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6  
7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
9

10 RIGHTHAVEN LLC, a Nevada limited-  
liability company,

11  
12 Plaintiff,

13 v.

14 KEVIN KELLEHER, an individual,

15 Defendant.  
16

Case No.: 2:10-cv-01184-KDJ-RJJ

**RESPONSE TO ORDER TO SHOW  
CAUSE WHY ACTION SHOULD NOT BE  
DISMISSED FOR LACK OF SUBJECT  
MATTER JURISDICTION**

17 Righthaven LLC (“Righthaven”) hereby responds to the Court’s November 2, 2011 Order  
18 to Show Cause why its Complaint should not be dismissed for lack of subject matter jurisdiction  
19 (the “OSC”). (Doc. # 28.) As the Court most certainly recalls, the OSC was issued based on  
20 Righthaven’s disclosure of several adverse decisions from this District, several of which are  
21 currently on appeal to the United States Court of Appeals for the Ninth Circuit. Righthaven  
22 brought these adverse decisions to the Court’s attention to permit it to address the issue of  
23 subject matter jurisdiction in this case prior to conducting trial and pursuant to its duty of candor  
24 to the tribunal.

25 Righthaven’s response to the OSC is based on the below Memorandum of Points and  
26 Authorities, the declarations of Steven A. Gibson, Mark A. Hinueber and Shawn A. Mangano,  
27 Esq., the pleadings and papers on file in this action, any oral argument this Court will entertain at  
28 the OSC hearing, and any other matter upon which this Court takes notice.

MEMORANDUM OF POINTS AND AUTHORITIES

**I. INTRODUCTION**

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

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

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

1 In an effort to cure any doubt as to whether Righthaven has full ownership in an assigned  
2 copyright, on May 9, 2011, Righthaven and Stephens Media executed a Clarification and  
3 Amendment to Strategic License Agreement (the “Amendment”), which not only makes clear  
4 that Righthaven has full ownership rights in any assigned copyright, it gives Stephens Media  
5 only a non-exclusive right to use an assigned work.

6 Subsequent to executing the Amendment, Righthaven and Stephens Media elected to  
7 further amend the Strategic Alliance Agreement in light of recent decision in *Righthaven LLC v.*  
8 *Hoehn*, where the Court in that case found that Righthaven lacked standing to sue, even under  
9 the Amendment. Doc. # 28, Case. No. 2:11-CV-00050-PMP-RJJ (D. Nev.) (Pro, J.) (“*Hoehn*”).  
10 (Dkt. 44 at n. 1.)

11 While Righthaven continues to believe that the Amendment was sufficient to confer  
12 standing to sue, Righthaven and Stephens Media wish to put the standing issue to rest.  
13 Therefore, these parties further amended the Strategic Alliance Agreement in order to address the  
14 concerns raised by the Court in *Hoehn*. The Amended and Restated Strategic Alliance  
15 Agreement (“Restated and Amended SAA”) was executed on July 7, 2011. (Mangano Decl. Ex.  
16 1.) The Restated and Amended SAA gives Righthaven the sole discretion to determine whether  
17 or not to bring an infringement action based on an assigned copyright. Further, as in the first  
18 Amendment, Righthaven is the sole owner of each assigned copyright, and Stephens Media  
19 holds only a non-exclusive license. Stephens Media may not encumber Righthaven’s rights in  
20 any assigned copyright, and Stephens Media’s option to re-purchase any assigned copyright does  
21 not accrue until five years after the copyright is assigned. In short, there can be no question that  
22 Righthaven is the only true owner of any assigned copyright and thus, has standing to sue for  
23 infringement.  
24

25 For these reasons, Righthaven respectfully requests that the Court find that it has at all  
26 times had standing to maintain this suit, or in the alternative, that any defect in Righthaven’s  
27 standing has been cured by the Amendment and/or the Restated and Amended SAA.  
28

## II. STATEMENT OF FACTS

Righthaven is the owner of a copyright registration for the literary piece “Calvert, longtime voice of UNLV, among six-member class” (the “Work”), which originally appeared in the *Las Vegas Review-Journal* on or about June 5, 2010. (Doc. # 1 at 2-3, Ex. 3.) Stephens Media, the original owner of the Work, assigned all rights, title and interest in and to the Work, including the right to seek redress for all past, present and future infringements (the “Assignment”).<sup>1</sup> On July 9, 2010, the United States Copyright Office (the “USCO”) granted registration of the Work. (Doc. # 1 at 3, Ex. 5.)

As alleged in the Complaint, Defendant Kevin Kelleher (“Defendant”) is identified as the owner of the Internet domain found at <pa-announcer.blogspot.com> (the “Domain” and together with the content appearing thereon referred to herein as the “Website”), as evidenced by the “About Me” section of the Domain. (Doc. # 1 at 2, Ex. 1.) Righthaven alleges that on or about June 5, 2010, Defendant displayed an unauthorized reproduction of the Work on the Website. (Doc. # 1 at 2, Ex. 4.) Righthaven further maintains that Defendant did so in willful disregard of the copyrights to the Work. (Doc. # 1 at 4.)

The Court issued the OSC on November 2, 2011, ordering Righthaven to respond in writing as to why its Complaint should not be dismissed for lack of subject matter jurisdiction. (Doc. # 28.) This filing is in response to the Court’s OSC.

## III. ARGUMENT

Standing is a jurisdictional requirement of subject matter that can be raised at any time, including *sua sponte* by the court, as is the case here. *D’Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008). Pursuant to Section 501(b) of the Copyright Act, only “the legal or beneficial owner of an exclusive right under a copyright” is entitled to sue for infringement. *Silvers*, 402 F.3d at 884. Section 106 of the Act, in turn, defines the exclusive rights that can be held in a copyright (*e.g.* the right to reproduce, to prepare derivative works, and

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<sup>1</sup> Righthaven is in the process of locating a copy of the Assignment executed by Stephens Media. Despite this shortcoming, Righthaven represents that the Assignment is identical to the assignment submitted in connection with the declarations of Mr. Gibson and Mr. Hinueber.

<sup>2</sup> Under the Amendment and the Restated and Amended SAA, Stephens Media’s interest has

1 to distribute copies). Exclusive rights in a copyright may be transferred and owned separately—  
2 for example, through assignment or an exclusive license—but no exclusive rights exist other than  
3 those listed in Section 106. *Silvers*, 402 F.3d at 885. While the right to assert an accrued cause  
4 of action for copyright infringement cannot be transferred alone, such a right can be transferred  
5 along with one or more of the exclusive rights in a copyright. *See id.* at 890.

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

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

21 Binding precedent establishes that the assignment from Stephens Media to Righthaven  
22 conveys upon Righthaven standing to bring this case. In *Silvers*, the Ninth Circuit held that an  
23 assignor can transfer the ownership interest in an accrued past infringement, but the assignee has  
24 standing to sue only if the interest in the past infringement is expressly included in the  
25 assignment and the assignee is also granted ownership of an exclusive right in the copyrighted  
26 work. *Id.* at 889-90. In so holding, the panel in *Silvers* aligned Ninth Circuit law with that of the  
27 Second Circuit as set forth in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980  
28

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*, **based on the**  
5 **plain language of the copyright assignment**:

- 6 • *Righthaven LLC v. Vote For The Worst, LLC, et al.*, No. 2:10-cv-01045-KJD-  
7 GWF (D. Nev. March 30, 2011).
- 8 • *Righthaven LLC v. Majorwager.com, Inc.*, 2010 WL 4386499, at \*2 (D. Nev. Oct.  
9 28, 2010).
- 10 • *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, 2010 WL 3522372, at \*2  
11 (D. Nev. Sept. 2, 2010).
- 12 • *Righthaven LLC v. Virginia Citizens Defense League, Inc.*, No. 2:10-cv-01683-  
13 GMN-PAL (D. Nev. June 23, 2011) (Doc. # 26 at 11-14).

14 (See also Gibson Decl. ¶¶ 9-10.)

15 Just like the assignments at issue in the cases above, the Assignment here transferred all  
16 exclusive ownership rights in and to the Work to Righthaven, and expressly included all accrued  
17 causes of action for copyright infringement:

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

23 (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4, Ex. 1, emphasis added.) At the moment of  
24 the Assignment, Righthaven became the owner of the Work with all rights of ownership,  
25 including the right to register the Work, license the Work and seek redress for  
26 infringement, including past infringement. In other words, the Assignment conferred  
27 upon Righthaven the exclusive rights required under the Copyright Act to bring suit for  
28 **both** past and future acts of infringement. As parties frequently do, Righthaven licensed  
back to Stephens Media the right to exploit the Work. It also sought registration of the  
Work with the USCO and brought suit against a blatant infringer.

1           Given several adverse decisions from this District, of which the Court was advised by  
2 Righthaven's counsel, there would understandably be concern over the SAA's effect on the  
3 Assignment. But nothing in the SAA's provisions alter the unambiguous language of the  
4 Assignment or the rights that Righthaven acquired. First, the SAA does not effectuate the  
5 assignment of any work. (Gibson Decl. ¶ 5, Ex. 2 § 7.2; Hinueber Decl. ¶ 5, Ex. 2 § 7.2.)  
6 Rather, the SAA reflects promises made by the parties with regard to future transactions in  
7 copyrights. (*Id.*) The SAA envisions an assignment to Righthaven of all rights, title and interest  
8 in and to potential copyrighted works, which includes the right to sue for any past, present or  
9 future infringements, coupled with a license back to Stephens Media of the right to exploit any  
10 copyrighted works. (*Id.*) But the SAA itself does not cause an assignment of property rights.

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

19           While parties in numerous other actions have alleged that this transactional structure  
20 constitutes a "sham" or meaningless assignment, adopting these allegations by a finding that  
21 Righthaven lacks standing to maintain this action for past infringement would eviscerate  
22 countless complex commercial and intellectual property transactions. "Principles of contract law  
23 are generally applicable in the construction of copyright assignments, licenses and other transfers  
24 of rights." *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978). An assignment  
25 transfers all rights, title and interest in and to the assigned property. *See id.*; *see also Pressley's*  
26 *Estate v. Russen*, 513 F. Supp. 1339, 1350 (D. N. J. 1981) ("An assignment passes legal and  
27 equitable title to the property . . ."). Axiomatically, when the totality of rights are assigned by  
28 one party to another, and the party receiving said assignment then conveys a license of some

1 interest to the same party or to another party, complete title to ownership vests in the assignee  
2 **prior to being divested through licensure**. In essence, this structure is akin to a real property  
3 transaction whereby one party holding a fee simple interest grants a life estate to another party,  
4 thereby resulting in the fee simple owner being temporarily divested of his right to use and  
5 enjoyment of the conveyed property during the lifetime of the life estate holder. The fee simple  
6 holder is still the “owner” of the property and will once again enjoy all rights, title and ownership  
7 upon expiration of the life estate.

8 Under the original version of the SAA, Stephens Media is granted an exclusive license to  
9 exploit copyrighted works following their assignment to Righthaven.<sup>2</sup> While this transactional  
10 structure described in the SAA, in which a license is given back to Stephens Media, may  
11 potentially be construed to limit Righthaven’s ability to bring suit for present and future  
12 infringements during the term of the license, it does not limit the company’s ability to bring suit  
13 for past infringements, which is precisely what is at issue here. As the Ninth Circuit held in  
14 *Silvers*, the right to sue for past infringement requires only an assignment of an ownership  
15 interest along with the expressed right to sue for an accrued claim for infringement. *Silvers*, 402  
16 F.3d at 889-90.

17 The transactional structure under the SAA and the actual assignment of rights comport  
18 with the holding in *Silvers*. Pursuant to the individual assignments that are ultimately executed,  
19 Righthaven is assigned all ownership rights, along with the right to sue for past, present and  
20 future infringements, associated with the work assigned. (*See, e.g.*, Gibson Decl. ¶ 4, Ex. 1;  
21 Hinueber Decl. ¶ 4, Ex. 1.) While Righthaven promises under the SAA to license rights back to  
22 Stephens Media to exploit the acquired works, there can be no license until **after** the assignment  
23 of ownership rights and the right to sue for past infringements is conveyed. This structure thus  
24 conveys ownership and the right to sue for accrued infringement claims, which is precisely what  
25 is required to establish standing under *Silvers* for purposes of accrued or past infringement  
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27 <sup>2</sup> Under the Amendment and the Restated and Amended SAA, Stephens Media’s interest has  
28 been clarified to be that of a non-exclusive licensee, which lacks standing to maintain suit for  
copyright infringement. *See, e.g., Silvers* 402 F.3d at 884-85.



1 claims. Any other conclusion would require the Court to ignore the expressly defined  
2 assignment and license-back structure contemplated by the parties to the SAA.

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

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

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

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

1           **C.       Standing Is Also Effected by the Amendments to the SAA.**

2           As stated above, Righthaven has standing to bring suit pursuant to the Assignment and  
3 SAA, which expressly confer (and reflect the intent to confer) full copyright ownership on  
4 Righthaven. Nevertheless, to further clarify the parties' intent—and to preempt any future  
5 challenges to Righthaven's standing—Righthaven and Stephens Media have clarified and  
6 amended their intent when entering into the SAA as set forth in the supporting declarations and  
7 in the Amendment and in the Restated and Amended SAA. (Gibson Decl. ¶ 12, Ex. 3; Hinueber  
8 Decl. ¶ 11, Ex. 3; Mangano Decl. Ex. 1.) These amendments reflect the subsequent and current,  
9 based on the Restated and Amended SAA, contractual relationship between the parties.

10           In the Amendment, Righthaven and Stephens Media promise to execute individual  
11 assignments for certain copyrighted works (as before), but Righthaven promises to grant  
12 Stephen's media only a non-exclusive license to exploit the work. (Gibson Decl. Ex. 3 at 1-2;  
13 Hinueber Decl. Ex. 3 at 1-2.) As a mere holder of the right to use the assigned copyrighted  
14 work, Stephens Media would not have standing to sue for infringement. *See, e.g., Silvers* 402  
15 F.3d at 884-85. Thus, the sole party holding any exclusive rights, and the attendant standing to  
16 sue for infringement, would be Righthaven. *See id.* This agreement reflects the parties' intent to  
17 transfer full rights in the copyright to Righthaven. (Gibson Decl. ¶¶ 5-12, Ex. 3; Hinueber Decl.  
18 ¶¶ 5-11, Ex. 3.) Further, the Amendment extinguishes the "right of reversion" previously held  
19 by Stephens Media, and replaces it with a standard option to re-purchase the copyright upon the  
20 satisfaction of certain conditions. (Gibson Decl. Ex. 3 at 2-3; Hinueber Decl. Exs. 3 at 2-3.) The  
21 Amendment also contains provisions requiring Stephens Media to pay Righthaven royalties for  
22 its use of the Work, making Righthaven the beneficial owner in the Work, in addition to its status  
23 as legal owner. (*Id.* at 1-2.)

24           Likewise, the Restated and Amended SAA further clarifies Stephens Media holds a non-  
25 exclusive license to exploit the works assigned to Righthaven. As a non-exclusive licensee,  
26 Stephens Media cannot sue for infringement of the Work. *See Davis v. Blige*, 505 F.3d 90, 101  
27 (2d Cir. 2007)("[T]he holder of a nonexclusive license may not sue others for infringement.");  
28 *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996)("[A] person holding a nonexclusive

1 license has no standing to sue for copyright infringement.”); *Eden Toys, Inc. v. Florelee*  
2 *Undergarment Co.*, 697 F.2d 27, 32 (2d Cir. 1982)(“The Copyright Act authorizes only to types  
3 of claimants to sue for copyright infringement: (1) owners of copyrights, and (2) persons who  
4 have been granted exclusive licenses by owners of copyrights.”). Rather, the right to sue for  
5 infringement of the works is held by Righthaven, which acquired ownership of the Work based  
6 on the Assignment from Stephens Media. *See* 17 U.S.C. § 101; 17 U.S.C. § 501(b).

7         Second, the Restated and Amended SAA eliminates two provisions that were concerns in  
8 the *Hoehn* decision: (1) a provision giving Stephens Media 30 days written notice prior to  
9 exploiting an infringed work; and (2) a separate provision giving Stephens Media the option to  
10 repurchase the copyright. (Doc. # 28 at 10.) The 30-day notice provision has been completely  
11 eliminated from the Restated Amendment. (Mangano Decl. Ex. 1.) Likewise, Stephens Media’s  
12 option to repurchase and assigned work may only be exercised five years after the date of  
13 assignment and fair market value must be paid to require a work. (*Id.*) Thus, Righthaven owns  
14 the works for at least a five-year term without the possibility of Stephens Media exercising its  
15 option to repurchase shortly after assignment under a potential scenario given the terms of the  
16 Clarification recognized in the *Hoehn* decision.  
17

18         Finally, the Restated and Amended SAA does not restrict Righthaven’s ability to exploit  
19 assigned works in any manner. Under the Clarification, the *Hoehn* decision expressed concern  
20 over the requirement that Righthaven notify Stephens Media of its intent to exploit any work  
21 outside of copyright infringement litigation. This notice requirement does not exist under the  
22 Restated Amendment. (Mangano Decl. Ex. 1.) Moreover, there is no restriction imposed on  
23 Righthaven’s ability to exploit works or to license works to other parties. (*Id.*)

24         Quite frankly, Righthaven has sought to fully address all of the concerns expressed in the  
25 *Hoehn* decision. In doing so, this Court is presented with record that is unlike those at issue in  
26 either the *Democratic Underground* or the *Hoehn* decisions. Most importantly, however,  
27 Righthaven has protectively addressed the concerns expressed as an impediment to it having  
28 standing. Accordingly, the Court should find Righthaven has standing to maintain the actions

1 identified in the OSC. In doing so, Righthaven hopes the standing issue is finally resolved in its  
2 favor so that it is no longer asserted by copyright infringers as a basis for escaping liability.

3 Courts frequently allow parties to a copyright transfer to subsequently clarify or amend  
4 their agreement in order to express their original intent to grant the assignor the right to sue for  
5 infringement. *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003)  
6 (recognizing that an oral assignment can be confirmed later in writing); *Imperial Residential*  
7 *Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995) (“[A] copyright owner’s  
8 later execution of a writing which confirms an earlier oral agreement validates the transfer ab  
9 initio.”); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir.  
10 1994); *see also Sabroso Publ’g, Inc.*, 141 F. Supp. 2d at 228; *Intimo, Inc. v. Briefly Stated, Inc.*,  
11 948 F. Supp. 315, 318 (S.D.N.Y. 1996) (giving effect to a “very late” amendment granting the  
12 plaintiff the right to bring the accrued causes of action); *Goldfinger Silver Art Co., Ltd. v. Int’l*  
13 *Silver Co.*, 1995 WL 702357, at \*4 (S.D.N.Y. Nov. 28, 1995) (holding that plaintiff could cure  
14 standing defect after the action was filed); *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830  
15 F. Supp. 614, 620 (N.D. Ga. 1993) (holding that second assignment cured standing defect).

16 Given that the parties to the Assignment, the Amendment, and the Restated and  
17 Amended SAA do not dispute the rights in the Work and the Defendant has not been prejudiced  
18 in any way by the Amendment, the Court—if it finds that original standing was defective—  
19 should allow the Amendment to cure the defect without dismissing the case.<sup>4</sup> *See Intimo, Inc.*,  
20 948 F. Supp. at 317-18; *Infodek, Inc.*, 830 F. Supp. at 620; *Wade Williams Dist., Inc. v. Am.*  
21 *Broad. Co., Inc.*, 2005 WL 774275, at \*4 (S.D.N.Y. April 5, 2005); *see also Dubuque Stone*  
22 *Prod. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 724 (8th Cir. 1966); *Kilbourn v. Western Surety*  
23 *Co.*, 187 F.2d 567, 571 (10th Cir. 1951). Moreover, permitting subsequent clarification or  
24 amendment of the parties’ original intent so as to cure any technical standing defects promotes  
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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 and the Restated and Amended SAA through ratification. *See Clarkson Co.*  
*Ltd. v. Rockwell Int’l Corp.*, 441 F. Supp. 792, 797 (N.D. Cal. 1977).

1 judicial economy and reduces litigation costs that would necessarily arise from the dismissal and  
2 re-filing of a new action. *Intimo, Inc.*, 948 F. Supp. at 318-19.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Righthaven respectfully requests the Court find that Righthaven  
5 has standing to maintain this infringement action.

6 Dated this 15<sup>th</sup> day of November, 2011.

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16 *Attorney for Righthaven LLC*

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 15<sup>th</sup> day of November, 2011, I caused the foregoing document to be served by the Court's CM/ECF system.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano  
SHAWN A. MANGANO, ESQ.

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