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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF NEVADA**

15 RIGHTHAVEN LLC, a Nevada limited-
16 liability company
17 Plaintiff,
18 v.
19 KEVIN KELLEHER, an individual
20 Defendant

21 Case No.: 2:10-cv-01184-KJD-RJJ
22)
23) **DEFENDANT KEVIN KELLEHER'S**
24) **RESPONSE TO PLAINTIFF**
25) **RIGHTHAVEN'S NOTICE OF ADVERSE**
26) **DECISIONS CONCERNING SUBJECT**
) **MATTER JURISDICTION**

27 Eight days prior to trial calendar call in a case in which it has conducted no discovery and
28 brought no substantive motions, Plaintiff Righthaven LLC suggests that "the Court may wish to
29 issue an Order to Show Cause so that is [sic] may rule on the presence of subject matter
30 jurisdiction prior to conducting trial in this matter." Righthaven LLC's Notice of Adverse
31 Decisions Concerning Subject Matter at 2. It is a peculiar suggestion for Righthaven to make,
32 given that "Righthaven maintains this Court has subject matter jurisdiction to adjudicate the
33 copyright infringement claims at issue in the case at bar." *Ibid.* Righthaven thus appears to be
34 inviting the Court to commit what Righthaven would contend is legal error by dismissing this
35 action.
36

1 Also peculiar is that in an October 7, 2011 teleconference with U.S. Magistrate Judge
2 Robert J. Johnston and Mr. Kelleher, Righthaven represented that it would move to dismiss the
3 instant case under Federal Rule of Civil Procedure 12(b)(1).¹ That assurance echoed an earlier
4 claim that Righthaven would dismiss this action. On June 20, 2011, Righthaven informed Mr.
5 Kelleher in an email that “Obviously, it appears that we will need to dismiss the action due to a
6 lack of standing.” Alas, Righthaven never did file a motion to dismiss this action, and now, on
7 the eve of trial, it suggests that perhaps the Court might wish to take up the issue of subject
8 matter jurisdiction.

9 In yet another bizarre element to its Notice, Righthaven implicitly faults Mr. Kelleher for
10 not moving to dismiss this action. *Id.* at 3 (“Defendant Kevin Kelleher has refused to seek
11 adjudication of the subject matter jurisdiction issue described herein through a request for
12 dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1).”). Mr. Kelleher does not
13 understand how waiting for Righthaven to do what it has repeatedly said it would do – move to
14 dismiss this case – amounts to a “refusal” of any sort.

15 What Righthaven never addresses is why it does not simply move for a voluntary
16 dismissal of this action under Rule 41(a)(2). Mr. Kelleher agrees that this action should be
17 dismissed. Perhaps the Court should treat Righthaven’s Notice as a voluntary dismissal under
18 Rule 41(a)(2). There would surely be a quarrel over the terms of dismissal concerning attorney
19 fees, costs and sanctions, and it would be for the Court to determine dismissal terms based on
20 what it “considers proper.” *Ibid.*

21 Regardless, Mr. Kelleher is amendable to any approach the Court might take to bring this
22 odd case to a merciful end. His counsel will gladly travel from Berkeley, California to Las Vegas
23 for the November 1st calendar call if that would be helpful. It might be illuminating for the Court
24 to hear Righthaven explain its litigation conduct in this action.

25
26 ¹ A recording of this brief teleconference is in the possession of Judge Johnston’s courtroom
clerk, Jerry Ries.

1 Once the dismissal issue is resolved, Mr. Kelleher will seek recovery of his attorney fees
2 and costs, and he will move for sanctions against Righthaven's attorneys for violations of Local
3 Rule 7.1-1 (nondisclosure of Stephens Media's financial interest in the outcome of this action)
4 and 28 U.S.C. § 1927 (counsel's unnecessary prolonging of this action).

5
6 Dated: October 25, 2011

Respectfully submitted,

7 ANDREW J. DHUEY

8 By: /s/ Andrew J. Dhuey

9 Attorney for Defendant,
10 Kevin Kelleher