore's Aquatica screenplay in 1994. This never happened." (dkt118-4 at 4). Actually, Petitioner's Second Amended Complaint (dkt45 at 8, 11,12) alleged that defendants had access as a matter of law ("They enjoyed access to Aquatica via Howard Gibson . . . ") at 8, #22 via transmittal to Lightstorm instead of directly "provided" Cameron with Aquatica. App. 262, 272. Thus, the lower court, relying on defendant's deceptive attribution in concluding the 1994-1996 access claim was frivolous, is made victim pursuant to *Hazel-Atlas*. In Document 175 at 6, the trial court, relying on the affidavit of J. Matthew Williams ("Williams Declaration"), held that Gibson "testified in deposition that he . . . never passed the script to Cameron or anyone at Lightstorm. Defs.' Mot., Ex. Williams 25, ECF No. 118-106." App. 29. Indeed, "Defs.' Mot., Ex. Williams 25, ECF No. 118-106" includes deceptive attribution. Gibson did not maintain that he never passed the script to anyone at Lightstorm in the pages defendants definitively cited (See App. 279-282, Gibson Deposition dkt157-31 and dkt157-32 at 105:1-16, 156:14-157:2). In

the pages defendants' cited, Gibson's deposition is absent of testimony that Aquatica was not him at the 1994 meeting at defendant Lightstorm's office, yet the lower court credited defendants' representation as true and relied on it. Defendants' deceptive attribution was made to deny access ("it must be reasonably possible that the paths of the infringer and the infringed work crossed. *Moore v. Columbia Pictures Industries, Inc.*, 972 F.2d 939, 942 (8th Cir. 1992)." See *Towler v. Sayles*, 76 F.3d 579, 582-83 (4th Cir. 1996) at 582). When asked if he was certain that he did not provide Aquatica to Lightstorm, Cameron or Fox, Gibson testified that "Let me specify that the top brass. I am for certain I didn't go to the top brass and the big guys there in 20th Century Fox." (Gibson Deposition, dkt157-31 & 157-32 at 169:16-21). App. 292. This deposition testimony is without the statement that Gibson did not give Aquatica to anyone at Lightstorm.

G. Gibson Did Not Deny Bringing Moore's Aquatica Screenplay to the 1994 Meeting at Lightstorm Entertainment In Deposition Pages Defendants Cited to Refute Access, Yet the Affirmed District Court Summary Judgment Decision Relied On Defendants' Deceptive Attribution

Here, defendants' "deceptive attribution" was not without effect on the district court (see Williams Decl. Ex. 25, dkt157-31 and dkt157-32 Gibson Deposition. at 105:1-16, 156:14-157:2) App. 280-282. As previously noted, defendants stated that "Gibson did not take Plaintiff's Aquatica with him to the meeting at Lightstorm. Williams Decl. Ex. 25 (Gibson Dep. at 105:1-16, 156:14-157:2)." (See ECF 118-2 at 15, filed by defendants' "In Support of Their Motion For Summary Judgment"). Here, Gibson's testimony is without the statement that he did not have Aquatica with him at his 1994 meeting at Lightstorm Entertainment, yet the standing, affirmed district court summary judgment opinion (Document 175 at 6-7) includes the statement that "Furthermore, even assuming that Gibson met with Cohen, Gibson denied bringing the script to the interview." The deceptive attribution to Gibson by defendants in referencing the pages cited, which was in fact, authored by the defendants and was consequently, referenced as fact by the trial judge in his opinion. Gibson's actual testimony proves deceptive attribution in defendants' Declaration. In the instant case, defendants' deceptive attribution to Gibson that he did not bring *Aquatica* to the 1994 meeting is fraud on the court, as a matter of law because the district court

referenced it, crediting it as a true and authentic material fact. Defendants strategically directed the court's attention to such deceptive attributions for summary judgment purposes.

H. Defendants Made Deceptive Attributions Concerning Expression of Ideas That Do Not Exist In Pre-Existing Works Which Constitute a Scheme to Defraud Under Governing Law

The Court filters out protectable elements. See *Feist*, 499 U.S. at 345, 111. The expression of an idea is protectable when original to the author. ("protection is given only to the expression of the idea – not the idea itself."). See *Mazer v. Stein*, 347 U.S. 201 (1954). Defendants' deceptive attributions of authorship with respect to elements as expression of ideas that in fact do not exist in pre-existing serves as a scheme to defraud with respect identifying similarities between the expression of ideas in Moore's works and Avatar. App. 104-143, 156-249.

Defendants engaged in deceptive attribution of authorship in violation of *Hazel-Atlas* by attributing elements to authors' whose works do not contain those elements. Thus, defendants' false claims that authorship of specific elements belonged to other creators whose works did not in fact include the referenced elements resulted in making the court victim with respect to filtering out the original, protectable elements. Indeed, "Original, as the term is used in copyright, means only that the work was independently created by the

author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." See *Feist*, supra at 345. Defendants stated that numerous elements in Moore's works existed in certain examples of prior art when in fact several elements were not in those particular referenced works. Such actions constitute deceptive attribution of authorship under *Hazel-Atlas*. Mark Rose engaged in deceptive attribution of authorship in his expert report: "(see, for example, Plaintiff's Exhibit 2, nos. 8, 10, 11, 17, and 18). I note that descriptions of underwater bioluminescence such as those found in Aquatica are prominent in Twenty Thousand Leagues (see, e.g., pp. 33, 110, 117, 165, and 256)." (dkt118-61 at Rose Report – pg. 38). App. 176. Here, the key phrase is "bioluminescence such as those found in Aquatica." Unlike *Leagues*, AQUATICA (dkt157-3, 157-4 & 157-5; see 157-5 at 119-132) depicts "A BIO-LUMINESCENT FOREST OF GIGANTIC, GREEN, REDWOOD TREE LIKE PLANTS" and a "RAINFOREST OF BIO-LUMINESCENT REDWOOD TREE-LIKE VEGETATION" App. 197. There is no bioluminescent rainforest or bioluminescent forest in *Leagues* in pages 33, 110, 117, 165, and 256 (dkt118-130) (dkt210-4 at 2) (dkt210-11 at 3-8. App. 241-245. Thus, defendants' expert report, in violation of *Hazel-Atlas*, makes a deceptive attribution of authorship since Jules Verne did not author the referenced element of a bioluminescent rainforest or bioluminescent forest in *Leagues* as defendants' expert falsely represented. Concerning *Xenogenesis*, General Instructions for Space 6 of the U.S. Copyright Registration form states "identify any preexisting work or works that this work is based on or incorporates" (Document

153-1 at 5). Xenogenesis and other referenced works are not included in Space 6 of the AVATAR copyright registration forms (Document 153-1) App. 121-122, 251-254. Nonetheless, Cameron's Declaration (Document 118-4) (App. 108, 256-260, 263.) fundamentally touts these works as pre-existing works that Avatar incorporates or is based on and the works were referenced by the district court opinion. App. 24-46. Namely, the "story he wrote in college," "sketch he drew . . . of a large tree" and "Xenogenesis," were not included in Space 6 for AVATAR's copyright registration certificate as "preexisting work or works that this work is based on or incorporates." Invoking such works absent from Space 6 later in litigation whereby the court decision references such works, constitutes deceptive attribution of authorship as a matter of law. Cameron's Declaration states "Many of the ideas in AVATAR that Mr. Moore claims resemble ideas from his 1994 Aquatica screenplay I had already used in my earlier, pre-1994 works" (Document 118-4 at 7, #20). Cameron's Declaration makes deceptive attribution that petitioner's copyright infringement claims addressed ideas when petitioner's side-by-side comparisons specifically addressed expressions of ideas (dkt18-1, dkt18-2, dkt157-47, dkt157-46) (dkt157, Ex. 9, Substantial similarities and striking similarities between Avatar, Descendants: The Pollination and Aquatica, dkt157-16 & 157-17)) App. 179, 235-240, 247-249, 265, 320-322. Additional deceptive attributions as a matter of law are evidenced by the fact that none of Cameron's "pre-1994 works" are included in the aforementioned Space 6 of AVATAR's copyright registration document. (Document 153-1) App.

251-254. Deceptive attribution of authorship is revealed in light of the U.S. Copyright Office records which indicate that Fox registered the work (Avatar) as having no "pre-existing work or works that this work is based on or incorporates" (other than the scriptment via a supplementary registration) and the application does not mention such works as *Xenogenesis*, *The Terminator*, *Mother*, *Chrysalis*, *Aliens*, *The Abyss*, *Terminator 2: Judgment Day*, *Strange Days*, *Rambo II*, or Cameron's high school drawing – all attributions to Avatar which the Cameron Declaration makes (as do affidavits from others – Rose Decl. Ex. 1 at 42 (Expert Report); Rovin Decl. Ex. 1 at 43, 61-63, 65-68, 110, 128, 130 (Expert Report)), but are not contained in the application. The referenced Cameron works relied upon by the district court, namely, the "story he wrote in college" (Chrysalis), "sketch he drew . . . of a large tree" and "Xenogenesis" were not included in Space 6 for Avatar's copyright registration document (completed years before litigation).

Referencing declarations germane to their motion for summary judgment (118-2), defendants falsely claimed that "5. Cameron's Scriptment . . . contains the plot, sequence of events, characters, settings, themes, moods, and pace contained in the Avatar film. Cameron Decl. ¶ 6, Ex. 1 (Avatar Scriptment); Declaration of Dr. Mark Rose ("Rose Decl.") . . . (Expert Report); Declaration of Jeff Rovin ("Rovin Decl.") Ex. 1 . . . Expert Report . . . " (118-2 at 3). Indeed, the Avatar scriptment (dkt118-5, dkt118-45, dkt118-55) setting for the Navi's home was ***three trees*** ("Josh follows Zuleika into the

village of her clan. They live inside the bases of three of the enormous mangrove-like trees") (App. 297), whereas in AVATAR's script (Doc. 18-5 at 45), the clan lives ***in one gargantuan tree*** ("Neytiri's village, is sheltered inside one of the GREAT TREES . . . with a trunk four times the diameter of the largest Sequoia. . . ."). App. 151. The court was made victim and deceived by defendants' deceptive attribution as evidenced by the Decision which stated "Cameron submitted a comprehensive declaration that specifically addresses Moore's allegations" (ECF 175 at 22). The Cameron Declaration (dkt118-4) contained deceptive attributions in referencing and addressing allegations Moore never made. Moore never alleged a similarity of "transitioning from a disabled body" (Cameron Decl. 118-4 at 10-11). App. 257. Instead, Moore's allegation entailed a wheelchair bound man who seeks a new body. App. 265. With respect to hometree, the court was made victim by deceptive attribution as evidenced by the Decision ("He introduced a sketch he drew in high school of a large tree on which he modeled the "hometree" in *Avatar*. Defs.' Mot. at 49." (ECF 175 at 22). App. 45. As evidenced by Document 210-4 at 10, Cameron's sketch is dissimilar to Avatar's home tree. App. 266. The element of the figure walking on a branch does not appear as Cameron's Declaration represents (dkt118-4) at 9-10 ("As shown in Exhibit 3 to the Declaration of Jon Landau ("Landau Declaration"), the characters in Avatar walk on the huge branches of the trees on Pandora as they move through the forest, as does the tiny figure in my eleventh-grade drawing "Spring on Planet

Flora."). App. 259, 266. See also Landau Declaration (dkt118-26) and Document (118-13). On its face, the referenced drawing does not show "the tiny figure" on a branch, but instead, shows "the tiny figure" on a bent tree as evidenced by the tree roots at the bottom of the tree (Document 118-13 at 2). Defendants' expert Jeff Rovin makes a deceptive attribution in espousing "he acknowledges this himself when he says of the forests in *Pollination*, "References for the forests include the following" and lists four films including *King Kong* (1933) (Ex. 1) and *Fellowship of the Ring* (2001) (Ex. 2)." (Expert Report of Jeff Rovin, dkt118-61 at 8. App. 128-129. Rather than references for creating his work, Moore stated "This was just a reference for people for people who hadn't read my Aquatica script to get an idea." (Moore Deposition, dkt157-36 & 157-37 at 172-173) App. 317. Clearly, smaller trees in King Kong are antithetical to the "gargantuan, mountain-like" trees in Pollination (dkt118-71) and gigantic, redwood tree like plants in Aquatica (see 157-5 at 119-132) (See Document 210-4 at 3) App. 267-269. (See dkt118-87). (See Pollination generally, dkt118-71; Document 210-4 at 18; dkt210-4 generally). App. 301-303. The Rovin Report's (dkt118-61) deceptive attribution is demonstrated at 58: "In yet another scene in Mr. Cameron's script, Rambo simultaneously lobs two grenades (STORM0011053), an element the Plaintiff alleges originated with *Aquatica* (#2, list of alleged fragmented literal similarities)." App. 315. In *Aquatica*, "Torin pulls out two grenades," see Document 18-2 at 14, #77 (App. 240), whereas "Rambo hurls two SMOKE GRENADES down the dike wall" (STORM0011025),

"He starts pulling grenades out of his pockets" (STORM0011049) and "Rambo throws two grenades down the hill" (STORM0011053). (dkt118-20) App. 312-315. Pulling two grenades in one sequence is an element in both Aquatica and Avatar (see dkt210-14 at 2-7), but not in Rambo. The Rambo movie (dkt118-121) does not show Rambo pulling two grenades. See dkt210-14 at 2-7. (See Document 210-3). Plaintiff also proffered similarity of heroes pulling out two grenades which mistakenly drop. App. 240.

Additionally, defendants' expert Mr. Di Fate makes the deceptive attribution that "The plaintiff has registered six drawings with the U. S. Copyright Office that he has associated with his screenplay entitled *Descendants: The Pollination*, and that he contends contain similarities to characters and objects that appear in the motion picture *Avatar*" (Expert Report of Vincent Di Fate, dkt118-65 at 10). App. 36, 319. Moore made specific allegations with respect to *only* two drawings. See Exhibit 5 (dkt157 at 35). Indeed, Exhibit 5 shows only the Ninurta and the Canopy Crawler drawings (Document 37-5 at 2-3) (App. 53-54) instead of "six drawings." (See also dkt118-109, dkt118-110). Further, the Rose Report (Page 67) attributes pre-authorship of rows of people lined with machines to the Matrix whereas Aquatica contains rows of people as living brains in dishes connected to machines. App. 191-266. Further, Aquatica (pgs. 76-77) contains small glowing creatures which maneuver onto a character. App. 224-225. This predates pre-authorship attributed to Avatar's scriptment. Indeed, part of the scheme to defraud was to deny petitioner's original

authorship – particularly when various elements are of important and are not contained in pre-existing works.

Notably, copyright law protects an author's expression. *Harper & Row* observed: "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." 471 U.S., at 558. Particularly, "In *Harper & Row*, for example, we explained that . . . he could prevent others from copying his "subjective descriptions and portraits" (*Feist* at 348-349). This Court's *Hazel-Atlas* opinion functions as governing law for fraud on the court with respect to these bedrock elements of copyright when a court is confronted with deceptive attributions of authorship.

I. Deceptive Attribution of Authorship Constitutes Fraud on the Court

Hazel-Atlas definitively provided the legal description for such acts which met the standard for "deceptive attribution of authorship" (*Hazel-Atlas*, 322 U.S. at 247). In district court, defendants made deceptive attributions which state "29. Xenogenesis included a planet with gigantic trees . . . very similar to those depicted in Avatar. Cameron Decl. ¶ 16, 23, 24, 30-37, Ex. 6 at 151 (Avatar Notes), Ex. 9 ("Springtime on Planet Flora"); Ex. 11 at 218 (Xenogenesis Treatment Ex. 12 at 226-29, (Xenogenesis Screenplay), Ex. 13 (Xenogenesis Artwork), Ex. 18 (Xenogenesis Pilot Film);

Frakes Decl. ¶ 4-5; Landau Decl. Exs. 3-6 (Avatar Images)." See Document 118-2 at 9. Markedly, on Xenogenesis pages 88, 91, 92, and 94 (filed under seal in lower court), trees are not described as gigantic. Instead of representing that, unlike Avatar, Xenogenesis depicts trees as "twisted overgrown fungi", defendants represented that they were similar to Avatar, when Avatar contains no such trees. App. 120. The summary judgment opinion, affirmed by the Fourth Circuit, was persuaded by such attributions ("Xenogenesis, featured a similar setting to that in Avatar . . . Cameron Decl. at 12. Cameron's detailed declaration and accompanying exhibits are persuasive.") ECF 75 at 22. App. 45. Notably, Pollination contains alien plants and colossal trees. App. 302.

J. *Hazel-Atlas* Violations Flout the Legal Standard that Some Infringement Is Still Infringement

Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity by Amy B. Cohen, Western New England University School of Law (1986-87) states "The legislative history of section 106 of the 1976 Act reveals Congress' intent that a work need not be reproduced in its entirety to constitute copyright infringement . . . copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted works would still be an infringement as long as the author's 'expression' rather than merely the author's

'ideas' are taken" (20 U.C. Davis L. Rev. 1986-1987, 721-722). In copyright infringement analysis, Courts examine the qualitative degree of a work that was appropriated and not only the quantitative degree of copyrighted material in an infringing work. ("Finally, in finding the taking "infinitesimal," the Court of Appeals accorded too little weight to the qualitative importance of the quoted passages of original expression.") See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In the instant case, defendants' deceptive attributions of authorship are at issue with respect to the qualitative importance of original expression. Because numerous elements in Moore's works are not contained in pre-existing works as deceptively attributed by defendants, the referenced prior art was materially different as a matter of law.

Petitioner's scripts for Aquatica and Pollination were ultimately in Defendant Lightstorm's possession. (Cameron Decl. at 4, App. 262). App. 324. Lightstorm Entertainment coverage for the Pollination states "he dives through the leaves . . . " (pg. 6) App. 103. Likewise in AVATAR (dkt118-111), Jake dives through the leaves. App. 93. Notably, diving through leaves of a novel, giant forest world was not included in the AVATAR Scriptment which reveals another deceptive attribution of authorship when defendants claimed that major elements in the scriptment were also in the film (and screenplay).

K. An Affidavit That Indicates Deceptive Attribution In A Suit Under the Patent And Copyright Clause Meets the *Hazel-Atlas* Fraud on the Court Standard

Defendants filed an affidavit, prepared by counsel (App. 308-311), that included deceptive attributions, namely the Declaration of Howard Roger Gibson (dkt157-34) and Exhibit 23 of Appeal 14-1135. Page three of the declaration states "I have never visited any offices of Lightstorm Entertainment ("Lightstorm")." In fact, Gibson admitted attending a meeting in the Lightstorm Offices in 1994 during his deposition testimony (dkt157-31 &157-32 at **82:1-21, 83:1-4**). App. 294-295. Nonetheless, defendants filed this declaration with deceptive attributions in violation of *Hazel-Atlas*, making it part of the record relied upon by the Fourth Circuit during Moore's appeal. Concerning his meeting at Lightstorm, Gibson stated "I was just trying, again, I was kind of hustling trying to just get into the next gig" at 83:1-4. Moreover, the declaration falsely represents that the petitioner sent him the Aquatica treatment (157-34 at 3, page 2 of affidavit) when in fact Gibson received the Aquatica screenplay (157-34 at 62:1-5). App. 293. The Gibson affidavit also deceptively attributes this statement: "I never showed "Aquatica" to anyone else and never discussed its content with anyone other than Mr. Moore shortly after I read it." 157-34 at 4-5. Instead, Gibson testified that he worked with Leona on True Lies (dkt157-31 & 157-32 at 123) and "Leona remembered me talking about "Aquatica" "

(157-34 at 168:20-21). Gibson also testified that he gave Aquatica to somebody (dkt157-31 & 157-32 at 132:5-16). App. 290. The Gibson affidavit prepared by defense counsel refers to an Aquatica "treatment" which was nonexistent in 1994. App. 48. In this Court's *Hazel-Atlas* fraud on the court decision, an affidavit that served to demonstrate fraud occurred was material. "Among the "papers" which the representative had procured from Clarke was an affidavit signed by Clarke stating that he, Clarke, had "signed the article and released it for publication." " *Hazel*, supra at 243. App. 364.

L. Defendants Made Deceptive Attributions Concerning the Avatar Scriptment That Were Relied Upon By the Court

Referencing defendants' experts, the district court held "the major copyright eligible elements of the work are contained in this early scriptment. See Expert Report of Mark Rose, Defs.' Mot., ECF No. 118-61; Expert Report of Jeff Rovin, Defs.' Mot., ECF No. 118-63." (ECF 175 at 8). App. 31. Most notably, the Avatar screenplay copyright registration supplementary application adds the Avatar scriptment to Space 6 as a preexisting work and states concerning the screenplay – "material added" (e.g., key elements requiring copyright protection). See App. 251. Indeed, "material added" beyond Avatar's scriptment involving the screenplay was deemed to be copyright protectable and evidently contained major elements, contrary to defense expert

reports – particularly in light of the doctrines of "selection and arrangement" and "intricateness." Thus, attributing major elements to the scriptment, which are not in fact, contained in the scriptment, is "deceptive attribution of authorship" as a matter of law under the *Hazel-Atlas* standard.

M. To Win Summary Judgment, Defendants Made Deceptive Attributions That Petitioner Was the Author of Elements and Depictions That He Did Not Author

Defendants made specific, deceptive attributions that Petitioner authored elements that he did not author or claim to author. Specifically:

> "the ancient Baruda Technopolis, a repository of information about advanced weaponry" (Rose Report, pg. 40). Aquatica characterizes the Technopolis having both military and other non-military information, stating "The documents I could read deal with aspects of Baruda computer technology and medical technology." (pg. 60) and depicts non weaponry resources (pgs. 11, 13, 60, 93, 94). App. 185-189.

> "There is also a lethal genetically engineered micro-algae." (Rovin Report, pg. 98) and "the great Baruda Dynasty . . . developed advanced weapons such as killer algae" (Rose Report at 11). Petitioner did not author "lethal" or "killer algae" element. App. 189-190.

Rovin Report (pg. 33) makes the deceptive attribution that Petitioner claimed the element of genetically altering creatures in large tank. App. 130. Aquatica does not contain the element of genetically engineering creatures in a large tank. Having been previously genetically altered, they are shown in a tank. App. 234.

"he not only claims that the seeds from the Tree of Souls in *Avatar* are substantially similar to the pyxidium seeds and the fireflies in *The Pollination*." (Rose Report, pg. 82). Rather, petitioner intricately claimed similarities of glowing seeds signifying that the heroes are special (pgs. 124-125, 127-128) (App. 178, 180-181) and the act of firefly-like creatures which alight on characters. Petitioner did not author the element of fireflies, but firefly-like creatures. App. 182-184.

Rovin Report falsely claims "spirituality is not present" in Pollination. App. 140. Rose Report falsely claims the Bio-Vapor is not spiritual, yet Pollination includes a "Pollinator Priest" and "sacred forests" (App. 131-132, 136).

"In another instance the allegation is based on the phrase "The Eastern Sea" (no. 1)." (Rose Report, pg. 84) and "the Plaintiff alleges a fragmented literal similarity (#1) based on one of the main settings of *Aquatica*, the 'Eastern Sea,'" (Rovin Report pg. 107). It is deceptive attribution to falsely represent Petitioner alleged similarity on just "The Eastern Sea." Petitioner intricately alleged the similarity that "the hero goes to the "Eastern Sea" and to the people of the Eastern Sea at an

island where a large crowd of these people stand with him on the shore as he addresses them. Three leaders stand near him." App. 249.

"The Pollinator leader Flytrap is introduced, buzzing with firefly-like insects." (Rose Report, pg. 47). Petitioner authored "firefly-like insects" but not the element of "buzzing." App. 108, 135, 194.

Rovin Report at 12 states "The military exploration is undersea in the Plaintiff's Aquatica . . . " whereas elements authored by Petitioner also include military exploration in a jungle. App. 227-228.

Rovin Report at 10 falsely claims that Flash Gordon palace tree house in one tree is prior art. Petitioner depicts a city propped up by columns of trees. App. 141-142.

Rovin Report at 109 deceptively attributes that "Plaintiff similarly claims that the holographic global display of Earth seen in Pollination (P/51) was appropriated by Avatar (allegation #32 in Exhibit 1 to the Amended Complaint". Petitioner alleged similarity between holographic forests in the referenced allegation. App. 96, 134.

Rovin Report (pg. 110) makes the deceptive attribution that "Star Wars also popularized the 'Xwing'style craft utilized in Pollination." Petitioner authored a raised insect like wing (e.g., horizontal Xwing) which is not in Star Wars. App. 96-97.

> "Plaintiff also alleges a substantial similarity between the body-soil garden in The Pollination and the scenes in Avatar . . . (Plaintiff's Exhibit 1, no. 23)" (Rose Report – pg. 67). App. 191. Petitioner alleged similarity between the plant-based filamentous covering on characters in both works. App. 108, 193, 196, 304.

Such deceptive attributions of authorship meet the *Hazel-Atlas* test for fraud on the court because the affirmed trial court opinion stated " . . . Defendants appropriately rely on expert testimony to show that the works are not substantially similar . . . " (ECF 175 at 14).

N. Petitioner Did Not Allege Upside Down Trees or 3-D Yellow And Green Holographic Maps Of The Forest, Yet The District Court Decision Stated That He Did

"Pl.'s Mot. at 10-12 . . . Moore argues . . . upside down trees with plants growing out of them are literal similarities . . . these amount to nothing more than scenes a faire. Id." (ECF 175 at 20). App. 43. Petitioner did not author upside down trees, while his work does not contain upside down trees nor did he claim this (see Pl's. Mot. at 10-12, dkt150). Moore alleged a plant that hangs from beneath rock over the jungle. e.g., see dkt210-2 at 2; Document 18-2 at 2-3, #10 and 18-2 at 5, #25. App. 236, #8, #10. Markedly, defendants misrepresented a pollination element and *Dante's Inferno* (dkt118-61 at 66) where Dante has an upside down tree. Moore does not use or claim this element, but

defendant's Dante reference appears to have an indirect, persuasive impact.

II. Default Judgment and Other Relief Is Necessary and Appropriate

A. In Addition To Vacating Lower Court Judgments, Default Judgment With Other Relief Is Necessary and Appropriate Pursuant To *Hazel-Atlas*

In view of these exceptional circumstances, this Court's power through *Hazel-Atlas* to vacate lower court rulings and invalidate lower court judgments is plenary. Pursuant to *Hazel-Atlas*, this Court should direct the lower courts to set aside lower courts judgment for fraud on the court, while providing all other relief that this Court deems just. Additionally, Petitioner Moore respectfully requests this Court to provide such additional relief, including, but not limited to, fraud on the court sanctions, payment of all attorney's fees (see *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) at 56-57; *Goodyear Tire & Rubber Co. v. Haeger et al.*, 581 U.S. ___ (2017) at 5, 8), and particularly, default judgment for damages requested in the complaint (App. 380-381) pursuant to *Hazel-Atlas*, supra at 251 ("take such additional action as may be necessary and appropriate"). Petitioner also urges this Court to direct the lower courts to return Petitioner's copyrights rights.

Due the convergence of summative exceptional circumstances, mandamus relief is warranted to remedy the deceptive attributions, including deceptive

attributions of authorship because "Truth needs no disguise" (*Hazel-Atlas*, supra at 247).

CONCLUSION

For the foregoing reasons and exceptional circumstances, this Court should grant the petition.

Respectfully submitted,

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