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8 *Nathan E. Palmer,*
9 *and David J. Della Terza*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 RIGHTHAVEN, LLC, a Nevada limited-liability
12 company

13 Plaintiff,

14 vs.

15 VOTE FOR THE WORST, LLC, an Utah
16 limited-liability company; NATHAN E.
17 PALMER, an individual; and DAVID J. DELLA
18 TERZA, an individual,

19 Defendants.

Case No.: 2:10-cv-01045-KJD-RJJ

**DEFENDANTS' MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

19 **DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

20 Defendants Vote for the Worst, LLC, Nathan E. Palmer, and David J. Della Terza
21 (collectively, "VFTW," or the "Defendants"), by and through their counsel, move to dismiss
22 Plaintiff Righthaven, LLC's (hereinafter "Righthaven[']s," or the "Plaintiff[']s") Complaint
23 (Doc. # 1) filed on June 28, 2010 for lack of subject matter jurisdiction, pursuant to Federal Rule
24 of Civil Procedure 12(b)(1) and Local Rule 7.2.

25 **I. Introduction**

26 Plaintiff filed this lawsuit against the Defendants on June 28, 2010, which VFTW
27 responded to with a Motion to Dismiss for lack of personal jurisdiction on August 16, 2010

1 (Doc. # 14). Righthaven filed an opposition to the Defendants' motion on September 1, 2010
2 (Doc. # 15) and the Defendants replied on September 13, 2010 (Doc. # 17). The Court
3 subsequently denied the Defendants' motion on March 30, 2011 (Doc. # 28) and the Defendants
4 filed an Answer to the Complaint on April 13, 2011 (Doc. # 32).

5 Pursuant to this Court's April 14, 2011 Order in *Righthaven LLC v. Democratic*
6 *Underground LLC*, Case No. 2:10-cv-01356, Doc. # 93 (D. Nev., filed Apr. 14, 2011), new
7 evidence regarding Righthaven's relationship with Stephens Media LLC (hereinafter "Stephens
8 Media") has been unsealed and released to the public. On April 15, 2011, an unredacted version
9 of the Defendants' Supplemental Memorandum Addressing Recently Produced Evidence
10 Relating to Pending Motions in the Democratic Underground case was made available on the
11 Public Access to Court Electronic Records ("PACER") system, as well as this court's CM/ECF
12 system. Case No. 2:10-cv-01356 Doc. # 79 (D. Nev., filed Mar. 9, 2011). *See* Decl. of J.
13 Malcolm DeVoy ¶¶ 2-3. A true and correct copy of Exhibit A to Doc. # 79 in *Democratic*
14 *Underground* is attached to this Motion as Exhibit A as well, for consistency. DeVoy Decl. ¶¶ 4-
15 5; Exh. A.

16 This document clearly reveals that Righthaven lacked the rights to bring this suit, and
17 thus this court lacks jurisdiction over this matter. Under Rule 12(b)(1), subject matter
18 jurisdiction is an essential element to every lawsuit, and must be present for any court to hear a
19 dispute. In this case, Righthaven does not have sufficient rights in the work putatively assigned
20 to it by Stephens Media to bring – or maintain – its case against VFTW. As such, the Court
21 should dismiss Righthaven's suit.

22 **II. Legal Standard**

23 Subject matter jurisdiction is an essential element to every lawsuit and must be
24 demonstrated "at the successive stages of the litigation." *Chapman v. Pier 1 Imports (U.S.), Inc.*,
25 631 F.3d 939, 954 (9th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561
26 (1992)). The existence of subject matter jurisdiction is an ongoing inquiry that a court must
27 conduct *sua sponte* in order to continue the case. *Chapman*, 631 F.3d at 954; *Bernhardt v.*

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1 *County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). Where subject matter jurisdiction is
2 absent, a court has no discretion and must dismiss the case. *Chapman*, 631 F.3d at 954.

3 A central component to subject matter jurisdiction is the question of standing, which
4 requires that the party experience actual or imminent harm. *Lujan*, 504 U.S. at 561 (citing
5 *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)). A party’s standing to bring a case is not subject to
6 waiver, and can be used to dismiss the instant action at any time. Fed. R. Civ. P. 12(h)(3); *U.S. v.*
7 *Hays*, 515 U.S. 737, 742 (1995); *Chapman*, 631 F.3d at 954.

8 **III. Argument**

9 **A. Righthaven Has No Standing to Bring This Case**

10 Righthaven is neither the owner nor exclusive holder of any rights in the copyrighted
11 work underlying this lawsuit. As such, Righthaven has suffered no injury or other cognizable
12 harm required for it to have standing under *Lujan*. Absent this very basic requirement of
13 standing, there is no subject matter jurisdiction in this case, and it must be dismissed.

14 For a plaintiff to sue for copyright infringement, it must have an exclusive right in a
15 copyright. *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005); *see*
16 *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144 (holding that only owners and
17 “exclusive licensees” may enforce a copyright or license). Without such exclusivity, a plaintiff
18 has no standing to enforce a copyright. *Sybersound*, 517 F.3d at 1144. As status as a copyright
19 owner or exclusive licensee is prerequisite for enforcing such a right, a plaintiff with neither
20 lacks standing to pursue an infringement claim on that copyright, as it cannot experience the
21 injury requisite for Article III standing under *Whitmore* and *Lujan*.

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1 Righthaven lacks sufficient rights under *Silvers* and *Sybersound* to bring this lawsuit.
 2 The Strategic Alliance Agreement (hereinafter, the “Agreement”) between Stephens Media and
 3 Righthaven found in Exhibit A obviates the need to examine the copyright assignment for the
 4 work at issue in this case.¹ Indeed, the Agreement makes it abundantly clear that Righthaven
 5 actually has *no* rights in the copyrights it claims. Most importantly, Section 7.2 of the
 6 Agreement, Exhibit A, provides as follows:

7 Despite any such Copyright Assignment, **Stephens Media shall retain (and is**
 8 **hereby granted by Righthaven) an exclusive license to Exploit the Stephens**
 9 **Media Assigned Copyrights** for any lawful purpose whatsoever and **Righthaven**
 10 **shall have no right or license to Exploit or participate in the receipt of**
 11 **royalties from the Exploitation of the Stephens Media Assigned Copyrights**
 12 **other than the right to proceeds in association with a Recovery.** To the extent
 13 that *Righthaven's* maintenance of rights to pursue infringers of the Stephens
 14 Media Assigned Copyrights in any manner would be deemed to diminish
 15 Stephens Media's right to Exploit the Stephens Media Assigned Copyrights,
 16 *Righthaven* hereby grants an exclusive license to Stephens Media to the greatest
 17 extent permitted by law so that Stephens Media shall have unfettered and
 18 exclusive ability to Exploit the Stephens Media Assigned Copyrights. *Righthaven*
 19 shall have no Obligation to protect or enforce any Work of Stephens Media that is
 20 not Stephens Media Assigned Copyrights.

21 Emphasis added; “Exploit” defined in Exhibit A, Schedule 1. Thus, while Stephens Media gives
 22 Righthaven the illusory rights for Righthaven to be *recognized* as the copyright holder of the
 23 works at issue in its lawsuits, it does not provide any transfer any of the rights in 17 U.S.C. § 106
 24 that must be transferred to make a valid copyright assignment or license, and thus grant the
 25 assignee the right to sue. *See Silvers*, 402 F.3d at 885. The “assignment” is a transparent sham
 26 that is designed to make Righthaven *appear* to be a copyright assignee for the purposes of filing
 27 suit, meanwhile the actual rights at issue are governed by this Agreement, which renders the
 28 assignment meaningless. (Exh. A.) The Agreement even specifically precludes Righthaven from

¹ Judge Hunt ordered this document to be made public in *Righthaven LLC v. Democratic Underground LLC*, Case 2:10-cv-1356 Order, Doc. # 93 (D. Nev., filed Apr. 14, 2011). His rationale included the fact that the contents of this document would have an impact on all Righthaven cases. “As I have read these and other motions in this case, and considered the multitude of cases filed by Righthaven, on the claimed basis that Righthaven owns the copyrights to certain Stephens Media copy, it appears to the Court that there is certainly an interest and even a right in all the other defendants sued by [Righthaven] to have access to this material.” *Id.* at 4.

1 the most basic of assignee rights and prohibits Righthaven from “Exploit[ing]” (Exh. A,
2 Schedule 1) the copyrighted works through distribution, publication or licensing. In the end,
3 Stephens Media is the only party to the Agreement with any exclusive rights in the copyrighted
4 content.

5 But that is not the full extent of the sham and the fraud that has been perpetrated upon
6 this court hundreds of times – as a right of reversion is also included in the Agreement. As seen
7 in Section 8 of the Agreement, Exhibit A:

8
9 Stephens Media shall have the right at any time to terminate, in good faith, any
10 Copyright Assignment (the "Assignment Termination") and enjoy a right of
11 complete reversion to the ownership of any copyright that is the subject of a
12 Copyright Assignment; provided, however, that if *Righthaven* shall have
13 commenced an action to prosecute an infringer of the Stephens Media Assigned
14 Copyrights, Stephens Media shall be exclusively responsible for effecting
15 termination of such action including, without limitation, all Losses associated
16 with any dismissal with prejudice.

17 In addition to Stephens Media having the exclusive license to use the copyrights for everything
18 but Righthaven’s lawsuits, it also retains the ability to reclaim those rights at any time.
19 Righthaven does not even acquire the exclusive right to sue, as the full text of Section 8, found in
20 Exhibit A, specifically contemplates Stephens Media litigating the infringement of the copyrights
21 it assigns to Righthaven.

22 This is not a true copyright ownership that Righthaven has acquired, nor is it even an
23 exclusive license – it is simply an attempt to illegally assign a copyright claim. And it is exactly
24 that narrow, exploitative interest that the Ninth Circuit held flew in the face of the Copyright Act,
25 and clearly stated could not be the basis of a copyright infringement lawsuit, in *Silvers*. 402 F.3d
26 at 890; *see also Sybersound*, 517 F.3d at 1144.

27 **B. Righthaven has Willfully Deceived this Court**

28 Righthaven fought mightily to keep this evidence from the public and from all defendants
in its legion of cases brought in this District. See *Righthaven LLC v. Democratic Underground
LLC*, Case No. 2:10-cv-1356. An examination of the document and its implications for

1 Righthaven's business model make the reason plain – it reveals the unlawful nature of
2 Righthaven's actions before this court and renders all of its lawsuits null and void. For this
3 reason, the Court has an independent justification for dismissing this case.

4 This Court has the inherent power to dismiss an action when a party has “willfully
5 deceived” the Court and “engaged in conduct utterly inconsistent with the orderly administration
6 of justice.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983); *Phoceene Sous-*
7 *Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982). Such conduct is
8 inimical to the proper and equitable use of not only this Court's resources, but the justice system
9 as a whole. There is little doubt, though, that this is exactly what Righthaven has done in this
10 case.

11 In the Agreement, Stephens Media retains an “exclusive license” to exploit the copyrights
12 allegedly assigned to Righthaven. (Exh. A § 7.2.) Righthaven has no right to receive royalties
13 for the copyrighted work's use, other than the recovery it is entitled to from litigation;
14 additionally, Righthaven specifically gives Stephens Media an unspecified – but expansive² –
15 exclusive license to exploit the copyrights. (*Id.*) The extent to which Righthaven putatively owns
16 the copyright is further undermined by Stephens Media's right to reversion, which allows it to
17 take back the copyright at almost any time (*Id.* § 8.)

18 Meanwhile, in Righthaven's Complaint, it deceptively claims to be the “owner” of the
19 copyrighted work (Doc. # 1 ¶¶ 9, 25) and avers to have the exclusive rights to reproduce the
20 work, create derivatives of the copyrighted work, distribute copies of the work and publicly
21 display the work under 17 U.S.C. § 106. (Doc. # 1 ¶¶ 32-35.) All of these claims are clearly
22 contradicted by Section 7.2 of the Agreement, which makes it clear that Righthaven has no rights
23 to use the work for any purpose other than litigation, and is assigned the copyright solely to coat
24 its lawsuits with the veneer of legitimacy. (Exh. A §§ 3.1, 3.3, 3.4, 7.1, 7.2.)

25 The Agreement embodied in Exhibit A defines the full scope of Stephens Media's
26 relationship with Righthaven, rendering any analysis of an individual copyright assignment
27 superfluous. It is clear from the Agreement that whatever rights Righthaven does have from

28 ² “[T]o the greatest extent permitted by law.” (*Id.*)

1 Stephens Media are insufficient to lawfully bring its lawsuit against these defendants (and others
2 as well), and that it lacks standing to do so. Righthaven willfully hid this information from the
3 Court, and when one party discovered it, Righthaven fought extensively to keep the information
4 from other Defendants. Now that it has seen the light of day, and this Court has opportunity to
5 gaze upon it, Righthaven's deception stands starkly revealed. This case must be dismissed.

6 **Conclusion**

7 Under the law of this Circuit, Righthaven does not have the legal right to pursue its
8 copyright infringement claim in this case. As seen from Exhibit A, it has acquired no rights from
9 Stephens Media, and certainly not enough to claim its copyrights were infringed upon. As such,
10 it has not suffered an injury cognizable by law, and its case is not properly before this Court.
11 Therefore, consistent with Federal Rule of Civil Procedure 12(h)(3), this Court should dismiss
12 Righthaven's case against the Defendants.

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14 Dated: April 17, 2011

Respectfully Submitted,

15 RANDAZZA LEGAL GROUP

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19 Marc J. Randazza
J. Malcolm DeVoy IV

20 Attorneys for Defendants,
21 *Vote for the Worst, LLC,*
22 *Nathan E. Palmer,*
23 *and David J. Della Terza*
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Randazza Legal Group and that on this 17th day of April, 2011, I caused documents entitled:

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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/ J. Malcolm DeVoy

J. Malcolm DeVoy