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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited liability company, Plaintiff, v. DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, an individual, Defendants.	Case No. 2:10-01356-RLH (GWF) **DEFENDANT DEMOCRATIC UNDERGROUND LLC'S REPLY TO STEPHENS MEDIA'S RESPONSE TO THE SUPPLEMENTAL MEMORANDUM**
DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company, Counterclaimant, v. RIGHTHAVEN LLC, a Nevada limited liability company, and STEPHENS MEDIA LLC, a Nevada limited-liability company, Counterdefendants.	

MEMORANDUM OF POINTS AND AUTHORITIES

Counterdefendant Stephens Media LLC ("Stephens Media") requested "leave to file a supplemental brief that responds to the new evidence and arguments presented in Defendants' Supplemental Memorandum." Dkt. 80 at 3:16-18. This Court granted Stephens Media's request, allowing Stephens Media to file a "response to the Supplemental Memorandum." Dkt. 94 at 2:23-24. However, in its response (Dkt. 99 ("Response")), Stephens Media elected not to address the Supplemental Memorandum or explain important questions raised by the Strategic Alliance Agreement ("SAA"). Dkt. 101, Ex. 2. Instead, Stephens Media chose to raise a new argument about mootness, ironically, even as it joined (Dkt. 99 at 2:5-6 and 6:28) Righthaven's response that proposes to *add Stephens Media as a plaintiff* pursuant to Federal Rule of Civil Procedure 17(a). *See* Dkt. 100 at fn.1 (5:26-28) and fn.4 (10:28 and 11:28)). As explained below, Stephens Media's failure to oppose the Supplemental Memorandum or explain the SAA is fatal to its motion to dismiss and its credibility, and Democratic Underground's counterclaim is not moot.

I. STEPHENS MEDIA FAILS TO RESPOND TO THE SUPPLEMENTAL MEMORNDUM OR THE STRATEGIC ALLIANCE AGREEMENT

After a several page digression on the state of the newspaper industry, Stephens Media briefly mentions some of the arguments raised by Defendant and Counterclaimant Democratic Underground, LLC ("Democratic Underground" or "DU"). *See* Dkt. 99 at 5:23-28. It does not dispute these arguments or contend DU's interpretation of the SAA is incorrect. *Id*. at 6:1. Instead, Stephens Media merely contests the conclusion drawn from these arguments—that the SAA shows that Stephens Media is the real party in interest—and deputizes Righthaven's Response (Dkt. 100) to explain why. Dkt. 99 at 6:26-28. Democratic Underground addresses those arguments in its reply to Righthaven's Response, filed herewith.

Stephens Media's Response not only fails to respond to the issues raised by the SAA or argued in the Supplemental Memorandum, it also fails to address the numerous factual inconsistencies between its prior statements to this Court and the information revealed by the SAA. Below are some examples of Stephens Media's incorrect statements, which remain unexplained.

Stephens Media Statements to the Court	Contradictions in the SAA
"Stephens Media's involvement with Righthaven ... is limited to its role as the assignor of the subject copyright." Stephens Media Motion to Dismiss (Dkt. 38) at 2:16-18.	Section 2 (describing SAA as "integrated transaction" with the formation of Righthaven, requiring that a "Stephens Media Affiliate" with "common owners" be a member of Righthaven LLC) Section 3.1 and 3.3 (describing procedures for Stephens Media to identify copyright to sue over, and to control whether to file litigation) Section 9 (describing limits and obligations imposed upon Stephens Media, including obligations to cooperate in litigation)
"Upon entering into the Righthaven Assignment on or about July 19, 2010, Stephens Media did not own the copyright, or any of its divisible rights, in and to the Work." *Id.* at 4:7-11.	Section 7.2 (Stephens Media "shall retain" an exclusive license in all of the divisible rights)
"Complete ownership of the work being sued upon has been transferred to Righthaven without any ambiguity." Stephens Media Reply in Support of Motion to Dismiss (Dkt. 56) at 4:8-9. "The ownership of the work at issue was vested in Righthaven and remains with Righthaven so long as the Assignment is valid." *Id.* at 6:26-7:2	Section 7.2 (Stephens Media "shall retain" an exclusive license in all of the divisible rights) Section 3.3 (automatic reversion of assignment if Righthaven fails to sue) Section 9.3 (Stephens Media has a right to mortgage the copyrights it purportedly assigned)
"Stephens Media has never been identified or disclosed as a party who has a direct pecuniary interest in the outcome of any Righthaven case. And for good reason..."[1] *Id.* at 10:20-22	Section 5 (providing for a 50/50 split in each litigation Recovery (less costs) between Righthaven and Stephens Media)

[1] It is true that none of the Certificates of Interested Parties filed by Righthaven in over 200 lawsuits in this Court have identified or disclosed Stephens Media as a party who has a direct pecuniary interest in the outcome—notwithstanding the SAA. *See e.g.* Dkt. 5. What is false is Stephens Media's representation to the Court that there is a "good reason" for this.

"Righthaven must make business decision that are in the best interest of Righthaven regardless of the impact on Stephens Media..." *Id.* at 11:27-28 "[N]either Stephens Media, not any other Righthaven customer, exercises control over Righthaven's method of copyright enforcement." *Id.* at 12:19-21	Section 3.1 (providing Stephens with control over which copyrights are part of Righthaven's campaign) Section 3.3 (providing that Stephens Media may stop a lawsuit from being filed on a variety of grounds, including the defendants "otherwise would be a person that, if the subject of an Infringement Action, would result in an adverse result to Stephens Media.") Section 8 (providing unilateral right to reversion of the purportedly assigned work) Section 9.4 (discussing procedure for Stephens Media to "reduce, adjust, settle or compromise" infringement)

In addition, Stephens Media raised new contradictions with the declaration recently filed by its general counsel, Mark Hineuber. Dkt. 101. Previously, Stephens Media had asserted that "[o]n or about **July 18, 2010**, Stephens Media entered into a copyright assignment with Righthaven (the 'Righthaven Assignment')." Dkt. 38 at 3:24-26 (emphasis added). Counsel for Stephens Media attached a purported assignment bearing that date to his declaration. Dkt. 38, Ex. 1 . Yet in the new declaration, Mr. Hineuber attached a different assignment (using the same form), purportedly of the same work, dated **July 8, 2010**. Dkt. 101, Ex. 1. Stephens Media offers no explanation for this discrepancy.[2]

Finally, another declaration recently filed by Mr. Hineuber further evidences the contradictions between the assertions Stephens Media has made and the facts. Stephens Media attached what it called an "exemplar" of the letters Righthaven would send to Stephens Media in each case prior to commencing litigation. *See* Dkt. 105-1 ¶ 6 and Ex. A. The letter states "[i]f you wish for Righthaven to refrain from pursuing infringement actions with respect to any or all of the Stephens Articles, please advise us within five business days." *Id.* at Ex. A. This directly

[2] The registration in Righthaven's name attached to the complaint is dated July 9, 2010, prior to the date of the assignment to Righthaven first attested to, making the difference in dates important. In addition, this new assignment has never been produced in discovery by Stephens Media or Righthaven. Instead, Stephens Media's discovery responses repeatedly referred to the July 19, 2010 assignment, which it now ignores. *See generally* Stephens Media responses to DU's requests for production quoted in DU's Motion to Compel (Dkt. 95). No discovery responses have been changed.

contradicts Stephens Media's prior assertion that "neither Stephens Media, nor any other Righthaven customer, exercises control over Righthaven's method of copyright enforcement." Dkt. 56 at 12:19-21.

This pattern of unexplained contradictions seriously diminishes Stephens Media's credibility, and DU respectfully requests that this Court consider them when evaluating the weight to give Stephens Media's other representations to the Court.

II. THE COUNTERCLAIM IS NOT MOOT

As the Ninth Circuit has found, "[t]he burden of demonstrating mootness is a heavy one," (*Northwest Envt'l Defense Ctr. v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *County of Los Angeles v. Davis,* 440 U.S. 625 (1979))) and Stephens Media has not met it. As Democratic Underground has already demonstrated, there is an actual controversy between Stephens Media and DU warranting a declaratory judgment. *See* Dkt. 46. Stephens Media now attempts to avoid that conclusion by asserting that the controversy between the parties is moot. However, the new statements in Stephens Media's Response regarding its litigious intent against Democratic Underground, like those that Stephens Media purports to have made in the past, are far too ambiguous to moot the live case or controversy between the parties. To the contrary, "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 126 (2007) (citation omitted).

A. Stephens Media's Equivocal Disavowals Do Not Moot the Controversy

Stephens Media claims to have mooted the counterclaim by referring back to a "proffer" it offered in Stephens Media's Reply in Support of Motion to Dismiss. That language reads: "Stephens Media will consent to being bound by the final outcome of this litigation insofar as it relates to Stephens Media's ability to sue for infringement on any reversionary interest it may possess in the literary work at-issue." *See* Dkt. 56 at 2:26-28. Manifestly, this is not a concession that DU's conduct did not infringe, or a covenant not to sue over the past alleged infringement or reposting of the Excerpt. Accordingly, Stephens Media's agreement to be "bound by the final

outcome" of Righthaven's claim does not moot the case or controversy between Stephens Media and DU.

For example, a final outcome that granted Righthaven's voluntary dismissal would not prevent Stephens Media from suing Democratic Underground on these same issues when it reposts the story or resolve the controversy between the parties. Even assuming that Stephens Media's "proffer" would bind it on the merits by Righthaven's dismissal as to Pampango's initial post (which is itself unclear), that would not preclude Stephens Media from asserting infringement by Righthaven if Democratic Underground, in its own new volitional act, reposted the article as it desires to do to maintain its complete archive. *See* Declaration of David Allen, Dkt. 48 ¶ 25. Likewise, a final outcome that determined that Stephens Media was the real party in interest and dismissed Righthaven's claim for lack of standing or champerty would not resolve the controversy between Stephens Media and DU.

Stephens Media further muddies the water with other references to its so-called disavowal sprinkled throughout its Reply in Support of Motion to Dismiss (Dkt. 56) and its Response to the Supplemental Memorandum (Dkt. 99) (*see e.g.* Dkt. 56 at 2 and 15, Dkt. 99 at 2, 6, 7 and 8.); indeed, those varying statements merely reinforce the point that a clear, unequivocal and binding concession that the appearance of the Excerpt on the DU Website is not infringing and a covenant not to sue DU or its users over the conduct at issue is needed before the controversy at issue can be resolved.[3] The string of haphazard statements throughout Stephens Media's briefing is subject to nuances, caveats and limitations. Democratic Underground should not be left with the prospect of litigating the interpretation and meaning of all of these statements in order to resolve this controversy. Only a declaration of non-infringement will be sufficient to unequivocally estop Stephens Media from pursuing further litigation against DU concerning these matters.

Even if there was an unequivocal covenant in its briefs, Stephens Media completely undercuts its purported disavowal by joining in Righthaven's Response to the Supplemental

[3] In addition, as discussed above, Stephens Media has made representations in its briefs that have been contradicted by the facts. This gives Democratic Underground and this Court reason to give little weight to Stephens Media's ambiguous statements about its true intentions.

Memorandum, which declares an intention to *add Stephens as a plaintiff* in Righthaven's copyright infringement action against DU should this Court finds that Righthaven on its own lacks standing. Dkt. 100 at fn.1 and fn.4. This does not sound like the strategy of a party that has no intention of pursuing a claim, either on its own behalf or through its agent Righthaven.[4]

B. The Cases Cited By Stephens Media Does Not Demonstrate Mootness

Moreover, the cases that Stephens Media has cited in support of its mootness argument are readily distinguishable and do not support dismissal of the counterclaim. For its primary legal authority, Stephens Media points to *Eccles v. Peoples Bank of Lakewood Village*, a Supreme Court case from 1948. 333 U.S. 426 (1948). In *Eccles*, a bank that was already a member of the Federal Reserve System sought to have a condition of membership declared invalid. Although the bank had no apparent intention or desire for the triggering circumstances to occur, the bank was concerned that the condition might nevertheless be triggered at some future point in time. In addition, the bank reasoned that the Federal Reserve Board might one day decide to reverse its policy and seek to rescind the bank's membership, even though the Board had already considered the bank's current status and—after an independent investigation, consideration of statements from the bank, and unanimous vote—concluded that "the public interest" called for retaining its membership. The Court held that the bank's purported concerns about possible future loss of membership based on contingent events were too speculative and attenuated to create a ripe controversy, especially where important public-law policy issues were concerned.

As Democratic Underground has already demonstrated, however, the context of its Counterclaim for a declaration of noninfringement is hardly speculative or attenuated: the content, over which Democratic Underground has already been sued, was posted in DU's forums (in other words, the condition giving rise to the controversy exists). Moreover, the litigation was initiated by an agent (Righthaven) that Stephens Media exclusively engaged for the express

[4] Stephens Media's unclear statements may be the result of Section 9.4 of the SAA, which requires that Stephens Media "not reduce, adjust, settle or compromise any infringement of Stephens Media Assigned Copyrights except as approved in writing by Righthaven" or Section 9.6, which requires Stephens Media to "cooperate fully" with Righthaven. Whatever Stephens Media's difficulties may be, DU remains entitled to a clear declaration of non-infringement.

purpose of bringing copyright infringement suits, *i.e.*, the controversy is imminent. *See* SAA § 3.4 ("Stephens Media hereby engages Right*haven* throughout the Term on an exclusive basis to undertake ... the pursuit of Infringement Actions.").

Stephens Media's ambiguous statements about its litigious intent are a far cry from a federal agency's thoughtfully considered disavowal of any intention to reverse itself in contravention of "the legitimate 'public interest.'" *Eccles*, 333 U.S at 435. Indeed, as the Ninth Circuit has observed, "[a] declaratory judgment action is not moot unless it is absolutely clear that the defendant will never renew its allegedly wrongful behavior." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc*.**,** 223 F.3d 1082, 1085 (9th Cir. 2000) (*citing FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1238 (9th Cir.1999).

Stephens Media also cites *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125 (9th Cir. 2005); however, the facts of that case are inapposite. There, the question of mootness arose due to the declaratory judgment *plaintiff's* agreement, pursuant to settlement terms, to cease engaging in the activity that gave rise to its declaratory relief action, not the defendants assertion that it would be bound by certain outcomes against other litigants.

Stephens Media's additional cases are inapposite. In *Drew Chem. Co. v. Hercules, Inc.*, 407 F.2d 360, 362 (2d Cir. 1969), there had "been a formal concession that the patent was not infringed." Stephens Media has never conceded that the copyright at issue was not infringed, and has joined several Righthaven briefs that repeatedly and emphatically assert that DU's use was infringing.

As Stephens Media concedes, *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054 (Fed. Cir. 1995) was overruled by *MedImmune* where the Supreme Court significantly loosened the standards for declaratory relief actions. Nevertheless, Stephens Media cites it for the proposition that the company can be bound by the representations of its counsel. As discussed above, the problem is not whether Stephens Media can be bound by its counsel's statements, the problem is with the statements themselves.

For example, in *Sunshine Kids Juvenile Prods., LLC v. Indiana Mills & Mfg., Inc.*, 2011 WL 862038, at * 3-5 (W.D. Wash. Mar. 9, 2011), the court rejected a mootness claim that was

based on statements made by counsel. There, the problem was not who made the statement, but that the court was "unable to conclude that the covenant is exhaustive enough to eliminate the uncertainty, and therefore the controversy, surrounding Sunshine's legal rights." *Id.* at *5. One problem was that the covenant in *Sunshine Kids* did not cover Sunshine's customers, even though there was a pattern of threats, including the threat of litigation, against customers. *Id.* Likewise, Stephens Media has a pattern of threats of litigation (*see* Dkt. 46 at 9), but has refused to agree not to sue Defendants' users who might post on its forums, like the user in this litigation.[5] Indeed, the record establishes that DU Website users have already refrained from posting due to the threat of litigation. Allen Decl., Dkt. 48 at ¶ 30 and Ex. C. "[C]ourts recognize that when a defendant's conduct, expressed or implied, creates the fear that customers face an infringement suit or the threat of one, the controversy is sufficiently immediate and real." *Sunshine Kids,* 2011 WL 862038, at *4 (citing *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc*., 846 F.2d 731, 736 (Fed. Cir. 1988) and *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783-784 (7th Cir. 1979)).

Like Stephens Media (Dkt. 99 at fn.5), the defendant in *Sunshine Kids* also argued that a declaratory relief suit over future actions was too speculative but refused to covenant not to sue for future products. *Id.* at *3-4. The mootness argument failed because the plaintiff had future plans that might lead to a lawsuit, just as Democratic Undergound has future plans that may lead to a lawsuit over Stephens Media's copyright—it plans to repost the article at issue and continue to provide a message board upon which users may post content. Allen Decl., Dkt. 48 at ¶¶ 24-29.

Likewise, in *Diamonds.net LLC v. Idex Online, Ltd.*, 590 F. Supp. 2d 593, 600 (S.D.N.Y. 2008) the court found a covenant not to sue insufficient. There, the promise covered only the defendant's website "as it currently exists as of the date of this covenant, or previously existed." Distinguishing *Super Sack*, the court noted that, even if *Super Sack* remained good law following *MedImmune*, the narrower covenant was insufficient and failed to account for activity planned by the counterclaimant. *Id.* at 600. Here, Stephens Media's purported promise not to sue is even

[5] Stephens Media's agent Righthaven has already expanded its litigation campaign to include individuals who post on message boards. *See* Steve Green, "Five more Righthaven copyright lawsuits filed," *Las Vegas Sun* (Mar. 8, 2011) (discussing several such lawsuits), available at http://www.lasvegassun.com/news/2011/mar/08/five-more-righthaven-suits-filed/.

narrower, buried in multiple inconsistent statements that are heavily nuanced with limitations.

Finally, *The State of Tex. v. West Publ'g. Co.*, 681 F. Supp. 1228 (W.D. Tex. 1988) does not help Stephens Media's argument. As Stephens Media candidly notes, the dismissal of the declaratory judgment action depended on that fact that the "copyright holder had not complained or threatened litigation." Dkt. 99 at 7:17-18. As DU has amply explained in its Response to the Motion to Dismiss (Dkt. 46), Stephens Media has made numerous complaints and threats of litigation. Indeed, even in its most recent brief Stephens Media lauded the efforts of its agent Righthaven in filing "a significant number of lawsuits in this district against alleged infringers of Stephens Media copyrights . . . ." Dkt. 99 at 4:9-11. This is hardly the brief of a company that is not intent of pursing alleged infringement again and again.

Accordingly, Stephens Media cannot moot the "case or controversy" that exists between Stephens Media and Democratic Underground with narrow and ambiguous representations about its intent or not to pursue further litigation against Democratic Underground.

III. DEMOCRATIC UNDERGROUND MUST BE ALLOWED DISCOVERY BEFORE STEPHENS MEDIA'S MOTION TO DISMISS MAY BE GRANTED

As discussed thoroughly in the accompanying response to Righthaven's brief, the SAA, even if coupled with the Amendment, already presents this Court with sufficient irrefutable evidence of the sham nature of the Assignment for the Court to find the Assignment is invalid and to deny Stephens Media's Motion to Dismiss. However, if this Court is not yet prepared to find the Assignment by Stephens Media to be sham, Democratic Underground must have the opportunity to bolster its arguments with discovery.

Righthaven and Stephens Media argue that this Court should re-write the SAA to conform to their alleged intent at the time of drafting. Dkt. 100 at 8:19-9:16. They cite to a provision of the SAA that purports to require this Court to interpret the contract in the event of any dispute. SAA § 15.1 ("such court *shall* correct the defect in a narrowly tailored manner to approximate the manifest intent of the Parties." (emphasis added)). They do not provide any authority that suggests that parties may contractually agree to impose such requirements for the Court, much less that such a provision would somehow bind the Court to reconstruct a contract at the parties'

request to the detriment of a non-party to the contract. But even supposing this provision were valid, it would not help Righthaven or Stephens Media. As the declarations of Mr. Hinueber (Dkt. 101) and Mr. Gibson (Dkt. 102) show, their manifest intent was to transfer effectively only a cause of action to Righthaven, while retaining the complete rights of ownership for Stephens Media. This is exactly what *Silvers* forbids, and this Court cannot reform their contracts to achieve an unlawful result.

However, if there was any doubt whether their intent was to form a champertous contract to get around *Silvers*—or any other question that the Assignment is ineffective to confer standing—Democratic Underground is entitled to discovery, including depositions of these two declarants, so it can prove the sham nature of this Assignment. Defendants have been diligent in seeking discovery on this point, and have a pending motion to compel. Dkt. 95.[6] But both Stephens Media and Righthaven have refused to provide documents about the formation of Righthaven and the SAA— claiming to the Magistrate Judge that all information other than the express terms of the SAA itself is not discoverable, even as they submit testimony on this Motion as to the SAA's meaning and their intention in entering it. See Dkt. 105 at 9:18-13:7 and Dkt. 106 at 12:21-13:7. At a minimum, before this Court could grant Stephens Media's motion to dismiss, DU must be able to conduct discovery into this important issue.

CONCLUSION

For these reasons stated above and in its prior briefing, Defendant Democratic Underground respectfully requests that this Court deny Stephens Media's Motion to Dismiss.

Dated: May 20, 2011

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[6] The parties stipulated and this Court ordered deposition discovery stayed pending ruling on the currently pending motions. Dkt. 70.