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5 *Attorney for Plaintiff Righthaven LLC*

7 RIGHTHAVEN LLC, a Nevada limited-  
liability company,

8 Plaintiff,

9 v.

10 VOTE FOR THE WORST, LLC, a Utah  
11 limited-liability company; NATHAN E.  
PALMER, an individual; and DAVID J.  
12 DELLA TERZA, an individual,

13 Defendant.  
14

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

**PLAINTIFF RIGHTHAVEN LLC'S  
RESPONSE TO DEFENDANT'S MOTION  
TO DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION**

15  
16 Plaintiff Righthaven LLC ("Righthaven") hereby responds to Defendants Vote For The  
17 Worst, LLC's, Nathan E. Palmer's, and David Della Terza's (collectively "Defendants") Motion  
18 to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion", Doc. # 33). Defendants'  
19 Motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), which  
20 asserts that Righthaven lacks standing to bring this action for copyright infringement. (Doc. # 33  
21 at 3-5.)

22 Righthaven's response is based on the below memorandum of points and authorities, the  
23 declaration of Steven A. Gibson (the "Gibson Decl."), the declaration of Mark A. Hinueber (the  
24 "Hinueber Decl."), the pleadings and papers on file in this action, any oral argument this Court  
25 may allow, and any other matter upon which this Court takes notice.  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Congress authorized a limited monopoly in copyrighted works “to motivate the creative  
4 activity of authors and inventors by the provision of a special reward.” *See Sony Corp. of Am. v.*  
5 *Universal City Studios, Inc.*, 464 U.S. 417, 429. Yet, since the proliferation of the internet and  
6 the number of people with websites and blogs, copyright holders have seen their works  
7 repeatedly copied and posted online without permission, recognition, or compensation. That is  
8 the case here, where Defendants displayed an unauthorized reproduction of an article by the *Las*  
9 *Vegas Review-Journal* on their blog. The abundance of infringement just like the one at issue  
10 here is why Stephens Media LLC (“Stephens Media”), owner of the *Las Vegas Review-Journal*,  
11 entered into an agreement with Righthaven to help it pursue these infringers.

12 Part of the strategy to pursuing online infringers requires Stephens Media to assign its  
13 copyright in a particular work to Righthaven, along with the right to sue for past, present and  
14 future infringement. It is black letter law that at the moment such an assignment occurs,  
15 Righthaven, as the current copyright owner, has standing to pursue a claim for infringement.  
16 This is a much different situation than in *Silvers v. Sony Pictures Entm’t Inc.*, 402 F.3d 881, 884  
17 (9th Cir. 2005), where the plaintiff, assigned only a *bare right to sue* for past copyright  
18 infringement, lacked standing.

19 To further clarify the mutual intent of Righthaven and Stephens Media to confer full  
20 ownership in copyright to Righthaven when entering into copyright assignments, both parties  
21 have provided declarations in support of this memorandum. Thus, to the extent the Court finds  
22 that anything in the Strategic Alliance Agreement (“SAA”) or copyright assignment is  
23 ambiguous such that it is unclear whether Righthaven has standing, it may interpret these  
24 agreements to confer full ownership rights in Righthaven. The Court’s ability to do this is also  
25 expressly set forth in the SAA, which vests the Court with the power to correct any defective  
26 provision in order to “approximate the manifest intent of the [p]arties.” (Gibson Decl. ¶ 11, Ex.  
27 2 § 15.1; Hinueber Decl. ¶ 10, Ex. 2 § 15.1.)

1 Finally, in an effort to cure any possible doubt as to whether Righthaven has full  
2 ownership in an assigned copyright, Righthaven and Stephens Media have recently executed a  
3 Clarification and Amendment to Strategic License Agreement (the “Amendment”), which not  
4 only makes clear that Righthaven has full ownership rights in any assigned copyright, it gives  
5 Stephens Media only a non-exclusive right to use an assigned work.

6 For these reasons, Righthaven respectfully requests that the Court find that it has at all  
7 times had standing to maintain this suit, or in the alternative, that any defect in Righthaven’s  
8 standing has been cured by the Amendment. Accordingly, Defendants’ Motion must be denied.

## 9 II. STATEMENT OF FACTS

10 Righthaven is the owner of a copyright registration for the literary piece entitled “NORM:  
11 ‘Idol’ finalists keep busy in Las Vegas” (the “Work”), which originally appeared in the *Las*  
12 *Vegas Review-Journal* on or about April 11, 2010. (Doc. # 1 at 2; Doc. # 1-1 at 2-3; Gibson  
13 Decl. ¶ 3; Hinueber Decl. ¶ 3.) May 25, 2010, Stephens Media, the original owner of the Work,  
14 assigned all rights, title and interest in and to the Work, including the right to seek redress for all  
15 past, present and future infringements (the “Assignment”). (Gibson Decl. ¶ 4, Ex. 1; Hinueber  
16 Decl. ¶ 4, Ex. 1; *see also* Doc. #1 at 4.) On June 21, 2010, Righthaven was granted registration  
17 of the Work with the United States Copyright Office based on the ownership rights conveyed by  
18 the Assignment. (Doc. # 1-1 at Ex. 3; Gibson Decl. ¶ 4.)

19 Righthaven contends that on April 12, 2010, an Internet forum user with the moniker  
20 “Racing Rat” posted an unauthorized copy of the Work on a website forum owned, operated and  
21 controlled by the Defendants. (*See* Doc. # 1 at 2-3.) Thus, Defendants’ alleged act of copyright  
22 infringement occurred prior to the Assignment, thereby constituting an accrued claim at the time  
23 Righthaven was conveyed ownership rights in and to the Work along with the right to sue for  
24 past, present and future infringement claims. (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4, Ex. 1;  
25 *see also* Doc. #1 at 4.) Defendant is alleged to have willfully violated the exclusive copyrights to  
26 the Work. (Doc. # 1 at 5.)

27 Defendants responded to Righthaven’s Complaint by filing a motion to dismiss on the  
28 grounds that this Court lacked *subject matter jurisdiction* and personal jurisdiction over them.

1 (Doc. # 14.) On March 30, 2011, the Court expressly found that Righthaven has sufficiently  
2 alleged standing to sue based on the ownership rights conferred by the Assignment, which  
3 expressly included the right to bring accrued infringement claims, in view of the decision in  
4 *Silvers*. (Doc. # 28 at 2-3.) The Court further determined the Defendants were subject to  
5 personal jurisdiction in this forum. (*Id.* at 3-6.)

6 Defendants' current dismissal request is nothing more than an attempt to take a proverbial  
7 second bite at a subject matter jurisdiction apple under the cloak of Internet-based innuendo and  
8 speculation as to the effect of SAA upon the Assignment. (Doc. # 33 at 3-6.) Defendants'  
9 pejorative bluster and meritless claims of willful deception by Righthaven must necessarily wilt  
10 in view of the well-founded arguments presented below. Simply put, Defendants' Motion must  
11 be denied because Righthaven was effectively conveyed ownership of the Work, along with,  
12 among other things, the right to seek redress of accrued infringement claims, through the  
13 Assignment. The terms of the SAA, upon which Defendant relies, does not divest Righthaven of  
14 standing to maintain this action for past infringement of the Work. To the extent there is any  
15 dispute about the parties' intent in entering into the transaction at issue, they have  
16 unquestionably expressed their intent and, if deemed necessary, have further clarified their intent  
17 through the Amendment. Accordingly, the Court should conclude, as it has previously found,  
18 that Righthaven has standing to maintain this action.

### 19 **III. ARGUMENT**

20 Standing is a jurisdictional requirement that can be raised at any time, including *sua*  
21 *sponte* by the court, as is the case here. *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d  
22 1031, 1035 (9th Cir. 2008). Pursuant to Section 501(b) of the Copyright Act, only "the legal or  
23 beneficial owner of an exclusive right under a copyright" is entitled to sue for infringement.  
24 *Silvers*, 402 F.3d at 884. Section 106 of the Act, in turn, defines the exclusive rights that can be  
25 held in a copyright (*e.g.* the right to reproduce, to prepare derivative works, and to distribute  
26 copies). Exclusive rights in a copyright may be transferred and owned separately—for example,  
27 through assignment or an exclusive license—but no exclusive rights exist other than those listed  
28 in Section 106. *Silvers*, 402 F.3d at 885. While the right to assert an accrued cause of action for

1 copyright infringement cannot be transferred alone, such a right can be transferred along with  
2 one or more of the exclusive rights in a copyright. *See id.* at 890.

3 As the assignee-owner of the full right and title in and to the Work, Righthaven has  
4 standing to sue for acts of copyright infringement occurring after it acquired ownership of the  
5 copyright. Pursuant to the express terms of the Assignment, Stephens Media also expressly  
6 transferred to Righthaven the right to assert accrued causes of action for infringement of the  
7 Work, giving Righthaven standing to sue for Defendant's infringement, even though that  
8 infringement occurred prior to the Assignment. (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4,  
9 Ex. 1.) In addition, Stephens Media and Righthaven recently executed a clarification and  
10 amendment to the SAA in order to further clarify and effectuate, to the extent not already  
11 accomplished, what has at all times been the intent of the parties—to transfer full ownership in  
12 copyright to Righthaven. (Gibson Decl. ¶ 12, Ex. 3; Hinueber Decl. ¶ 11, Ex. 3.) This  
13 Amendment has cured any defects in standing that existed under the parties' original contractual  
14 relationship. (*Id.*) Therefore, as set forth below, Righthaven respectfully requests that the Court  
15 find that Righthaven has standing to maintain this action.<sup>1</sup>

16 **A. Pursuant to the Written Assignment, Righthaven Has Standing to Sue for**  
17 **Past Infringement.**

18 Binding precedent establishes that the assignment from Stephens Media to Righthaven  
19 conveys upon Righthaven standing to bring this case. In *Silvers*, the Ninth Circuit held that an  
20 assignor can transfer the ownership interest in an accrued past infringement, but the assignee has  
21 standing to sue only if the interest in the past infringement is expressly included in the  
22 assignment and the assignee is also granted ownership of an exclusive right in the copyrighted  
23 work. *Id.* at 889-90. In so holding, the panel in *Silvers* aligned Ninth Circuit law with that of the  
24 Second Circuit as set forth in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980  
25

26 \_\_\_\_\_  
27 <sup>1</sup> If the Court finds that despite the parties' Amendment to the SAA, Righthaven still lacks  
28 standing, Righthaven requests that it be granted leave to join Stephens Media as a plaintiff in  
order to cure the jurisdictional deficiency. *See Benchmark Homes, Inc. v. Legacy Home Builders*  
*L.L.C.*, 2006 WL 208830, at \*1 (D. Neb. Jan. 26, 2006) (granting plaintiff's request for leave to

1 (2d Cir. 1991), which recognized the right to sue for past infringement when both the copyright  
2 and the accrued claims were purchased. *Silvers*, 402 F.3d at 889.

3 Multiple courts in this district have already determined that Righthaven has standing to  
4 bring a claim for past infringement under the Ninth Circuit's standard in *Silvers*, including this  
5 very Court in this same case (Doc. # 28 at 2-3) based on the plain language of the copyright  
6 assignment:

- 7
- 8 • *Righthaven LLC v. Majorwager.com, Inc.*, 2010 WL 4386499, at \*2 (D. Nev. Oct. 28, 2010).
  - 9 • *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, 2010 WL 3522372, at \*2 (D. Nev. Sept. 2, 2010).
- 10

11 (*See also* Gibson Decl. ¶¶ 9-10.)

12 Just like the assignments at issue in the cases above, and as this Court has already  
13 determined in this very case, the Assignment transferred all exclusive ownership rights in and to  
14 the Work to Righthaven, and expressly included all accrued causes of action for copyright  
15 infringement:

16 Assignor hereby transfers, vests and assigns [the Work]...to  
17 Righthaven...all copyrights requisite to have Righthaven recognized as the  
18 copyright owner of the Work for purposes of Righthaven being able to  
19 claim ownership as well as the right to seek redress for ***past, present and future infringements*** of the copyright in and to the Work.

20 (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4, Ex. 1, emphasis added.) At the moment of  
21 the Assignment, Righthaven became the owner of the Work with all rights of ownership,  
22 including the right to register the Work, license the Work and seek redress for  
23 infringement, including past infringement. In other words, the Assignment conferred  
24 upon Righthaven the exclusive rights required under the Copyright Act to bring suit for  
25 ***both*** past and future acts of infringement. The Court has already reached this conclusion  
26 once in this very case. (Doc. # 28 at 2-3.) This inevitable observation aside, as parties  
27 frequently do, Righthaven licensed back to Stephens Media the right to exploit the Work.  
28

1 It also sought registration of the Work with the USCO and brought suit against a blatant  
2 infringer.

3 While Defendants argue that the SAA renders the Assignment ineffective, nothing in the  
4 SAA's provisions alter the unambiguous language of the Assignment or the rights that  
5 Righthaven acquired.<sup>2</sup> First, the SAA does not effectuate the assignment of any work. (Gibson  
6 Decl. ¶ 5, Ex. 2 § 7.2; Hinueber Decl. ¶ 5, Ex. 2 § 7.2.) Rather, the SAA reflects promises made  
7 by the parties with regard to future transactions in copyrights. (*Id.*) The SAA envisions an  
8 assignment to Righthaven of all rights, title and interest in and to potential copyrighted works,  
9 which includes the right to sue for any past, present or future infringements, coupled with a  
10 license back to Stephens Media of the right to exploit any copyrighted works. (*Id.*) But the SAA  
11 itself does not cause an assignment of property rights.

12 Nor does the SAA's right of reversion provision have any impact on Righthaven's  
13 present standing to sue for past infringement. The right of reversion gives Stephens Media the  
14 right to regain the ownership to any assigned work in the future under certain conditions. (*Id.* §  
15 8.) That future right has no impact on Righthaven's current ownership status, its ownership  
16 status at the time of the assignment, or its status at the time it filed this action. Indeed, unless  
17 and until Stephens Media exercises its right of reversion, that right will have no impact  
18 whatsoever. Stephens Media has not exercised that right (Gibson Decl. Ex. 2 § 8; Hinueber  
19 Decl. Ex. 2 § 8.), and there is nothing in the record to suggest it will.

20 While parties in numerous other actions have alleged that this transactional structure  
21 constitutes a "sham" or meaningless assignment, adopting these allegations by a finding that

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22 <sup>2</sup> Righthaven further contends that Defendants' lack standing to challenge the contractual  
23 validity of the SAA. Courts have held, that as a matter of public policy, it would be inequitable  
24 to allow an infringer to use the validity of transfer of rights to a copyrighted work as a defense  
25 when no dispute exists between the parties to the transfer. *See Magnuson v. Video Yesteryear*,  
26 85 F.3d 1424, 1428-29 (9th Cir. 1996); *Elden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d  
27 27, 36-37 (2d Cir. 1982); *Sabroso Publ'g, Inc. v. Caiman Records Am., Inc.*, 141 F.Supp.2d 224,  
28 227-28 (D. P.R. 2001)(denying motion to dismiss for lack of standing based on alleged invalidity  
of transfer of copyrighted interest). Moreover, as a matter of general contract law, only the  
contracting parties to an agreement have standing to attack its validity. *See, e.g., Greater Iowa  
Corp. v. McLendon*, 378 F.2d 783, 792 (8th Cir. 1967).

1 Righthaven lacks standing to maintain this action for past infringement would eviscerate  
2 countless complex commercial and intellectual property transactions. “Principles of contract law  
3 are generally applicable in the construction of copyright assignments, licenses and other transfers  
4 of rights.” *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978). An assignment  
5 transfers all rights, title and interest in and to the assigned property. *See id.*; *see also Pressley’s*  
6 *Estate v. Russen*, 513 F. Supp. 1339, 1350 (D. N. J. 1981) (“An assignment passes legal and  
7 equitable title to the property . . .”). Axiomatically, when the totality of rights are assigned by  
8 one party to another, and the party receiving said assignment then conveys a license of some  
9 interest to the same party or to another party, complete title to ownership vests in the assignee  
10 ***prior to being divested through licensure.***

11 While the transactional structure described in the SAA, in which a license is given back  
12 to Stephens Media, may potentially be construed to limit Righthaven’s ability to bring suit for  
13 present and future infringements during the term of the license, it does not limit the company’s  
14 ability to bring suit for past infringements, which is precisely what is at issue here. As the Ninth  
15 Circuit held in *Silvers*, the right to sue for past infringement requires only an assignment of an  
16 ownership interest along with the expressed right to sue for an accrued claim for infringement.  
17 *Silvers*, 402 F.3d at 889-90.

18 The transactional structure under the SAA and the actual assignment of rights comport  
19 with the holding in *Silvers*. Pursuant to the individual assignments that are ultimately executed,  
20 Righthaven is assigned all ownership rights, along with the right to sue for past, present and  
21 future infringements, associated with the work assigned. (*See, e.g.*, Gibson Decl. ¶ 4, Ex. 1;  
22 Hinueber Decl. ¶ 4, Ex. 1.) While Righthaven promises under the SAA to license rights back to  
23 Stephens Media to exploit the acquired works, there can be no license until ***after*** the assignment  
24 of ownership rights and the right to sue for past infringements is conveyed. This structure thus  
25 conveys ownership and the right to sue for accrued infringement claims, which is precisely what  
26 is required to establish standing under *Silvers* for purposes of accrued or past infringement  
27 claims. This Court has already determined as much in denying the Defendants’ first attempt at  
28 dismissal for lack of subject matter. (Doc. # 28 at 2-3.) The same result is compelled upon

1 examination of the Defendants' apparently new but not improved subject matter jurisdiction  
2 attack predicated on the SAA's disclosure. Any other conclusion would require the Court to  
3 ignore the expressly defined assignment and license-back structure contemplated by the parties  
4 to the SAA.

5 **B. The Court Should Construe the Contracts to Convey to Righthaven All**  
6 **Rights Necessary for It to Have Standing.**

7 Under Nevada law,<sup>3</sup> the Court should interpret the contracts to find that they convey any  
8 and all rights necessary to establish Righthaven as the true and lawful owner of the copyright to  
9 the Work. To the extent there is any ambiguity with respect to whether the Assignment  
10 sufficiently conveyed the rights to Righthaven so that it has standing to bring this action, the  
11 court should look to parties' intent. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481,  
12 488, 117 P.3d 219, 224 (2005) (internal quotation omitted). Moreover, pursuant to the express  
13 language of the SAA, if any portion of the SAA is deemed void or unenforceable, the Court is  
14 contractually vested with the power to correct any defective provision in order to "approximate  
15 the manifest intent of the [p]arties." (Gibson Decl. ¶ 11, Ex. 2 § 15.1; Hinueber Decl. ¶ 10, Ex. 2  
16 § 15.1.)

17 Contrary to Defendants' conspiratorial assertions, there can be no question that the  
18 parties intended to convey to Righthaven any right necessary for it to bring suit. As set forth in  
19 the accompanying declarations and as reflected in the SAA, the Assignment, and the recently-  
20 executed Amendment discussed below, the parties to the SAA and the Assignment intended to  
21 vest copyright ownership of specific works in Righthaven so as to grant it the right to sue for  
22 infringement, including past infringement, while still permitting Stephens Media to use the  
23 works going forward based on a license of rights to do so from Righthaven. (Gibson Decl. ¶¶ 5-  
24 12, Exs. 2-3; Hinueber Decl. ¶¶ 5-11, Exs. 2-3.) Accordingly, the Court should construe the  
25 contracts in such a way that they convey to Righthaven all rights that are necessary to have  
26

27  
28 <sup>3</sup> The SAA expressly states that it is governed by Nevada law. (Gibson Decl. ¶ 5, Ex. § 15.3; Hinueber Decl. ¶ 5, Ex. § 15.3.)

1 standing to maintain this action. If the Court does so, it will necessarily conclude once again that  
2 Righthaven has always had standing to bring this suit.

3 **C. Standing Is Also Effected by the Amendment.**

4 As stated above, Righthaven has standing to bring suit pursuant to the Assignment and  
5 SAA, which expressly confer (and reflect the intent to confer) full copyright ownership on  
6 Righthaven. Nevertheless, to further clarify the parties' intent—and to preempt any future  
7 challenges to Righthaven's standing—Righthaven and Stephens Media have clarified and  
8 amended their intent when entering into the SAA as set forth in the supporting declarations and  
9 in the Amendment. (Gibson Decl. ¶ 12, Ex. 3; Hinueber Decl. ¶ 11, Ex. 3.) In the Amendment,  
10 Righthaven and Stephens Media promise to execute individual assignments for certain  
11 copyrighted works (as before), but Righthaven promises to grant Stephen's media only a non-  
12 exclusive license to Exploit the work. (Gibson Decl. Ex. 3 at 1-2; Hinueber Decl. Ex. 3 at 1-2.)  
13 As a mere holder of the right to use the assigned copyrighted work, Stephens Media would not  
14 have standing to sue for infringement. *See, e.g., Silvers* 402 F.3d at 884-85. Thus, the sole party  
15 holding any exclusive rights, and the attendant standing to sue for infringement, would be  
16 Righthaven. *See id.* This agreement reflects the parties' intent to transfer full rights in the  
17 copyright to Righthaven. (Gibson Decl. ¶¶ 5-12, Ex. 3; Hinueber Decl. ¶¶ 5-11, Ex. 3.) Further,  
18 the Amendment extinguishes the "right of reversion" previously held by Stephens Media, and  
19 replaces it with a standard option to re-purchase the copyright upon the satisfaction of certain  
20 conditions. (Gibson Decl. Ex. 3 at 2-3; Hinueber Decl. Exs. 3 at 2-3.) The Amendment also  
21 contains provisions requiring Stephens Media to pay Righthaven royalties for its use of the  
22 Work, making Righthaven the beneficial owner in the Work, in addition to its status as legal  
23 owner. (*Id.* at 1-2.)

24 Courts frequently allow parties to a copyright transfer to subsequently clarify or amend  
25 their agreement in order to express their original intent to grant the assignor the right to sue for  
26 infringement. *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003)  
27 (recognizing that an oral assignment can be confirmed later in writing); *Imperial Residential*  
28 *Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995) ("[A] copyright owner's

1 later execution of a writing which confirms an earlier oral agreement validates the transfer ab  
 2 initio.”); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir.  
 3 1994); *see also Sabroso Publ’g, Inc.*, 141 F. Supp. 2d at 228; *Intimo, Inc. v. Briefly Stated, Inc.*,  
 4 948 F. Supp. 315, 318 (S.D.N.Y. 1996) (giving effect to a “very late” amendment granting the  
 5 plaintiff the right to bring the accrued causes of action); *Goldfinger Silver Art Co., Ltd. v. Int’l*  
 6 *Silver Co.*, 1995 WL 702357, at \*4 (S.D.N.Y. Nov. 28, 1995) (holding that plaintiff could cure  
 7 standing defect after the action was filed); *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830  
 8 F. Supp. 614, 620 (N.D. Ga. 1993) (holding that second assignment cured standing defect).

9 Given that the parties to the Assignment and the Amendment do not dispute the rights in  
 10 the Work and the Defendant has not been prejudiced in any way by the Amendment, the Court—  
 11 if it finds that original standing was defective—should allow the Amendment to cure the defect  
 12 without dismissing the case.<sup>4</sup> *See Intimo, Inc.*, 948 F. Supp. at 317-18; *Infodek, Inc.*, 830 F.  
 13 Supp. at 620; *Wade Williams Dist., Inc. v. Am. Broad. Co., Inc.*, 2005 WL 774275, at \*4  
 14 (S.D.N.Y. April 5, 2005); *see also Dubuque Stone Prod. Co. v. Fred L. Gray Co.*, 356 F.2d 718,  
 15 724 (8th Cir. 1966); *Kilbourn v. Western Surety Co.*, 187 F.2d 567, 571 (10th Cir. 1951).  
 16 Moreover, permitting subsequent clarification or amendment of the parties’ original intent so as  
 17 to cure any technical standing defects promotes judicial economy and reduces litigation costs  
 18 that would necessarily arise from the dismissal and re-filing of a new action. *Intimo, Inc.*, 948 F.  
 19 Supp. at 318-19.

20 **D. Defendant’s Claim That Righthaven Has Willfully Deceived The Court is**  
 21 **Wholly Without Merit.**

22 In a transparent attempt to benefit from the groundswell of Internet-based conspiracy  
 23 theories and baseless attacks against the propriety of its alleged business model, Defendants  
 24 alternatively request dismissal of Righthaven’s Complaint because it has willfully deceived the  
 25 Court. (Doc. # 33 at 5-8.) As the above arguments clearly establish, Righthaven has standing to  
 26

27 <sup>4</sup> Federal Rule of Civil Procedure 17(a) additionally supports Righthaven’s request to have the  
 28 parties’ intent to grant the company standing to bring this action by recognizing and giving effect  
 to the Amendment through ratification. *See Clarkson Co. Ltd. v. Rockwell Int’l Corp.*, 441 F.  
 Supp. 792, 797 (N.D. Cal. 1977).

1 maintain this action for past infringement of the Work. (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl.  
2 ¶ 4, Ex. 1.) Righthaven has buttressed this inevitable conclusion by supplying the Court with  
3 supporting declarations from both parties to the transaction that unquestionably demonstrates  
4 their intent in effectuating the Assignment. (Gibson Decl. ¶¶ 5-12, Exs. 2-3; Hinueber Decl. ¶¶ 5-  
5 11, Exs. 2-3.) Moreover, Righthaven has further submitted the Amendment, which, while  
6 unnecessary to vest the Court with standing for Defendants' past infringement under *Silvers*,  
7 unequivocally clarifies Righthaven's standing to maintain this action along with actions for  
8 present and future infringements of the Work. (Gibson Decl. ¶ 12, Ex. 3; Hinueber Decl. ¶ 11,  
9 Ex. 3.)

10 Given the above-cited authority, supporting materials and this Court's own prior decision  
11 (Doc. # 28 at 2-3), Defendants would have to somehow pull a proverbial rabbit from a  
12 magician's top hat in order to successfully justify dismissal of Righthaven's Complaint on the  
13 ground that it willfully deceived this Court by filing this action. In short, the record before the  
14 Court demonstrates Righthaven's entitlement to maintain this action. Accordingly, Defendants'  
15 request for dismissal based on willful deception by Righthaven must be rejected and the rampant,  
16 unjustified Internet-based criticism attendant to such baseless claims must come to an end in  
17 view of this Court's anticipated, well-reasoned decision.

#### 18 **IV. CONCLUSION**

19 For the foregoing reasons, Righthaven respectfully requests the Court find that Righthaven  
20 has standing to maintain this infringement action. Accordingly, Defendants' Motion must be  
21 denied.

22 Dated this 9<sup>th</sup> day of May, 2011.

23 SHAWN A. MANGANO, LTD.

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*Attorney for Righthaven LLC*

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 9<sup>th</sup> day of May, 2011, I caused the foregoing document to be served by the Court's CM/ECF system.

SHAWN A. MANGANO, LTD.

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