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

|   |   |  |
|---|---|--|
| 10 RIGHTHAVEN LLC, a Nevada limited liability company   | } | Case No.: 2:10-cv-01036-LRH-PAL                                |
| 11 Plaintiff,   |   | Assigned For All Purposes To:<br>Hon. Judge Larry R. Hicks     |
| 12 v.   | } | Courtroom:   |
| 13 REALTY ONE GROUP, INC., a Nevada corporation; DAVID TINA, an individual; and MICHAEL J. NELSON, an individual, |   | DEFENDANT REALTY ONE GROUP, INC.'S MOTION TO SET ASIDE DEFAULT |
| 14<br>15 Defendants.  |   | Complaint Filed: 06/10/2010                                    |

16  
17  
18 TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD

19 PLEASE TAKE NOTICE that on \_\_\_\_\_ at \_\_\_\_\_, 2011, or as soon  
20 thereafter as the matter may be heard, in Courtroom\_\_\_\_ of the above-entitled  
21 Court, located at 333 Las Vegas Blvd. South, Las Vegas, Nevada 89101,  
22 Defendant REALTY ONE GROUP, INC., a Nevada corporation, by and through  
23 its attorneys of record, Skane Wilcox, LLP, hereby moves the Court to set aside the  
24 Clerk's entry of default dated on or about October 6, 2010, pursuant to Rule 55(c)  
25 of the Federal Rules of Civil Procedure. This motion is brought on the ground  
26 good cause exists for setting aside the default in that the default was entered as a  
27 result of this moving defendant's mistake, surprise or excusable neglect; defendant  
28



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **STATEMENT OF FACTS**

4 On June 25, 2010, Plaintiff Righthaven, LLC (“Righthaven”) filed its  
5 Complaint for copyright infringement against Realty Once Group, Inc. (“Realty  
6 One”), David Tina and Michael J. Nelson. (Court’s Docket # 1.) Plaintiff alleges  
7 Michael J. Nelson is a licensed real estate agent in the State of Nevada “engaged”  
8 by Realty One. (Complaint, page 2, paragraphs 9-10, lines 17-20.) Plaintiff  
9 alleges Mr. Nelson operates a blog for the benefit of Realty One. (Complaint, page  
10 2, paragraph 12, lines 24-26.) Plaintiff is the owner of certain copyrighted  
11 material. (Complaint, page 3, paragraph 16, lines 10-11.) The material originally  
12 appeared in the *Las Vegas Review - Journal*. (Complaint, page 3, paragraph 18,  
13 lines 14-15.) Plaintiff alleges defendants, including Realty One, wrongfully  
14 published its copyrighted article. (Complaint, page 3, paragraph 19, lines 16-18.)

15 Righthaven filed an Affidavit of Service attesting that Realty One was  
16 served with the summons and complaint through its registered agent, CSC Services  
17 of Nevada, Inc., on or about June 30, 2010. (Doc # 10.) Realty One learned that  
18 Plaintiff was contending Realty One had been served with the Summons and  
19 Complaint. Realty One immediately investigated and learned that Plaintiff served  
20 its registered agent, CSC Services of Nevada, Inc. (“CSC”). CSC contended it  
21 notified Realty One of the service by sending an e-mail to Realty One’s employee,  
22 Natasha Shpirt. Ms. Shpirt checked her e-mail in-box and discovered she did not  
23 have any e-mail messages from CSC on June 30, 2010, or at any other time,  
24 regarding this lawsuit.

25 Therefore, Realty One never had notice that it had been served with the  
26 Summons and Complaint prior to the time the default was entered. Had Realty  
27 One had such notice, it would have timely filed a responsive pleading.  
28

1 The Clerk entered default against Realty One on or about October 6, 2010.  
2 (Doc # 16.)

3 Realty One therefore brings this motion to set aside the default so that it may  
4 then proceed with a motion to dismiss. This Court dismissed the action against  
5 defendant Michael J. Nelson on or about October 19, 2010 on the ground Mr.  
6 Nelson's use of the copyrighted article constituted "fair use" under 17 United  
7 Stated Code (U.S.C.) Section 107. (Doc # 17.) The Court concluded: "After  
8 reviewing Nelson's use of the copyrighted material, the court finds that Nelson's  
9 use falls within the Fair Use doctrine. Accordingly, Nelson did not infringe  
10 Righthaven's copyright as a matter of law and the court shall grant Nelson's  
11 motion." (Id.)

12 The only alleged publication of the copyrighted material was on Mr.  
13 Nelson's blog. Since the action has been dismissed against Mr. Nelson, there is no  
14 basis for a finding of liability against Realty One and Realty One is also entitled to  
15 a dismissal.

## 16 II

### 17 GOOD CAUSE EXISTS FOR SETTING ASIDE THE DEFAULT

18 Under Federal Rule of Civil Procedure 55(c), the Court "may set aside an  
19 entry of default for good cause. . . ." The "good cause" standard enunciated in  
20 Rule 55(c) is identical to that governing a default judgment under Rule 60(b).  
21 (*Franchise Holding II, LLC v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925  
22 (9th Cir. 2004) ("*Franchise Holding*"); *TCI Group Life Ins. Plan v. Knoebber*, 244  
23 F.3d 691, 696 (9th Cir. 2001) ("*TCI Group*").) Federal Rule of Civil Procedure  
24 60(b) states in part: "On motion and upon such terms as are just, the court may  
25 relieve a party or a party's legal representative from a final judgment, order, or  
26 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or  
27 excusable neglect." "Good cause" is typically enough to demonstrate "excusable  
28 neglect." (*Franchise Holding*, *supra*, 375 F.3d at 927.)

1           The Court has broad discretion in setting aside an entry of default. See, for  
2 example, *Brady v. United States*, 211 F.3d 499, 504 (9th Cir. 2000) [The “district  
3 court’s discretion is ‘especially broad’ when . . . it is entry of default that is being  
4 set aside, rather than a default judgment.”] Further, “judgment by default is a  
5 drastic step appropriate only in extreme circumstances; a case should, whenever  
6 possible, be decided on the merits.” (*Falk v. Allen*, 739 F.2d 461, 463 (9th Cir.  
7 1984); *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615  
8 F.3d 1085, 1089 (9th Cir. 2010).)

9           The Court will consider three factors when determining whether a defendant  
10 has established good cause: (1) whether defendant’s culpable conduct led to the  
11 default; (2) whether defendant has a meritorious defense; and (3) whether lifting  
12 the default would prejudice the plaintiff. (*Franchise Holding*, supra, 375 F.3d at  
13 926.) “Where timely relief is sought from a default . . . and the movant has a  
14 meritorious defense, doubt, if any, should be resolved in favor of the motion to set  
15 aside the default so that cases may be decided on their merits.” (*Mendoza v.*  
16 *Wright Vineyard Management*, 783 F.2d 941, 945-946 (9th Cir. 1986).)

17           A. Realty One Did Not Engage in Culpable Conduct.

18           A defendant’s conduct is culpable “where there is no explanation of the  
19 default inconsistent with a devious, deliberate, willful, or bad faith failure to  
20 respond.” (*Employee Painters’ Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993,  
21 1000 (9th Cir. 2007), quoting *TCI Group*, supra, 244 F.3d at 698). As this court  
22 has previously explained:

23                   The Court finds that Defendants’ conduct does not  
24 qualify as “culpable.” Under this prong, where a  
25 defendant has received actual or constructive notice  
26 that suit has been filed and has intentionally failed to  
27 answer, a court may find that there has been culpable  
28 conduct leading to the default. *See id.* at 697. In this  
context, “intentional” means that the defendant acted  
wilfully, deliberately, or in bad faith. *Id.* Where a

1 defendant negligently failed to answer, but then offers  
2 a “good faith explanation negating any intention to  
3 take advantage of the opposing party, interfere with  
4 judicial decision making, or otherwise manipulate the  
5 legal process,” a court will find that the defendant has  
6 not acted intentionally. *Id.* Culpable conduct involves  
7 “not simply nonappearance following receipt of notice  
of the action, but rather conduct which hindered  
judicial proceedings.” *Id.* at 698.

8 *Ernestberg v. Mortgage Investors Group*, No. 2:08-cv-01304-RCJ-RJJ, 2009 WL  
9 160241, at \*2 (D. Nev. Jan. 22, 2009).

10 Realty One did not deviously, deliberately, willfully, or in bad faith fail to  
11 respond. There was simply an error in the electronic transmission between the  
12 registered agent, CSC, and Realty One so that Realty One never received notice that  
13 it had been served with the Summons and Complaint. Once Realty One learned that  
14 Righthaven claimed service had been effected, its corporate counsel promptly  
15 investigated and retained litigation counsel to file the instant motion. Realty One  
16 has a credible, good faith explanation as to why it did not timely respond to the  
17 Complaint. At most, Realty One’s failure to answer is neglectful, not intentional,  
18 and neglectful conduct is not culpable. Therefore, this factor weighs in favor of  
19 setting aside the default against Realty One.  
20

21 B. Realty One Has Meritorious Defenses.

22 “A defendant seeking to vacate a default judgment must present specific facts  
23 that would constitute a defense. But the burden on a party seeking to vacate a  
24 default judgment is not extraordinarily heavy.” (*TCI Group*, supra, 244 F.3d at 700)  
25 All that is necessary to satisfy the meritorious defense requirement is “to allege  
26 sufficient facts that, if true, would constitute a defense: the question whether the  
27 factual allegation is true is not to be determined by the court when it decides the  
28

1 motion to set aside the default.” (*Id.*) Realty One has at least three meritorious  
2 defenses to Plaintiff’s claims:

3 1. Fair Use.

4 This Court dismissed the action against Michael J. Nelson on or about  
5 October 19, 2010 on the ground Mr. Nelson’s use of the copyrighted article  
6 constituted “fair use” under 17 U.S.C. § 107. (Doc # 17.) The only alleged  
7 publication of the copyrighted material was on Mr. Nelson’s blog. Since the action  
8 has been dismissed against Mr. Nelson, there is no basis for a finding of liability  
9 against Realty One and Realty One is also entitled to a dismissal. Realty One is  
10 only a defendant because Plaintiff alleges Mr. Nelson is Realty One’s agent and  
11 Mr. Nelson allegedly maintained his blog, where the article was published, for the  
12 benefit of Realty One. (Complaint, page 2, paragraph 12, lines 24-26.)

14 Fair use of a copyrighted work is a valid defense to an allegation of  
15 infringement of copyright under the Copyright Act. (17 U.S.C. § 107.) The Fair  
16 Use doctrine states in pertinent part that “the fair use of a copyrighted work, . . . for  
17 purposes such as criticism, comment, [or] news reporting . . . is not an infringement  
18 of copyright.” (*Ibid.*)

19 Courts will consider four different factors in determining whether the  
20 affirmative defense applies:

- 21 (1) the purpose and character of the use, including  
22 whether such use is of a commercial nature or is for  
23 nonprofit educational purposes; (2) the nature of the  
24 copyrighted work; (3) the amount and substantiality of  
25 the portion used in relation to the copyrighted work as  
26 a whole; and (4) the effect of the use upon the  
27 potential market for or value of the copyrighted work.  
28

1 (*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Field v.*  
2 *Google Inc.*, 412 F. Supp. 2d 1106, 1117 (D. Nev. 2006).)

3 If the copyrighted work is primarily informational, it is more likely to fall  
4 within the realm of fair use. (*Los Angeles News Service v. Reuters Television Int'l*  
5 *Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998). “The scope of fair use is greater when  
6 ‘informational’ as opposed to more ‘creative’ works are involved.” (*Hustler*  
7 *Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1153-1154 (9th Cir. 1986).)  
8 “The law generally recognizes a greater need to disseminate factual works than  
9 works of fiction or fantasy.” (*Harper & Row Publishers, Inc. v. National Enterprises*  
10 (1985) 471 U.S. 539, 563.)  
11

12 The alleged copyrighted work at issue in this case is an article containing  
13 newsworthy factual information appearing in a newspaper made available to the  
14 world at large on the Las Vegas Review-Journal’s web site. The article does not  
15 contain any fictional material and is not based on fantasy. A party may properly re-  
16 publish news reports. See, for example, *Los Angeles News Service v. CBS*  
17 *Broadcasting, Inc.*, 305 F.3d 924, 938-942 (9th Cir. 2002) (re-publication of a video  
18 depicting a news report was a fair use because it was informational rather than  
19 creative).  
20

21 Realty One is therefore entitled to fair use of the article. Such fair use could  
22 not have any effect on the value of the article to Plaintiff since the article is available  
23 for free to everyone who can access the internet.

## 24 2. Implied License.

25 Plaintiff alleges Realty One’s employee, Mr. Nelson, published on his  
26 blog an article originally published in the Las Vegas Review-Journal. Realty One  
27 can potentially establish an implied license defense. The Las Vegas Review-  
28 Journal was the original owner of the copyrighted article at issue and offered the



1 article to the world for free when it was originally published on the web site. The  
2 Review-Journal encouraged people to save links to the work or to send links to the  
3 work to others anywhere in the world at no cost and without restriction. (See  
4 Exhibit “2” to the Complaint.) The Review-Journal web site also enables third  
5 parties to “right click” and copy the text of articles on the site.

6 An implied license is a defense to a claim of copyright infringement. (*Field*  
7 *v. Google, Inc.*, supra, 412 F. Supp.2d at 1115.) “An implied license can be found  
8 where the copyright holder engages in conduct from which the other party may  
9 properly infer that the owner consents to his use.” (*Id.* at 1116.) Accordingly,  
10 based on this implied license, the allegedly infringing copy was, in fact, authorized  
11 by the Review-Journal and cannot constitute an infringement.<sup>1</sup>

12  
13 3. Any Infringement Was De Minimis.

14 “The de minimis doctrine essentially provides that where unauthorized  
15 copying is sufficiently trivial, ‘the law will not impose legal consequences.’” (*On*  
16 *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).) “The *de minimis* doctrine  
17 is rarely discussed in copyright opinions because suits are rarely brought over trivial  
18 instances of copying...Trivial copying is a significant part of modern life.” (*Id.* at  
19 173.) Also see, *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74  
20 (2d Cir. 1997) (“de minimis in the copyright context can mean...a technical  
21 violation of a right so trivial that the law will not impose legal consequences.”)

22  
23 The alleged copyrighted work that forms the basis of this suit was, and still is,  
24 available for free on the Las Vegas Review-Journal’s web site. Plaintiff has suffered

25  
26  
27 <sup>1</sup> On or about September 17, 2010, in a similar case entitled *Righthaven, LLC v. Jan Klerks, et al.*, Case No. 2:10-  
28 cv-00741-GMN-LRL, this Court, by the Honorable Gloria M. Navarro, granted defendant’s motion to set aside a  
default on the ground the “implied license” was perhaps defendant’s “most meritorious defense.” See Court’s Order  
of September 17, 2010, page 7, lines 4-5.

1 no harm and has incurred no damages. The allegedly infringing copy has no  
2 plausible effect on the market for the copyrighted work.

3 C. Plaintiff Will Not Be Prejudiced if the Court Sets Aside the Default.

4 Prejudice to plaintiff turns on “whether plaintiff’s ability to pursue his claim  
5 will be hindered.” (*Falk v. Allen*, supra, 739 F.2d 461, 463.) “To be prejudicial, the  
6 setting aside of a judgment must result in greater harm than simply delaying  
7 resolution of the case.” (*TCI Group*, supra, 244 F.3d at 701.) “There is no prejudice  
8 where a party suffers the loss of a quick victory due to an opponent’s procedural  
9 default and must resort to litigating on the merits.” (*Arrow Electronics, Inc. v. Night*  
10 *Operations Sys., Inc.*, No. 3:10-cv-00175-ECR-VPC, 2010 WL 3119337, at \*3 (D.  
11 Nev. Aug. 6, 2010).)

12 Plaintiff will not be prejudiced if the Court sets aside the default. Instead,  
13 Plaintiff will be required to litigate the case on its merits, which is the strong policy  
14 of this Court.

15  
16 There is a web site available to the public entitled “Righthaven Lawsuits” at  
17 [www.righthavenlawsuits.com](http://www.righthavenlawsuits.com). The web site shows that as of December 8, 2010,  
18 Plaintiff has filed 181 lawsuits in this Court. Realty One is informed and believes  
19 that most of these lawsuits are similar to the one currently before the Court and  
20 involve copyright infringement claims. Allowing one more such lawsuit to proceed  
21 will not prejudice Righthaven. Therefore, this factor also favors setting aside the  
22 default.  
23

24 **III**

25 **CONCLUSION**

26 Realty One has met the three prerequisites to setting aside the default entered  
27 against it. Realty One is not guilty of culpable conduct, it has meritorious defenses  
28 on the merits and Plaintiff will not be prejudiced if the default is set aside. Realty

1 One has therefore shown good cause under Rule 55(c) of the Federal Rules of Civil  
2 Procedure. Realty One therefore respectfully requests the Court to grant its motion  
3 and allow Realty One to defend this lawsuit on the merits.  
4

5 Dated: December 27, 2010

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7  
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