

# EXHIBIT 1

# EXHIBIT 1

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17

18 UNITED STATES DISTRICT COURT  
19 DISTRICT OF NEVADA  
20

21 RIGHTHAVEN LLC, a Nevada limited  
liability company, )  
22 Plaintiff, )  
23 v. )  
24 NATIONAL ORGANIZATION FOR THE )  
REFORM OF MARIJUANA LAWS, a )  
25 District of Columbia domestic nonprofit )  
Corporation; MEDIA ACCESS PROJECT, )  
26 INC., a California corporation, )  
27 Defendants. )  
28

Case No. 2:10-cv-00351-LDG-PAL  
**DEFENDANT'S MOTION TO DISMISS**  
**FOR LACK OF SUBJECT MATTER**  
**JURISDICTION AND LACK OF**  
**PERSONAL JURISDICTION**

1 that Righthaven is not even the current owner of the copyrights in “Dr. Reefer’s business goes  
2 to pot” and “Marijuana activists take stand against bill.” These defects deprive the court of  
3 jurisdiction over the subject matter of this case. Additionally, as explained below, NORML’s  
4 contacts with Nevada are insufficient to confer personal jurisdiction on this Court,  
5 notwithstanding Righthaven’s conclusory statements to the contrary. Accordingly, the Court  
6 is without discretion to adjudicate Righthaven’s claims against NORML.

#### 7 IV. ARGUMENT

##### 8 A. The Court Lacks Subject Matter Jurisdiction in this Case.

##### 9 1. Righthaven lacks standing to prosecute its claims of copyright 10 infringement.

11 As a general rule, “[t]he legal or beneficial owner of an exclusive right under a  
12 copyright is entitled to bring actions for infringements of that right occurring *during the period*  
13 *of its ownership.*” *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir.  
14 1991) (quoting 17 U.S.C. § 501(b)) (emphasis added); *Pye v. Mitchell*, 574 F.2d 476, 479 (9th  
15 Cir. 1978) (“Only the proprietor of statutory copyright at the time of acts of infringement is  
16 entitled to damages under 17 U.S.C. § 101.”). “Ownership of a copyright may be transferred  
17 in whole or in part by any means of conveyance,” and “[t]he owner of any particular exclusive  
18 right is entitled, to the extent of that right, to all the protection and remedies accorded to the  
19 copyright owner.” 17 U.S.C. § 201(d)(1)-(2).

20 A plaintiff who fails to show ownership of a valid copyright at the time of infringement  
21 lacks standing to sue for any infringement that occurred prior to assignment of the copyright.  
22 *See Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (outlining  
23 the requirements for standing to sue for copyright infringement). “Standing to assert a  
24 copyright claim is a jurisdictional requirement, and the Court must dismiss an action for lack  
25 of subject matter jurisdiction if it determines the plaintiff lacks standing.” *Giddings v. Vision*  
26 *House Production, Inc.*, 584 F.Supp.2d 1222, 1229 (D.Ariz. 2008) (citing *Lewis v. Casey*, 518  
27 U.S. 343, 349 n.1 (1996)).  
28

1 In this case, while Righthaven has adduced evidence that it is now the owner of a valid  
2 copyright in “Marijuana as Medicine,” that evidence shows that Righthaven is not the original  
3 owner, but rather an assignee of that copyright. (Pl.’s Compl. Ex. 4. (“Transfer: By written  
4 agreement.”).) Righthaven has failed, however, to show that it was the owner of the copyright  
5 in “Marijuana as Medicine” when the alleged infringement occurred, and it has not submitted  
6 any proof whatsoever that it has *ever* owned the copyrights in “Dr. Reefer’s business goes to  
7 pot” and “Marijuana activists take stand against bill.” The copyright notice on each of these  
8 articles, as shown in Righthaven’s Exhibits 1, 2, 3, and 5, indicates that LVRJ was the  
9 copyright owner at the time the articles were made available in the MAP news feed. Under  
10 these circumstances—and absent more—the Court cannot satisfy itself that Righthaven has  
11 standing to prosecute its claims of copyright infringement against NORML; nor can it,  
12 therefore, satisfy itself of subject matter jurisdiction.

13 **B. The Court Lacks Jurisdiction Over NORML Because NORML’s Contacts with**  
14 **Nevada are Insufficient to Satisfy the Requirements of Federal Due Process.**

15 The basis for personal jurisdiction in Nevada over a non-Nevada resident is set forth in  
16 the Nevada long-arm statute. That statute is coextensive with the Due Process Clause of the  
17 U.S. Constitution. *See Nev. Rev. Stat. § 14.065.* Thus, in determining whether the exercise of  
18 jurisdiction over a non-Nevada resident by a Nevada court is proper, the federal due process  
19 analysis applies.

20 In the case of a corporate defendant, the requirement of “presence” in the forum state  
21 “may be met by such contacts of the corporation with the state of the forum as make it  
22 reasonable, in the context of our federal system of government, to require the corporation to  
23 defend the particular suit which is brought.” *International Shoe Co. v. Washington*, 326 U.S.  
24 310, 316-17 (1945).

25 Where a defendant is not physically present in the forum state but maintains a website  
26 that is accessible to forum residents, the Ninth Circuit and the District of Nevada apply the  
27 “sliding scale” test articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.  
28 Supp. 1119, 1124 (W.D.Pa. 1997), to determine whether personal jurisdiction lies in the forum

# EXHIBIT 2

# EXHIBIT 2

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Jonathan W. Fountain (NV Bar No. 10351)  
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5 Attorneys for Defendant  
MAJORWAGER.COM, INC.  
6

7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 RIGHTHAVEN, LLC, a Nevada limited liability  
company,

Case No. 2:10-cv-00484-RCJ-LRL

11 Plaintiff,

**DEFENDANT'S MOTION  
TO DISMISS**

12 vs.

13 MAJORWAGER.COM, INC., a Canadian  
14 corporation,

15 Defendant.

16 Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6), Defendant  
17 MAJORWAGER.COM, INC., ("Defendant" and/or "MajorWager"), hereby moves the Court to  
18 dismiss this action for lack of subject matter jurisdiction, lack of personal jurisdiction, and for  
19 failure to state a claim upon which relief can be granted. This motion is supported by the  
20 accompanying declarations of Russ Hawkins (the "Hawkins Decl.") and Jonathan W. Fountain  
21 (the "Fountain Decl."), the exhibits attached thereto, and any oral argument the Court may allow.

22 **PRELIMINARY STATEMENT**

23 MajorWager operates an Internet website devoted to providing information of general  
24 interest to a worldwide audience of persons interested in sports, sports betting, and a variety of  
25 both related and unrelated topics. This case is based upon nothing more than the posting of a  
26 single<sup>1</sup> article from the Las Vegas Review Journal within the "forums" section of MajorWager's

27 <sup>1</sup> While Plaintiff has attached several articles to the Complaint that it claims were posted on Defendant's  
28 website, the Complaint only alleges that a single article (the "Work") has been infringed. The Work is entitled  
"March to book begins," and is attached to the Complaint as Exhibit 14.

1 *plausible* for the court to constitutionally exercise personal jurisdiction over the defendant. *See id.*;  
 2 *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001). In ruling on the motion, only  
 3 uncontroverted allegations must be accepted as true. *See AT&T v. Compagnie Bruxelles Lambert*,  
 4 94 F.3d 586, 588 (9th Cir. 1996). Thus, the court need not assume the truth of allegations  
 5 contradicted by affidavit. *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th  
 6 Cir. 1977). However, in the absence of an evidentiary hearing, conflicts in the parties' affidavits  
 7 are resolved in the plaintiff's favor. *AT&T*, 94 F.3d at 588-89.

### 8 ARGUMENT

#### 9 I. RIGHTHAVEN DOES NOT HAVE STANDING TO SUE (AND THE COURT 10 LACKS SUBJECT MATTER JURISDICTION) BECAUSE RIGHTHAVEN HAS 11 FAILED TO ALLEGE THAT IT OWNED THE COPYRIGHTS AT ISSUE AT THE 12 TIME OF THE ALLEGED INFRINGEMENT.

13 While “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled to  
 14 bring actions for infringements of that right occurring during the period of its ownership,”  
 15 *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991), **a plaintiff who**  
 16 **fails to show ownership of a valid copyright at the time of infringement lacks standing to sue**  
 17 **for any infringement that occurred prior to its ownership of those rights.** *See Silvers v. Sony*  
 18 *Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (“in order for a plaintiff to be ‘entitled . . .  
 19 to institute an action’ for infringement, the infringement must be ‘committed while he or she is the  
 20 owner of’ the particular exclusive right allegedly infringed.”). “Standing to assert a copyright  
 21 claim is a jurisdictional requirement, and the Court must dismiss an action for lack of subject  
 22 matter jurisdiction if it determines the plaintiff lacks standing.” *Giddings v. Vision House*  
 23 *Production, Inc.*, 584 F. Supp. 2d 1222, 1229 (D. Ariz. 2008) (citing *Lewis v. Casey*, 518 U.S.  
 24 343, 349 n.1 (1996)). Here, the Court lacks subject matter jurisdiction and should dismiss this  
 25 case because Righthaven has failed to allege or otherwise demonstrate that it was the owner of the  
 26 copyrights at issue **at the time of the alleged infringement.**

27 The Complaint alleges that Righthaven is the owner of the copyrights in “March to book  
 28 begins” (the “Work”). (Compl. ¶ 54.) The Complaint further alleges that: **No later than** March  
 18, 2010, MajorWager reproduced an unauthorized copy of the Work . . . on MajorWager's

1 Website.” (Compl. ¶ 60.) (Emphasis added.) The Complaint, however, does not allege that  
2 Righthaven was the owner of the copyrights at the time of the alleged infringement.

3 Even worse, it appears that Righthaven was not, in fact, the copyright owner at the time of  
4 the alleged infringement. Each of the articles attached to the Complaint (including the Work) bear  
5 a copyright notice. In every case, the notice states: “Copyright © Las Vegas Review-Journal.”  
6 The Las Vegas Review-Journal is the most widely published newspaper in Clark County, Nevada.  
7 It is owned and operated by Stephens Media, LLC, who has registered the name “Las Vegas  
8 Review-Journal” as a fictitious firm name in Clark County, Nevada. (See Ex. A to Fountain Decl.,  
9 LVRJ FFN Filing.) Copyrights vest in the author of a work when the work is first fixed into  
10 tangible form. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737, 109 S. Ct.  
11 2166, 2171, 104 L. Ed. 2d 811, 822 (1989); 17 U.S.C. § 201(a). If the author is an employee, the  
12 employer will own the work under the “work for hire” doctrine. *Id.* Here, the Work is dated  
13 March 18, 2010, and contains the statement “By Matt Youmans” underneath the title. Thus, it  
14 appears that the Work was written by Mr. Youmans as an employee of Stephens Media LLC.  
15 Under the “work for hire” doctrine Stephens Media LLC was the author of the work, and,  
16 therefore, was the initial owner of all copyrights in the Work. This analysis is consistent with  
17 Righthaven’s Exhibit 15. It states that, at the time the copyright application was filed, Stephens  
18 Media LLC was the author of the Work. It also states that Righthaven succeeded to the copyrights  
19 in the Work as a result of “Transfer: By written agreement,” but does not give a date when the  
20 alleged transfer occurred. While copyrights may be assigned, and while Stephens Media LLC  
21 may have, in fact, assigned its copyrights to Righthaven, there is no allegation that Stephens  
22 Media LLC did so on or prior to March 18, 2010, the date of the alleged infringement.

23 Because Righthaven was not the owner of the copyrights in the Work on the date of the  
24 alleged infringement, March 18, 2010, it does not have standing to sue, the Court lacks subject  
25 matter jurisdiction, and the Complaint must be dismissed.

26 ///

27 ///

28 ///



# EXHIBIT 3

# EXHIBIT 3

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 8 Attorneys for Defendants

United States District Court

District of Nevada

9	RIGHTHAVEN, LLC, a Nevada	)	
10	limited liability company,	)	
11		)	
	Plaintiff,	)	
12	v.	)	Case No.: 2:10-cv-601-RLH-PAL
		)	
13	INDUSTRIAL WIND ACTION	)	
14	CORP., a New Hampshire	)	
15	corporation; and JONATHAN S.	)	
16	LINOWES, an individual resident	)	
	of New Hampshire,	)	
17		)	
	Defendants.	)	
		)	

**MOTION TO DISMISS**

18  
 19  
 20 Come now Defendants, by and through the undersigned attorney and file this Motion to  
 21 Dismiss Plaintiff's Complaint based on: 1) failure to state a cause of action, pursuant to Fed.R.Civ.P.  
 22 12(b)(6); 2) lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1); and 3) lack of  
 23 personal jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(2). This motion is made based on all pleadings  
 24 and papers on file herein and the Memorandum of Points and Authorities attached hereto and any  
 25 further argument and evidence as may be presented at hearing.  
 26

27 Dated this 26<sup>th</sup> day of May 2010

28 Respectfully submitted by:

1 March 22, 2010.” The Complaint does not allege any infringement beyond March 22, 2010. In fact,  
2 Paragraphs 69, 70, and 71 all state the opposite. Nor does the Complaint allege that Defendants are  
3 currently utilizing the material, which, in fact, they are not.  
4

5 The Complaint specifically does not allege that Righthaven had obtained the copyright in the  
6 Work at the time of the alleged infringement, “[n]o later than March 22, 2010.” Neither does the  
7 Complaint make any allegations that the transfer agreement referred to in Exhibit 15, contained any  
8 transfer of a right to sue for damages allegedly suffered by prior copyright owners.  
9

10 In short, the Complaint fails to allege a set of facts that would indicate that Defendants’  
11 alleged infringement occurred at a time in which Plaintiff had any ownership interest in the Work  
12 at issue, at all. Without such allegations, there can be no legally cognizable claim for copyright  
13 infringement. While in considering a Rule 12(b)(6) Motion to Dismiss all allegations of material fact  
14 in the Complaint must be taken as true and construed in the light most favorable to Plaintiff,  
15 *SmileCare Dental Group, supra*, the Court is neither required nor permitted to add factual  
16 allegations that are not contained within the Complaint itself. Here, because Plaintiff has failed to  
17 assert facts or make any allegation stating that Righthaven was the copyright owner at the time of  
18 the alleged infringement, Plaintiff has failed to state a cause of action upon which relief can be  
19 granted. Therefore dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is appropriate.  
20  
21

22 **B. The Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction,**  
23 **Pursuant to Fed.R.Civ.P. 12(b)(1).**

24 This same flaw in Plaintiffs’ Complaint, – that it fails to allege copyright ownership in the  
25 article in question at the time of the alleged infringement – also requires dismissal pursuant to  
26 Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction. As a general rule, “[t]he legal or  
27  
28

1 beneficial owner of an exclusive right under a copyright is entitled to bring actions for infringements  
2 of that right occurring during the period of its ownership." *ABKCO Music, Inc. v. Harrisongs Music,*  
3 *Ltd.*, 944 F.2d 971, 980 (2d Cir.1991) (quoting 17 U.S.C. § 501(b)) ; *Pye v. Mitchell*, 574 F.2d 476,  
4 479 (9thCir. 1978) ("Only the proprietor of statutory copyright at the time of acts of infringement  
5 is entitled to damages under 17 U.S.C. § 101."). "Ownership of a copyright may be transferred in  
6 whole or in part by any means of conveyance," and "[t]he owner of any particular exclusive right is  
7 entitled, to the extent of that right, to all the protection and remedies accorded to the copyright  
8 owner." 17 U.S.C. § 201(d)(1)-(2).

11 A plaintiff who fails to show ownership of a valid copyright **at the time of infringement**  
12 lacks standing to sue for any infringement that occurred prior to assignment of the copyright. *See*  
13 *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) ("Additionally, in  
14 order for a plaintiff to be 'entitled ... to institute an action' for infringement, the infringement must  
15 be "committed while he or she is the owner of" the particular exclusive right allegedly infringed. 17  
16 U.S.C. § 501(b)."). "Standing to assert a copyright claim is a jurisdictional requirement, and the  
17 Court must dismiss an action for lack of subject matter jurisdiction if it determines the plaintiff lacks  
18 standing." *Giddings v. Vision House Production, Inc.*, 584 F.Supp.2d 1222, 1229 (D.Ariz. 2008)  
19 (citing *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996)).

22 Here, a plain reading of the Complaint fails to find any allegation of facts demonstrating that  
23 Righthaven was the owner of the copyright at the time that Plaintiff alleges the infringement  
24 occurred. If anything, the dates referred to in the Complaint suggest just the opposite. It is clear,  
25 however, that the Complaint does not provide allegations of material fact showing that Righthaven  
26 has standing to prosecute its claims of copyright infringement against Defendants. Nor can the  
27  
28

# EXHIBIT 4

# EXHIBIT 4

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 Attorneys for Plaintiff  
 6

7 **UNITED STATES DISTRICT COURT**  
 8 **DISTRICT OF NEVADA**  
 9

10 RIGHTHAVEN LLC, a Nevada limited-  
 liability company,

11  
 12 Plaintiff,

13 v.  
 14

15 NATIONAL ORGANIZATION FOR THE  
 REFORM OF MARIJUANA LAWS, a  
 16 District of Columbia domestic nonprofit  
 corporation; MEDIA AWARENESS  
 17 PROJECT (MAP), INC., a Delaware non-  
 profit corporation,  
 18

19 Defendants.  
 20

Case No.: 2:10-cv-0351-LDG-PAL

**JOINT STIPULATION AND ORDER TO  
 EXTEND TIME FOR PLAINTIFF TO  
 OPPOSE DEFENDANT’S MOTION TO  
 DISMISS FOR LACK OF SUBJECT  
 MATTER JURISDICTION AND LACK  
 OF PERSONAL JURISDICTION AND TO  
 WITHDRAW THE CONTEST OF LACK  
 OF SUBJECT MATTER JURISDICTION  
 FROM DEFENDANT’S MOTION**

21 Righthaven LLC (“Righthaven”) and the National Organization for the Reform of  
 22 Marijuana Laws (“NORML”), by and through their attorneys of record, hereby stipulate to  
 23 extend the time for Righthaven to oppose NORML’s Motion to Dismiss for Lack of Subject  
 24 Matter Jurisdiction and Lack of Personal Jurisdiction (“NORML’s Motion;” Docket No. 12)  
 25 until Wednesday, June 2, 2010.

26 Righthaven and NORML also hereby stipulate that the provisions of NORML’s Motion  
 27 contesting the absence of subject matter jurisdiction and Righthaven’s standing before this Court  
 28 are hereby withdrawn, without prejudice, including the section of NORML’s Motion

1 commencing on page six (6), line seven (7), through page seven (7), line twelve (12). The  
2 provisions in NORML's Motion regarding lack of personal jurisdiction shall remain at issue  
3 before this Court and the docketed dates, amended by this stipulation, will remain unchanged as  
4 well. This stipulation has been made in good faith and not for the purpose of delay.

5  
6 DATED this twentieth day of May, 2010.

7  
8 IT IS SO ORDERED.

9  
10  
11 UNITED STATES DISTRICT JUDGE

12  
13 Dated: \_\_\_\_\_

14  
15  
16 Submitted by:

17 RIGHTHAVEN LLC

18 WATSON ROUNDS

19 /s/ J. Charles Coons  
20 J. Charles Coons, Esq.  
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22 /s/ Cassandra P. Joseph  
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23 Attorney for Plaintiff

24 Attorney for Defendant

# EXHIBIT 5

# EXHIBIT 5



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5 Attorneys for Defendant  
MAJORWAGER.COM, INC.  
6

7  
8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 RIGHTHAVEN, LLC, a Nevada limited liability  
company,

Case No. 2:10-cv-00484-RCJ-LRL

11 Plaintiff,

**DEFENDANT’S REPLY IN SUPPORT  
OF ITS MOTION TO DISMISS**

12 vs.

13 MAJORWAGER.COM, INC., a Canadian  
14 corporation,

15 Defendant.

16 Defendant MAJORWAGER.COM, INC., (“MajorWager”), hereby submits its reply in  
17 support of its motion to dismiss for failure to state a claim and lack of personal jurisdiction. This  
18 reply is supported by the accompanying supplemental declarations of Russ Hawkins (the “Supp.  
19 Hawkins Decl.”) and Nikkya Williams (the “Williams Decl.”), the exhibits attached thereto, and  
20 any oral argument the Court may allow.

21 **PRELIMINARY STATEMENT**

22 It is not an exaggeration to say that this case borders on being frivolous. In fact, that has  
23 been the consensus of the substantial media coverage given to the now 47 Righthaven lawsuits  
24 currently pending before this Court. (*See, e.g.* Ex. 1 to Williams Decl.) (attaching articles). These  
25 lawsuits are based upon the posting of Las Vegas Review-Journal (“RJ”) articles on websites  
26 often, as in this case, by third parties, to further their own personal interest in an online discussion  
27 about a particular topic. Also in many cases, including this one, the allegedly infringing posts  
28 either give credit to the RJ or link right back to it. In addition, most of these suits, again, including

1 In sum, the alleged infringement was technical and, because it only involved one  
2 copyrighted work, *de minimis*, at best. The alleged infringement was not committed by  
3 MajorWager, but rather, by a former employee who has not been associated with MajorWager for  
4 years, and who acted independently to further his own personal interest in an ongoing online  
5 dialog concerning sports and sports wagering. Because the RJ offered the article at issue for free,  
6 encouraged visitors to its website to download or email the article to others for free, and because  
7 the article continues to be available online from the RJ's own website for free, Plaintiff has  
8 suffered no damages whatsoever.

9 As set forth more fully below, Plaintiff has failed to sufficiently allege a *prima facie* case  
10 for the exercise of personal jurisdiction over MajorWager, a Canadian website operator that has  
11 had no contacts with the State of Nevada. And, while teeming with outrage over a technical and,  
12 at best, *de minimis* infringement that resulted in no damages, Plaintiff's opposition was not  
13 supported by any sworn testimony or authenticated evidence. It fails to provide the facts the  
14 Complaint is sorely missing. Rather, Plaintiff's opposition brief wastes pages upon pages  
15 presenting bald assumptions, unsupported conclusions, and specious chains of false logic in an  
16 attempt to convince the Court that personal jurisdiction exists over MajorWager. Plaintiff has also  
17 failed to identify a single act of infringement that occurred in the United States and, therefore, fails  
18 to state a claim upon which relief can be granted.<sup>1</sup>

19 Under these circumstances the Court should not subject MajorWager to the substantial  
20 burden and expense of jurisdictional discovery, but should instead dismiss this meritless suit  
21 outright.

22 ///  
23 ///  
24 ///

25 \_\_\_\_\_  
26 <sup>1</sup> MajorWager does not contest, at this time, that Righthaven has standing to sue but must  
27 point out that its motion to dismiss for lack of subject matter jurisdiction was entirely proper based  
28 on the absence of facts pled in the Complaint. Defendant was well within its rights to bring this  
deficiency to the Court's attention.

# EXHIBIT 6

# EXHIBIT 6

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8 Attorney for Defendants

United States District Court

District of Nevada

8 RIGHTHAVEN, LLC, a Nevada )  
9 limited liability company, )  
10 Plaintiff, )  
11 v. )  
12 INDUSTRIAL WIND ACTION )  
13 CORP., a New Hampshire )  
14 corporation; and JONATHAN S. )  
15 LINOWES, an individual resident )  
16 of New Hampshire, )  
17 Defendants. )

Case No.: 2:10-cv-601-RLH-PAL

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS**

18 Come now Defendants, by and through the undersigned attorney and file this Reply to  
19 Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Complaint based on: 1) failure to  
20 state a cause of action, pursuant to Fed.R.Civ.P. 12(b)(6); 2) lack of subject matter jurisdiction,  
21 pursuant to Fed.R.Civ.P. 12(b)(1); and 3) lack of personal jurisdiction, pursuant to Fed.R.Civ.P.  
22 12(b)(2), based on all pleadings and papers on file herein and the Memorandum of Points and  
23 Authorities attached hereto and any further argument and evidence as may be presented at hearing.  
24

25 Dated this 12<sup>th</sup> day of July 2010

26 Respectfully submitted by:  
27  
28

1        *Roebuck & Co.*, 1982 Copyright Law Decisions (C.H.) ¶ 25,397 at p. 17,298, 1982  
2        WL 1264 (S.D.N.Y.1982); 3 M. Nimmer, *Nimmer on Copyright*, § 12-02, at 12-30  
3        (1990) ( Nimmer ). Rather, the assignee is only entitled to bring actions for  
4        infringements that were committed while it was the copyright owner and the assignor  
5        retains the right to bring actions accruing during its ownership of the right, even if  
6        the actions are brought subsequent to the assignment. Nimmer, § 12.02 at  
7        12-29-12-30. Finally, the Copyright Act does not permit copyright holders to choose  
8        third parties to bring suits on their behalf. *See Eden Toys, Inc. v. Foresee*  
9        *Undergarment Co.*, 697 F.2d 27, 32 n. 3 (2d Cir.1982).

10       944 F.2d at 980.

11       In *Silvers*, the Ninth Circuit endorsed the Second Circuit's finding in *ABKCO*, that while a  
12       copyright holder could not merely contractually assign the right to bring actions for infringement  
13       without also assigning the copyright, the reverse is not true. A copyright holder can assign the  
14       copyright without also assigning any rights to accrued causes of action. 404 F.3d at 890, citing  
15       *ABKCO*, 944 F.2d at 981.

16       The failure of the Complaint to aver that Righthaven had any interest in the work in question  
17       at the time the alleged infringement occurred, rendered said Complaint inadequate under both  
18       Fed.R.Civ. Proc. 12(b)(1) and 12(b)(6). This deficiency prompted the Motion to Dismiss pursuant  
19       to those two provisions. Subsequently, in Plaintiff's Opposition Motion Righthaven did assert that  
20       it had an Assignment giving it an interest in the alleged accrued cause of action that is the subject  
21       of this case. It also produced a copy of the Assignment, although that, in itself, was not required.  
22       What is required, and was missing from the Complaint, but present in the Opposition brief, is the  
23       assertion that Righthaven possesses an interest in any copyright infringement action concerning the  
24       material at issue which may have occurred at the time of the alleged infringement.

25       Clearly, then, it would be contrary to the cause of judicial economy for Defendants, in light  
26       of the statements contained within the Opposition brief, to continue to pursue the Motion to Dismiss  
27       pursuant to Sections 12(b)(1) and 12(b)(6). Moreover, Defendants are willing to stipulate to an  
28       amendment to Plaintiff's Complaint stating that Plaintiff's Assignment provided it with sufficient