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

10 RIGHTHAVEN, LLC, a Nevada limited
liability company,
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Plaintiff,
12
vs.
EMTCity.com, an entity of unknown origin and
13 nature; and Christopher J. Malley, an
individual,
14
Defendants.

Case No. 2:10-cv-00854-HDM-PAL

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

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16 Defendant Christopher J. Malley d/b/a EMTCity.com (“Mr. Malley”) hereby submits his
17 reply in support of his renewed motion to dismiss this case for lack of personal jurisdiction, as
18 follows.

19 **PRELIMINARY STATEMENT**

20 When the Complaint was filed Righthaven failed to allege sufficient facts to demonstrate a
21 *plausible* case under *Iqbal* for the exercise of personal jurisdiction over Mr. Malley. In fact,
22 virtually all of the Complaint’s material allegations are conclusory, and fact-devoid, including
23 Righthaven’s allegation that Mr. Malley “willfully” infringed Righthaven’s copyrights. There are
24 simply no facts demonstrating willfulness. Mr. Malley moved to dismiss the Complaint because
25 of Righthaven’s failure to support its claims, including its jurisdictional claims, with factual
26 allegations.

27 Righthaven argued in its opposition to Mr. Malley’s motion to dismiss that the Court has
28 specific personal jurisdiction over Mr. Malley under the *Columbia Pictures* case. As the argument

1 goes, because the Complaint contains a conclusory allegation that Mr. Malley “willfully”
2 infringed Righthaven’s copyrights, the Court automatically has personal jurisdiction because,
3 Righthaven claims, the *Calder* effects test is satisfied. Righthaven makes this pitch despite the
4 fact that it has never supported its allegation of “willful” infringement with sufficient facts to make
5 out a *plausible* case for personal jurisdiction under *Iqbal*. Righthaven implicitly conceded as
6 much in its opposition brief when it begged the Court for leave to conduct jurisdictional discovery.
7 The Court granted Righthaven’s request and allowed Righthaven 45 days to conduct jurisdictional
8 discovery. However, Righthaven failed to conduct any jurisdictional discovery at all.

9 Now, Righthaven tries to deflect attention from its failure to prosecute this case by
10 mischaracterizing the Court’s October 20, 2010 ruling, claiming that it was Mr. Malley who
11 should have conducted jurisdictional discovery -- not Righthaven. But that argument is illogical
12 and ignores the language of the Court’s ruling. It is illogical because it is Righthaven, the
13 plaintiff, who bears the burden of establishing a plausible, *prima facie*, case for the Court’s
14 exercise of personal jurisdiction, not Mr. Malley, the defendant. And it ignores the language of
15 the Court’s ruling, because during the October 20, 2010 hearing, the Court specifically stated that
16 it was granting Righthaven the opportunity to conduct jurisdictional discovery.

17 Thus, jurisdictional discovery has come and gone yet Righthaven has failed to uncover
18 facts to support its empty jurisdictional allegations -- especially its empty allegation that Mr.
19 Malley “willfully” infringed Righthaven’s copyrights. Righthaven’s conclusory allegations
20 remain conclusory and cannot be afforded the presumption of truth. In addition, Mr. Malley
21 refuted several, if not all, of Righthaven’s allegations by submitting sworn testimony. (*See* Docket
22 No. 8-1, Decl. of Christopher J. Malley, 7/12/2010; Docket No. 11-1, Supp. Decl. of Christopher
23 J. Malley, 8/1//2010.) Righthaven did not counter Mr. Malley’s sworn testimony with sworn
24 testimony of its own.¹ Thus, because many, if not all, of Righthaven’s allegations are either

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¹ The best Righthaven was able to do was submit a misleading declaration from its counsel
which tried to show that the EMTCity.com website advertises Nevada jobs. (*See* Docket No. 10,
Decl. of Joseph C. Chu.) However, as Mr. Malley pointed out in his supplemental declaration, the
website redirects the user to an unaffiliated job search site and only displays Nevada jobs after the
user (in this case Righthaven’s counsel) types “NEVADA” into a field and clicks on the search
button. (*See* Docket No. 11-1, Supp. Decl. of Christopher J. Malley.)

1 conclusory or stand controverted and unrebutted by Righthaven, those allegations cannot be
2 afforded the presumption of truth. Righthaven has failed to allege a plausible, *prima facie*, case
3 for the Court’s exercise of specific personal jurisdiction over Mr. Malley.

4 In addition, it is now crystal clear (if it was not before) that Righthaven cannot rely on
5 *Columbia Pictures* to establish specific personal jurisdiction in this case. The *Columbia Pictures*
6 court relied upon the defendants’ entry into several license agreements with the plaintiff, who was
7 a resident of the forum, when it concluded that the “purposeful availment” element of the specific
8 personal jurisdiction test was satisfied. The *Columbia Pictures* court also relied upon the district
9 court’s factual finding that willful infringement occurred when it analyzed the elements of the
10 *Calder* effects test. This case is very different. Here, Mr. Malley has not entered into license
11 agreements or any other contracts with anyone in Nevada. Indeed, Mr. Malley has had no contacts
12 with Nevada whatsoever. (See Docket No. 8-1, Decl. of Christopher J. Malley, 7/12/2010; Docket
13 No. 11-1, Supp. Decl. of Christopher J. Malley, 8/1//2010.) And here, unlike *Columbia Pictures*,
14 the Court is tasked with reviewing Righthaven’s conclusory allegations of allegedly “willful”
15 infringement (which cannot be afforded the presumption of truth) as opposed to a lower court’s
16 finding that willful infringement had in fact occurred.

17 ARGUMENT

18 **I. THE COURT SHOULD DISMISS THIS CASE BECAUSE RIGHTHAVEN FAILED** 19 **TO CONDUCT JURISDICTIONAL DISCOVERY AND HAS FAILED TO OBTAIN** 20 **FACTS TO SUPPORT ITS EMPTY JURISDICTIONAL ALLEGATIONS.**

21 Righthaven claims that Mr. Malley is at fault for failing to engage in jurisdictional
22 discovery. (See, e.g., No. 25, Pltf.’s Opp. to Defts.’ Renewed Mot. to Dismiss at 7, ll. 21-24)
23 (“While Defendants were provided with an opportunity to develop some of the novel theories
24 advanced during the October 20th Hearing via a 45-day jurisdictional discovery period granted by
25 the Court, they did not do so.”). However, it is Righthaven, the plaintiff, not Mr. Malley, the
26 defendant, who bears the burden of establishing a *prima facie* case for the Court’s exercise of
27 personal jurisdiction. See *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538
28 (9th Cir. 1986) (“plaintiff bears the burden of showing that the court has jurisdiction”). And it is
Righthaven, not Mr. Malley, who requested jurisdictional discovery so that it could uncover facts

1 to support the Complaint's factually unsupported jurisdictional allegations. In its opposition to
2 Mr. Malley's initial motion to dismiss, Righthaven argued the following:

3 Alternatively, should there remain any uncertainty as to the Defendants'
4 willfulness, this arises to a factual determination and thus warrants reasonable
5 jurisdictional discovery . . . The pertinent jurisdictional facts which should be
6 subject to discovery include, without limitation: the nature and extent of the
7 Defendants' contacts with Nevada, the number of third-party posts removed by
8 the Defendants pursuant to the Defendants takedown policy, the number of
9 copyright infringement notices received by the Defendants, the identity of the
Website user identified by the Website as "Dust Devil," and Dust Devil's
association and/or relationship with the Defendants. Thus, if this Court chooses
to entertain the Defendants' jurisdictional argument, then jurisdictional discovery
is the appropriate and necessary mechanism to resolve the disputed jurisdictional
facts.

10 (See Docket No. 9, Pltf.'s Opp. to Defs.' Mot. to Dismiss at 22:16-23:3.) (Emphasis added.)
11 Given the absence of jurisdictional facts in its Complaint, Righthaven begged the Court for
12 jurisdictional discovery. In contrast, Mr. Malley certainly did not request jurisdictional discovery
13 and consistently argued that jurisdictional discovery would be futile. (See Docket No. 11, Deft.'s
14 Reply in Suppt. of its Mot. to Dismiss at 13:3-15:15.)

15 On October 20, 2010, the Court heard oral argument on Mr. Malley's motion. The Court
16 concluded the October 20, 2010 hearing by stating the following:

17 For the reasons set forth, the Motion to Dismiss is denied. It's denied without
18 prejudice, however. The Court is going to grant a period of 45 days from today's
19 date within which the parties can engage in limited discovery, limited to the
questions that have been raised here with respect to the standing issue, and with
respect to specific jurisdiction.

20 I'm not going to permit general discovery beyond that. I think there's enough of
21 an issue here. I think you've met the pleading requirement, but I think there's
22 enough of an issue here to have those issues addressed more fully after you've
had an opportunity for discovery, specifically on the issue of specific jurisdiction.

23 (See Docket No. 26-1, 10/20/2010 Hearing Trans. at 35, ll. 3-14.) (Emphasis added.) The Court's
24 reference to "after you've had an opportunity for discovery" is obviously a reference to
25 Righthaven. Even so, Righthaven conveniently omits this portion of the hearing transcript from its
26 brief opposing Mr. Malley's renewed motion to dismiss. Righthaven's argument, that when the
27 Court granted its request for jurisdictional discovery, it did so to afford Mr. Malley an opportunity
28 to engage in jurisdictional discovery, is, in addition to being illogical, unsupported by the record.

1 It is a red herring designed to distract the Court from the fact that Righthaven brought a frivolous
2 action in Nevada against a New Hampshire resident without any evidence that Mr. Malley had any
3 connection with Nevada sufficient to warrant the Court's exercise of personal jurisdiction.

4 Thus, jurisdictional discovery has come and gone yet Righthaven has failed to uncover
5 facts to support its empty jurisdictional allegations -- especially its empty allegation that Mr.
6 Malley "willfully" infringed Righthaven's copyrights. Righthaven's conclusory allegations
7 remain conclusory and cannot be afforded the presumption of truth. Mr. Malley refuted several, if
8 not all, of Righthaven's allegations by submitting sworn testimony. (*See* Docket No. 8-1, Decl. of
9 Christopher J. Malley, 7/12/2010; Docket No. 11-1, Supp. Decl. of Christopher J. Malley,
10 8/1/2010.) However, Righthaven did not counter Mr. Malley's sworn testimony with sworn
11 testimony of its own.² Because many, if not all, of Righthaven's allegations are either conclusory
12 or stand controverted and unrebutted by Righthaven, those allegations cannot be afforded the
13 presumption of truth. Righthaven has failed to allege a plausible, *prima facie*, case for the Court's
14 exercise of specific personal jurisdiction over Mr. Malley.

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16 **II. THE COURT SHOULD DISMISS THIS CASE BECAUSE *COLUMBIA PICTURES*
DOES NOT SUPPORT THE EXERCISE OF PERSONAL JURISDICTION.**

17 If it was not clear before it is now crystal clear that Righthaven cannot rely on *Columbia*
18 *Pictures* to establish specific personal jurisdiction in this case. This is because the *Columbia*
19 *Pictures* decision involved the post-summary-judgment review of a district court's finding that
20 willful infringement had occurred (as opposed to the review of an allegation of willful copyright
21 infringement in connection with a motion to dismiss) and because the jurisdictional holding in
22 *Columbia Pictures* was based upon the defendants' other, contract-related, forum contacts, and not
23 solely upon the district court's finding that willful copyright infringement had occurred. These
24 distinctions are critical. They were recognized by the United States District Court for the Eastern
25 District of Kentucky, which, in reviewing a motion to dismiss for lack of personal jurisdiction in a
26 patent infringement case between Lexmark and Laserland, offered the following analysis:

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² See Note 1, *supra*.

1 Lexmark asserts that Laserland's willful infringement is alone a sufficient contact
2 with Kentucky for the Court to exercise personal jurisdiction. Plaintiff cites to
3 *Columbia Pictures Television v. Crypton Brod. of Birmingham, Inc.*, 106 F.3d 284
4 (9th Cir. 1997) (*rev'd on other grounds, Feltner v. Columbia Pictures Television,*
5 *Inc.*, 522 U.S. 993, 139 L. Ed. 2d 398, 118 S. Ct. 556 (1998)), in which the Ninth
6 Circuit found that the willful infringement of a copyright alone is sufficient to
7 satisfy the purposeful availment prong. The Court found that the defendant
8 "willfully infringed copyrights owned by [plaintiff], which, as [defendant] knew,
9 had its principal place of business in the [forum state]. This fact alone is
10 sufficient to satisfy the 'purposeful availment' requirement." *Columbia Pictures*
11 at 289. Although Lexmark correctly quotes this case, the Court declines to find
12 jurisdiction based solely on Defendant's alleged patent infringement. Plaintiff
13 sets forth no evidence regarding Defendant's willfulness. Further, even in the
14 *Columbia Pictures* case, the court did not actually base its finding of personal
15 jurisdiction solely on the willful copyright infringement argument. The Court in
16 *Columbia Pictures* found that the defendant had numerous contract-related
17 contacts with the forum state sufficient to satisfy the purposeful availment
18 requirement.

11 *Lexmark Int'l, Inc. v. Laserland, Inc.*, 304 F. Supp. 2d 913, 918-19 (E.D. Ky. 2004).

12 A review of the *Columbia Pictures* decision illustrates the point. In *Columbia Pictures*,
13 the district court found that the primary defendant, Feltner, had engaged in willful copyright
14 infringement by continuing to broadcast television shows after his licenses to broadcast the
15 shows had expired. *Columbia Pictures*, 106 F.3d at 288-89. The district court granted summary
16 judgment in favor of Columbia Pictures. *Id.* Feltner appealed and argued that venue was
17 improper in the Central District of California. The Ninth Circuit stated the following:

18 Columbia alleged, and the district court found, that Feltner willfully infringed
19 copyrights owned by Columbia, which, as Feltner knew, had its principal place of
20 business in the Central District. This fact alone is sufficient to satisfy the
21 "purposeful availment" requirement.

21 Additionally, Columbia relies on Feltner's wide-ranging contract-related contacts
22 with Columbia in the Central District. Feltner argues that these contacts cannot
23 support venue because they all arise out of the license agreements which,
24 according to Feltner, are unenforceable because they were never signed by
25 Columbia. This argument fails both because Feltner did not raise this argument in
26 the district court and because whether or not the agreements are enforceable as a
27 matter of contract law, Feltner's contacts with the Central District remain the
28 same. Feltner's contract-related contacts are sufficient to satisfy the "purposeful
29 availment" requirement.

26 *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 289
27 (9th Cir. 1997). (Internal citation omitted.) (Emphasis added.)

28 *Columbia Pictures* does not support Righthaven's position. In *Columbia Pictures*, the

1 district court made a factual finding that Feltner had engaged in “willful” copyright infringement.
2 This case is different due to the absence of facts supporting Righthaven’s allegations of willful
3 copyright infringement. In this case, Righthaven alleges that:

- 4 • The Defendants willfully copied, on an unauthorized basis, the Work from a
5 source emanating from Nevada;
- 6 • EMT has willfully engaged in the copyright infringement of the Work; [and]
- 7 • Mr. Malley has willfully engaged in the copyright infringement of the Work.

8 (Compl. ¶¶ 14, 45-46.) These allegations are entirely conclusory and devoid of factual support.
9 “Willful” means acting “with knowledge that [one’s] conduct constitutes copyright infringement.”
10 *Columbia Pictures*, 106 F.3d at 293. Righthaven has not alleged a single fact to support its claim
11 that Mr. Malley and EMTCity.com (who are one and the same) posted the article at issue on the
12 EMTCity.com website with knowledge that doing so constituted copyright infringement. In
13 addition, Mr. Malley has specifically denied this allegation in a sworn declaration, pointing to the
14 fact that the article was posted by a third party, Dust Devil. (*See* Docket No. 8-1, Decl. of
15 Christopher J. Malley in Suppt. of Defts.’ Mot. to Dismiss at ¶ 5) (“I deny that I engaged in any
16 willful or intentional copyright infringement. I also deny that I purposefully direct[ed] or
17 expressly target[ed] any activity at Nevada Residents. ‘Dust Devil’ is a third party known to me
18 and believed to be a resident of Texas. Dust Devil posted the article mentioned in the Complaint
19 to the discussion forum section of my EMTCity.com website. Dust Devil did so without my
20 authorization or consent.”.)

21 Because Mr. Malley has denied this allegation, it is controverted and cannot be taken as
22 true. *See Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. Cal. 2003)
23 (“Unless directly contravened, Mattel’s version of the facts is taken as true, and conflicts between
24 the facts contained in declarations submitted by the two sides must be resolved in Mattel’s favor
25 for purposes of deciding whether a *prima facie* case for personal jurisdiction exists”). In addition,
26 there is no conflict between competing declarations for the Court to resolve in Righthaven’s favor
27 because Righthaven has not submitted a declaration to counter Mr. Malley’s denial. Thus, Mr.
28 Malley’s denial stands unrebutted. Moreover, in this case, Mr. Malley has not engaged in any

1 contractual negotiations with any party located in the forum like Feltner had done in *Columbia*
2 *Pictures*. The additional contract-based forum contacts present in *Columbia Pictures* do not exist
3 in this case. *Columbia Pictures* is procedurally and factually distinguishable. It is not on all fours
4 with this case and the Court need not follow it here.

5 **CONCLUSION**

6 Righthaven's position -- that a factually unsupported allegation of willful copyright
7 infringement is, by itself, sufficient for the Court to require a New Hampshire resident to defend a
8 lawsuit in Nevada -- turns constitutional due process protections on their head. This is especially
9 so where, as here, Righthaven brought this action without any facts supporting its jurisdictional
10 allegations, begged the Court for jurisdictional discovery, was given the opportunity to conduct
11 jurisdictional discovery, yet failed to do so and has since failed to support its empty jurisdictional
12 allegations with jurisdictional facts. Mr. Malley is a working man. He can hardly afford the cost
13 of cross-country federal litigation over a frivolous copyright claim. This Court should provide
14 him with the constitutional protection he deserves.

15 Dated: this 20th day of January, 2011.

16 Respectfully submitted,

17 LEWIS AND ROCA LLP

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Lewis and Roca LLP and that on this 20th day of January, 2011, I caused documents entitled:

- REPLY IN SUPPORT OF DEFENDANT’S RENEWED MOTION TO DISMISS,

to be served as follows:

- by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne Avenue, Suite 210, Las Vegas, Nevada, 89129-7701, upon which first class postage was fully prepaid; and/or
- Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or
- to be hand-delivered;
- by the Court’s CM/ECF system.

s/Jonathan W. Fountain
An employee of Lewis and Roca LLP