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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
10

11 RIGHTHAVEN LLC, a Nevada limited-
liability company,

12
13 Plaintiff,

14 v.

15 DEMOCRATIC UNDERGROUND, LLC, a
16 District of Columbia limited-liability
company; and DAVID ALLEN, an individual,

17
18 Defendants.

19
20 DEMOCRATIC UNDERGROUND, LLC, a
District of Columbia limited-liability
company,

21
22 Counterclaimant,

23 v.

24 RIGHTHAVEN LLC, a Nevada limited-
25 liability company; and STEPHENS MEDIA
LLC, a Nevada limited-liability company,

26
27 Counterdefendants.
28

Case No.: 2:10-cv-01356-RLH-GWF

**RIGHTHAVEN LLC’S RESPONSE TO
DEFENDANTS’ SUPPLEMENTAL
MEMORANDUM ADDRESSING
RECENTLY PRODUCED EVIDENCE
RELATING TO PENDING MOTIONS**

1 Righthaven asserts that it has standing to sue for past infringement under *Silvers*, which
2 has always been the parties' intent. To further clarify their mutual intent, declarations from the
3 parties to the transaction have submitted supporting declarations. Thus, to the extent the Court
4 finds that anything in the Strategic Alliance Agreement ("SAA") or copyright assignment is
5 ambiguous such that it is unclear whether Righthaven has standing, it may interpret these
6 agreements to confer full ownership rights in Righthaven. The Court's ability to do this is also
7 expressly set forth in the SAA, which vests the Court with the power to correct any defective
8 provision in order to "approximate the manifest intent of the [p]arties." (Gibson Decl. ¶ 11, Ex.
9 2 § 15.1; Hinueber Decl. ¶ 10, Ex. 2 § 15.1.)

10 In an effort to cure any possible doubt as to whether Righthaven has full ownership in an
11 assigned copyright, Righthaven and Stephens Media have recently executed a Clarification and
12 Amendment to Strategic License Agreement (the "Amendment"), which not only makes clear
13 that Righthaven has full ownership rights in any assigned copyright, it gives Stephens Media
14 only a non-exclusive right to use an assigned work.

15 Finally, Defendants' claim that the SAA demonstrates that Righthaven faces no possible
16 market harm under the fourth fair use analysis factor is misplaced. (Doc. # 79 at 8.) This case
17 involves a claim of past copyright infringement that was assigned to Righthaven, who then
18 sought redress for this accrued claim by filing suit against the Defendants. The SAA does not
19 change this fact. Given that Righthaven was assigned the accrued copyright infringement claim
20 against the Defendants, the market harm analysis is appropriately directed toward the holder of
21 the work at the time the infringement occurred. To the extent the Court believes otherwise
22 despite the Defendants failure to cite any specific authority in support of their contention, the
23 Amendment clarifies that Stephens Media is granted a non-exclusive license and is paid an
24 annual license fee. (*See* Gibson Decl. Ex. 3, Hinueber Decl. Ex. 3.) These rights and benefits
25 weigh against a finding of fair use under the fourth analysis factor.

26 **II. STATEMENT OF FACTS**

27 Righthaven is the owner of a copyright registration for the literary piece "Tea Party
28 power fuels Angle" (the "Work"), which originally appeared in the *Las Vegas Review-Journal*

1 on or about May 13, 2010. (Doc. # 1 at 3; Gibson Decl. ¶ 3; Hinueber Decl. ¶ 3.) Righthaven
2 has alleged that Defendants displayed an unauthorized copy of the Work shortly after it was
3 published and continued to display this unauthorized copy until, at least, receiving notice of this
4 lawsuit. (Doc. # 1 at 4.)

5 On July 8, 2010, Stephens Media, the original owner of the Work, assigned all rights, title
6 and interest in and to the Work, including the right to seek redress for all past, present and future
7 infringements (the “Assignment”). (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4, Ex. 1; *see also*
8 Doc. #1 at 4.) Righthaven filed for registration of the Work with the United States Copyright
9 Office (the “USCO”) on July 9, 2010. (Doc. # 1-1 at Ex. 4; Gibson Decl. ¶ 4.)

10 As argued below, Righthaven has standing to maintain this action because it was properly
11 assigned the accrued infringement claim along with ownership of the Work through the
12 Assignment. Righthaven’s standing to bring this action for the accrued past infringement of the
13 Work demonstrates, along with the other evidence already before the Court, demonstrates the
14 objective reasonableness of its claims and the utter uselessness of adjudicating Defendants’
15 Counterclaims, which have been brought to needlessly drag Stephens Media into this case.

16 **III. ARGUMENT**

17 Standing is a jurisdictional requirement that can be raised at any time, including *sua*
18 *sponte* by the court, as is the case here. *D’Lil v. Best Western Encina Lodge & Suites*, 538 F.3d
19 1031, 1035 (9th Cir. 2008). Pursuant to Section 501(b) of the Copyright Act, only “the legal or
20 beneficial owner of an exclusive right under a copyright” is entitled to sue for infringement.
21 *Silvers*, 402 F.3d at 884. Section 106 of the Act, in turn, defines the exclusive rights that can be
22 held in a copyright (*e.g.* the right to reproduce, to prepare derivative works, and to distribute
23 copies). Exclusive rights in a copyright may be transferred and owned separately—for example,
24 through assignment or an exclusive license—but no exclusive rights exist other than those listed
25 in Section 106. *Silvers*, 402 F.3d at 885. While the right to assert an accrued cause of action for
26 copyright infringement cannot be transferred alone, such a right can be transferred along with
27 one or more of the exclusive rights in a copyright. *See id.* at 890.

1 As the assignee-owner of the full right and title in and to the Work, Righthaven has
2 standing to sue for acts of copyright infringement occurring after it acquired ownership of the
3 copyright. Pursuant to the express terms of the Assignment, Stephens Media also expressly
4 transferred to Righthaven the right to assert accrued causes of action for infringement of the
5 Work, giving Righthaven standing to sue for Defendants' infringement, even though that
6 infringement occurred prior to the Assignment. (Gibson Decl. ¶ 4, Ex. 1; Hinueber Decl. ¶ 4,
7 Ex. 1.) In addition, Stephens Media and Righthaven recently executed a clarification and
8 amendment to the SAA in order to further clarify and effectuate, to the extent not already
9 accomplished, what has at all times been the intent of the parties—to transfer full ownership in
10 copyright to Righthaven. (Gibson Decl. ¶ 12, Ex. 3; Hinueber Decl. ¶ 11, Ex. 3.) This
11 Amendment has cured any defects in standing that existed under the parties' original contractual
12 relationship. (*Id.*) Therefore, as set forth below, Righthaven respectfully requests that the Court
13 find that Righthaven has standing to maintain this action.¹ With such a finding, the Court must
14 necessarily reject Defendants' contention this action was objectively unreasonable when filed
15 and it must further reject their plea that the Assignment must be found invalid through an
16 adjudication of their counterclaim allegations.

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

19 Binding precedent establishes that the assignment from Stephens Media to Righthaven
20 conveys upon Righthaven standing to bring this case and establishes that the action was not, as
21 Defendants' contend, objectively unreasonable when filed. In *Silvers*, the Ninth Circuit held that
22 an assignor can transfer the ownership interest in an accrued past infringement, but the assignee
23 has standing to sue only if the interest in the past infringement is expressly included in the
24 assignment and the assignee is also granted ownership of an exclusive right in the copyrighted
25 work. *Id.* at 889-90. In so holding, the panel in *Silvers* aligned Ninth Circuit law with that of the

26 ¹ If the Court finds that despite the parties' Amendment to the SAA, Righthaven still lacks
27 standing, Righthaven requests that it be granted leave to join Stephens Media as a plaintiff in
28 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
join real party in interest after finding that plaintiff lacked standing to sue under Copyright Act).

1 Second Circuit as set forth in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980
2 (2d Cir. 1991), which recognized the right to sue for past infringement when both the copyright
3 and the accrued claims were purchased. *Silvers*, 402 F.3d at 889.

4 Multiple courts in this district have already determined that Righthaven has standing to
5 bring a claim for past infringement under the Ninth Circuit's standard in *Silvers*, based on the
6 plain language of the copyright assignment: (1) *Righthaven LLC v. Vote For The Worst, LLC, et*
7 *al.*, Case No. 2:10-cv-01045-KJD-GWF (D. Nev. March 30, 2011); (2) *Righthaven LLC v.*
8 *Majorwager.com, Inc.*, 2010 WL 4386499, at *2 (D. Nev. Oct. 28, 2010); and (3) *Righthaven*
9 *LLC v. Dr. Shezad Malik Law Firm P.C.*, 2010 WL 3522372, at *2 (D. Nev. Sept. 2, 2010). (*See*
10 *also* Gibson Decl. ¶¶ 9-10.) Just like the assignments at issue in the cases, the Assignment here
11 transferred all exclusive ownership rights in and to the Work to Righthaven, and expressly
12 included all accrued causes of action for copyright infringement. (Gibson Decl. ¶ 4, Ex. 1;
13 Hinueber Decl. ¶ 4, Ex. 1, emphasis added.) At the moment of the Assignment, Righthaven
14 became the owner of the Work with all rights of ownership, including the right to register the
15 Work, license the Work and seek redress for infringement, including past infringement. In other
16 words, the Assignment conferred upon Righthaven the exclusive rights required under the
17 Copyright Act to bring suit for **both** past and future acts of infringement. As parties frequently
18 do, Righthaven licensed back to Stephens Media the right to exploit the Work. It also sought
19 registration of the Work with the USCO and brought suit against a blatant infringer.

20
21 Nothing in the SAA's provisions alter the unambiguous language of the Assignment or
22 the rights that Righthaven acquired.² First, the SAA does not effectuate the assignment of any

23 ² Righthaven further contends that Defendants' lack standing to challenge the contractual
24 validity of the SAA. Courts have held, that as a matter of public policy, it would be inequitable
25 to allow an infringer to use the validity of transfer of rights to a copyrighted work as a defense
26 when no dispute exists between the parties to the transfer. *See Magnuson v. Video Yesteryear*,
27 85 F.3d 1424, 1428-29 (9th Cir. 1996); *Elden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d
28 27, 36-37 (2d Cir. 1982); *Sabroso Publ'g, Inc. v. Caiman Records Am., Inc.*, 141 F.Supp.2d 224,
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 work. (Gibson Decl. ¶ 5, Ex. 2 § 7.2; Hinueber Decl. ¶ 5, Ex. 2 § 7.2.) Rather, the SAA reflects
2 promises made by the parties with regard to future transactions in copyrights. (*Id.*) The SAA
3 envisions an assignment to Righthaven of all rights, title and interest in and to potential
4 copyrighted works, which includes the right to sue for any past, present or future infringements,
5 coupled with a license back to Stephens Media of the right to exploit any copyrighted works.
6 (*Id.*) But the SAA itself does not cause an assignment of property rights.

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

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

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

8 The transactional structure under the SAA and the actual assignment of rights comport
9 with the holding in *Silvers*. Pursuant to the individual assignments that are ultimately executed,
10 Righthaven is assigned all ownership rights, along with the right to sue for past, present and
11 future infringements, associated with the work assigned. (*See, e.g.*, Gibson Decl. ¶ 4, Ex. 1;
12 Hinueber Decl. ¶ 4, Ex. 1.) While Righthaven promises under the SAA to license rights back to
13 Stephens Media to exploit the acquired works, there can be no license until *after* the assignment
14 of ownership rights and the right to sue for past infringements is conveyed. This structure thus
15 conveys ownership and the right to sue for accrued infringement claims, which is precisely what
16 is required to establish standing under *Silvers* for purposes of accrued or past infringement
17 claims. Any other conclusion would require the Court to ignore the expressly defined
18 assignment and license-back structure contemplated by the parties to the SAA.

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

21 Under Nevada law,³ the Court should interpret the contracts to find that they convey any
22 and all rights necessary to establish Righthaven as the true and lawful owner of the copyright to
23 the Work. To the extent there is any ambiguity with respect to whether the Assignment
24 sufficiently conveyed the rights to Righthaven so that it has standing to bring this action, the
25 court should look to parties' intent. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481,
26 488, 117 P.3d 219, 224 (2005) (internal quotation omitted). Moreover, pursuant to the express

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

1 language of the SAA, if any portion of the SAA is deemed void or unenforceable, the Court is
2 contractually vested with the power to correct any defective provision in order to “approximate
3 the manifest intent of the [p]arties.” (Gibson Decl. ¶ 11, Ex. 2 § 15.1; Hinueber Decl. ¶ 10, Ex. 2
4 § 15.1.)

5 There can be no question that the parties intended to convey to Righthaven any right
6 necessary for it to bring suit. As set forth in the accompanying declarations and as reflected in
7 the SAA, the Assignment, and the recently-executed Amendment discussed below, the parties to
8 the SAA and the Assignment intended to vest copyright ownership of specific works in
9 Righthaven so as to grant it the right to sue for infringement, including past infringement, while
10 still permitting Stephens Media to use the works going forward based on a license of rights to do
11 so from Righthaven. (Gibson Decl. ¶¶ 5-12, Exs. 2-3; Hinueber Decl. ¶¶ 5-11, Exs. 2-3.)
12 Accordingly, the Court should construe the contracts in such a way that they convey to
13 Righthaven all rights that are necessary to have standing to maintain this action. If the Court
14 does so, Righthaven has always had standing to bring this suit, its claims are objectively
15 reasonable and Defendants’ counterclaim allegations concerning the validity of the Assignment
16 do not demand adjudication.

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

18 As stated above, Righthaven has standing to bring suit pursuant to the Assignment and
19 SAA, which expressly confer (and reflect the intent to confer) full copyright ownership on
20 Righthaven. Nevertheless, to further clarify the parties’ intent—and to preempt any future
21 challenges to Righthaven’s standing—Righthaven and Stephens Media have clarified and
22 amended their intent when entering into the SAA as set forth in the supporting declarations and
23 in the Amendment. (Gibson Decl. ¶ 12, Ex. 3; Hinueber Decl. ¶ 11, Ex. 3.) In the Amendment,
24 Righthaven and Stephens Media promise to execute individual assignments for certain
25 copyrighted works (as before), but Righthaven promises to grant Stephen’s media only a non-
26 exclusive license to Exploit the work. (Gibson Decl. Ex. 3 at 1-2; Hinueber Decl. Ex. 3 at 1-2.)
27 As a mere holder of the right to use the assigned copyrighted work, Stephens Media would not
28 have standing to sue for infringement. *See, e.g., Silvers* 402 F.3d at 884-85. Thus, the sole party

1 holding any exclusive rights, and the attendant standing to sue for infringement, would be
 2 Righthaven. *See id.* This agreement reflects the parties’ intent to transfer full rights in the
 3 copyright to Righthaven. (Gibson Decl. ¶¶ 5-12, Ex. 3; Hinueber Decl. ¶¶ 5-11, Ex. 3.) Further,
 4 the Amendment extinguishes the “right of reversion” previously held by Stephens Media, and
 5 replaces it with a standard option to re-purchase the copyright upon the satisfaction of certain
 6 conditions. (Gibson Decl. Ex. 3 at 2-3; Hinueber Decl. Exs. 3 at 2-3.) The Amendment also
 7 contains provisions requiring Stephens Media to pay Righthaven royalties for its use of the
 8 Work, making Righthaven the beneficial owner in the Work, in addition to its status as legal
 9 owner. (*Id.* at 1-2.)

10 Courts frequently allow parties to a copyright transfer to subsequently clarify or amend
 11 their agreement in order to express their original intent to grant the assignor the right to sue for
 12 infringement. *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003)
 13 (recognizing that an oral assignment can be confirmed later in writing); *Imperial Residential*
 14 *Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995) (“[A] copyright owner’s
 15 later execution of a writing which confirms an earlier oral agreement validates the transfer ab
 16 initio.”); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir.
 17 1994); *see also Sabroso Publ’g, Inc.*, 141 F. Supp. 2d at 228; *Intimo, Inc. v. Briefly Stated, Inc.*,
 18 948 F. Supp. 315, 318 (S.D.N.Y. 1996) (giving effect to a “very late” amendment granting the
 19 plaintiff the right to bring the accrued causes of action); *Goldfinger Silver Art Co., Ltd. v. Int’l*
 20 *Silver Co.*, 1995 WL 702357, at *4 (S.D.N.Y. Nov. 28, 1995) (holding that plaintiff could cure
 21 standing defect after the action was filed); *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830
 22 F. Supp. 614, 620 (N.D. Ga. 1993) (holding that second assignment cured standing defect).

23 Given that the parties to the Assignment and the Amendment do not dispute the rights in
 24 the Work and the Defendant has not been prejudiced in any way by the Amendment, the Court—
 25 if it finds that original standing was defective—should allow the Amendment to cure the defect
 26 without dismissing the case.⁴ *See Intimo, Inc.*, 948 F. Supp. at 317-18; *Infodek, Inc.*, 830 F.

27
 28 ⁴ Federal Rule of Civil Procedure 17(a) additionally supports Righthaven’s request to have the
 parties’ intent to grant the company standing to bring this action by recognizing and giving effect

1 Supp. at 620; *Wade Williams Dist., Inc. v. Am. Broad. Co., Inc.*, 2005 WL 774275, at *4
2 (S.D.N.Y. April 5, 2005); *see also Dubuque Stone Prod. Co. v. Fred L. Gray Co.*, 356 F.2d 718,
3 724 (8th Cir. 1966); *Kilbourn v. Western Surety Co.*, 187 F.2d 567, 571 (10th Cir. 1951). Doing
4 so would cure any technical standing defects promotes judicial economy and reduces litigation
5 costs that would necessarily arise from the dismissal and re-filing of a new action. *Intimo, Inc.*,
6 948 F. Supp. at 318-19.

7 **D. The SAA Does Not Materially Alter the Fourth Fair Use Analysis Factor.**

8 As argued above, Righthaven has standing to maintain this action given the conveyance
9 of ownership in and to the Work along with the right to sue for accrued infringement claims,
10 which is exactly the nature of the claims in this case. This is an action for past infringement that
11 has validly been assigned along with ownership of the Work as required by *Silvers*. As such, the
12 Court's analysis under the fourth fair use factor should remain focused on the market harm to the
13 holder at the time of infringement. Righthaven's alleged inability to exploit the Work in view of
14 the SAA does not alter this fact. To the extent the Court finds otherwise, Righthaven asks the
15 Court to consider the SAA together with the Amendment, which delineates the non-exclusive
16 rights granted to Stephens Media and the associated annual license fees associated with these
17 rights. (*See* Gibson Decl. Ex. 3, Hinueber Decl. Ex. 3.) These rights and benefits weigh against
18 a finding of fair use under the fourth analysis factor.

19 **IV. CONCLUSION**

20 For the foregoing reasons, Righthaven respectfully requests the Court find that Righthaven
21 has standing to maintain this infringement action, that its claim was not objectively unreasonable
22 when brought, and that the supplemental evidence does not weigh in favor of fair use under the
23 fourth analysis factor.

24 Dated this 9th day of May, 2011.

25 SHAWN A. MANGANO, LTD
26 By: /s/ Shawn A. Mangano
27 SHAWN A. MANGANO, ESQ.
Attorney for Righthaven LLC

28 to the Amendment through ratification. *See Clarkson Co. Ltd. v. Rockwell Int'l Corp.*, 441 F.
Supp. 792, 797 (N.D. Cal. 1977).

CERTIFICATE OF SERVICE

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

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