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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE ROGER L. HUNT, U.S. DISTRICT JUDGE

RIGHTHAVEN, LLC, a
Nevada limited-liability
company,

Plaintiff,

vs.

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

Defendants.

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

Counterclaimant,

vs.

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

Counterdefendants.

No. 2:10-cv-01356-RLH-GWF
July 14, 2011
Las Vegas, Nevada

TRANSCRIPT OF ORDER TO SHOW CAUSE [116]

1 APPEARANCES:

2 For the Plaintiffs: SHAWN MANGANO
3 COLBY WILLIAMS
4 DONALD CAMPBELL
Attorneys at Law

5 For the Defendants: LAURENCE F. PULGRAM
6 KURT OPSAHL
Attorneys at Law

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15 FTR No. RLH/20110714

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17 (Transcript produced from digital voice recording;
18 transcriber not present at proceedings)

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1 LAS VEGAS, NEVADA, JULY 14, 2011, 9:04 A.M.

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3 P R O C E E D I N G S

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5 THE COURT: Be seated.

6 THE CLERK: Righthaven, LLC, versus Democratic
7 Underground, LLC, et al, 2:10-cv-1356-RLH-GWF.

8 This is the time set on order for a show cause
9 hearing and also for the motion to reconsider.

10 Counsel, please note your appearances for the
11 record.

12 MR. MANGANO: Shawn Mangano on behalf of
13 plaintiff Righthaven, LLC.

14 MR. WILLIAMS: Good morning, Your Honor, Colby
15 Williams on behalf of Stephens Media.

16 MR. CAMPBELL: Donald Drew Campbell on behalf
17 of Stephens Media.

18 MR. PULGRAM: Laurence Pulgram on behalf of
19 Democratic Underground.

20 MR. OPSAHL: Kurt Opsahl, the Electronic
21 Frontier Foundation, on behalf of Democratic
22 Underground.

23 THE COURT: Thank you.

24 MR. WILLIAMS: Excuse me, Your Honor. I heard
25 your clerk say this was also set for a motion for

1 reconsideration. I didn't know if I misheard that. I
2 wasn't aware that that was also on calendar, or if it
3 was just the order to show cause. Because the briefing
4 isn't complete on the motion for reconsideration.

5 THE COURT: If that was said, and I didn't
6 catch if that was said; but, no, we're not hearing the
7 motion for reconsideration here.

8 This is the time for Righthaven to respond to the
9 order to show cause why the Court should not issue
10 sanctions.

11 Counsel, I'm going to give you 10 minutes to
12 argue your position and your response. Between the
13 response and your affidavit, obviously, the arguments
14 were repeated, sometimes more than once. So you don't
15 need to repeat them. But I will give you the 10
16 minutes.

17 And you have liberty, if you wish, to respond to
18 the Demographic Underground's reply. The Court will
19 decide when you've finished whether or not it feels it
20 necessary to give Democratic Underground an opportunity
21 to reply to your comments with respect to their reply.

22 MR. MANGANO: Okay, Your Honor. So just so I
23 understand your procedure, should I -- there's no need
24 to reserve any time at this point to respond to
25 Democratic Underground? I mean, because, you're

1 correct, I have set --

2 THE COURT: If I give them an opportunity to
3 reply to your comments, I very likely will give you a
4 short period of time, if you feel it's necessary, to
5 respond to that without just repeating the arguments
6 that you've made before.

7 MR. MANGANO: Yes, Your Honor. In view of
8 that, we have set forth our position in our response to
9 the order to show cause, while they've set forth in my
10 declaration and they've set forth in the OSC response, I
11 wish to highlight the fact that upon receiving this
12 Court's order, I took all steps necessary to immediately
13 take corrective action in view of what was set forth
14 with regard to compliance with the Certificate of
15 Interested Parties.

16 I had entered this case fairly late into the
17 briefing on the motion to voluntarily withdraw the
18 complaint. In fact, the strategic alliance agreement
19 was not produced until late -- well, into early this
20 year, which obviously you unsealed.

21 During that time period we were dealing with
22 significant issues with regard to the confidentiality of
23 that document, the confidentiality of other materials,
24 responding to supplemental briefing which, admittedly,
25 is -- the briefing in this case has been significant.

1 From a personal standpoint, I did not reflect on
2 the Certificate of Interested Parties at that time as to
3 what was contained in it and the impact of the strategic
4 alliance agreement on it.

5 I'm not disagreeing with the Court's analysis,
6 I'm just stating a simple fact that I didn't fully
7 appreciate when that document came out its effect on the
8 other -- on the earliest file in the case.

9 THE COURT: Well, if it gives you any comfort,
10 counsel, the Court is not holding you responsible for
11 the failure -- you, personally, responsible for the
12 failure.

13 MR. MANGANO: Since it's more -- I will
14 breathe a sigh of relief because I do honor my
15 responsibilities before this Court. And that's why I
16 have taken corrective action.

17 And despite any disagreement that may exist, Your
18 Honor, you've issued a decision. I intend to comply
19 with it. I intend to have my clients comply with it,
20 not only in this case, but in all cases moving forward.

21 I also would like to point out that there has
22 been an argument made, and I think it's somewhat
23 misconstrued by Democratic Underground that somehow the
24 OSC response, which I prepared, and which I submitted
25 supporting declaration, sought to cast blame on two

1 in-house lawyers, Mr. Chu and Mr. Coons.

2 Upon joining Righthaven and working with Mr. Chu
3 and Mr. Coons, I found them to be outstanding attorneys.
4 They were very diligent. They had addressed
5 significantly complex issues, personal jurisdiction
6 issues.

7 There was a recent decision by I believe Judge
8 Navarro, and there was another decision in Southcoast
9 Partners case which dealt with personal jurisdiction in
10 view of the tension between some existing Ninth Circuit
11 case law, Brayton Purcell being one of them, and whether
12 or not in -- personal jurisdiction is appropriate in the
13 venue in which the copyrighted material emanated. Those
14 are very, very difficult issues, Your Honor. And these
15 were very skilled attorneys that addressed those issues.

16 That said, and in view of my own experience,
17 which is quite significant compared to Mr. Chu and
18 Mr. Coons, I honestly cannot believe that they fully
19 appreciate their disclosure obligation.

20 It's not an aspersion upon them. I think it's
21 more of a reflexion, a common-sense reflexion of that I
22 don't think that -- I think they may have -- as a matter
23 of fact, I know that it was -- it's been represented to
24 me, that they performed some sort of analysis or case
25 law or whatever, and that they came up with the

1 Certificate of Interested Parties, and they said okay,
2 you know, that's what happened.

3 THE COURT: What's their status currently?

4 MR. MANGANO: Mr. Chu is not practicing law
5 currently. It's my understanding that he suffered a
6 fairly significant back injury.

7 THE COURT: I understand he's recovering from
8 back injury.

9 MR. MANGANO: And I have spoken to him. He,
10 in fact, contacted me because he was concerned over some
11 of the representations that had been disseminated in the
12 media based upon what were my perceived allegations
13 against his misconduct.

14 I don't believe that he committed any misconduct,
15 not sanctionable misconduct, given the standards that
16 are applicable. I think that it was an honest mistake.
17 I think that everyone, including Mr. Chu and Mr. Coons,
18 who were responsible either for registering the
19 copyrighted work or drafting the complaint --

20 THE COURT: So he's no longer with the
21 company?

22 MR. MANGANO: No. And the same thing with
23 Mr. Coons. He's out, and he's started his own firm, my
24 understanding.

25 These two individuals who are on the Certificate

1 of Interested Parties knew it was the R-J. They
2 reference the R-J work. They attached the R-J work.

3 In fact, this morning I pulled articles, because
4 I know it's been widely reported in the media, and I did
5 a search; and, I mean, there's an article by Mr. Green,
6 who is in the -- Steve Green from the Sun is here in
7 court today, you know, that I found that dated back to
8 early May -- April, May of 2010, which aver to the
9 relationship between Stephens Media's enforcement of its
10 copyrights, the family of Warren Stephens, that the R-J
11 is owned by Stephens Media.

12 So I understand that that might not be enough for
13 the Court to perform a recusal analysis, because you're
14 not expected -- and, for the most part, when you've got
15 litigants, you're obviously not going to be out doing
16 your independent research because --

17 THE COURT: Well, you're correct, sir, and
18 that's because the Court's not obligated to do it, you
19 are.

20 But, more important, the representations were
21 that -- while these articles came from the R-J, was that
22 Righthaven had now been assigned the exclusive right to
23 pursue the violation of those.

24 So that does not put the Court -- even if it had
25 done the research, doesn't put the Court on notice that

1 Stephens Media had an interest, a pecuniary interest.

2 MR. MANGANO: Your Honor, you're correct that
3 when -- first of all, the allegations with regard to the
4 assignment, I know that there's a lot -- and I'm hopeful
5 that at some point we'll get an opportunity to have --
6 we have rather esteemed counsel on both sides to address
7 the pending motions that are before the Court. But
8 you're correct. The assignment issue may not or does
9 not provide the direct pecuniary interest. That's --
10 that's -- I think that's fair.

11 That said, Stephens Media was brought into the
12 case only 20 days after the Certificate of Interested
13 Parties that's deemed defective was filed.

14 That should at least have triggered -- absent
15 anything else, absent news articles, absent averments in
16 the complaint, anything like that, that there may be an
17 interest in Stephens Media's part. If Your Honor -- if
18 Stephens Media was IBM and you had a more than 10
19 percent holding in IBM, they were brought into the case,
20 you would have to recuse yourself under Federal Civil
21 Procedure 7.1.

22 So I -- I understand the Court's concern. I
23 understand that given the manner in which you have
24 interpreted the local rule requirement, we have done
25 everything necessary to correct that mistake. And I've

1 affirmatively done that.

2 I don't want to stand here and point fingers at
3 Mr. Chu or Mr. Coons. I really don't. These are two
4 exceptional lawyers with -- should Mr. Chu, and I urge
5 him to do so, come back and practice law, he is an
6 exceptional writer. He's an exceptional attorney.

7 I would hate to have the results of their
8 participation in this case at all reflect upon their
9 ability or their future status as counsel in this state
10 practicing before this court and in this jurisdiction as
11 a whole.

12 I can say nothing more that -- I believe this was
13 an honest mistake. This was not an intentional act to
14 conceal Stephens Media. That's my honest belief, Your
15 Honor. And I don't feel that it rises to the level of
16 the standards of except for. You may feel otherwise.
17 And reasonable minds can disagree. But I feel the
18 circumstances demonstrate otherwise.

19 And unless you have any other questions, Your
20 Honor, I'll yield to opposing counsel.

21 THE COURT: I don't have any questions.

22 MR. MANGANO: Thank you, Your Honor.

23 THE COURT: Given what he's said, you've
24 responded to his written document and responded quite
25 adequately, in the Court's view. I don't know that

1 there's anything about what Mr. Mangano just said that
2 suggests to the Court that I need to hear from
3 Democratic Underground.

4 MR. OPSAHL: Thank you, Your Honor.

5 THE COURT: Let me make it clear that the
6 Court is also not here to find fault with Mr. Coons or
7 Mr. Chu.

8 I do find it significant, however, that in all of
9 this -- and I -- I've read and reread this sentence from
10 the statement in the response, and I quote from the
11 second page: It is certainly understandable how Local
12 Rule 7-1.1 could have arguably been reasonably construed
13 to not require the disclosure of Stephens Media's
14 interest in any recovery.

15 I was impressed that you were able to get three
16 hedge words or qualifiers within the space of four words
17 in that sentence and wondered if maybe you ran out of
18 them.

19 That significant, I guess, to me is is that we
20 don't have any affidavit from Mr. Chu or Mr. Coons:
21 One, that they made a mistake; two, that they didn't
22 understand it; three, that they didn't understand Local
23 Rule 7.1-1. But, more importantly, I don't have any
24 evidence that they even knew about the relationship;
25 that they were familiar with the terms and circumstances

1 of the strategic agreement.

2 An argument that they arguably could have
3 reasonably construed to not require that, in the Court's
4 opinion, is, frankly, ludicrous.

5 Rule 7.1-1, the purpose of it, the primary
6 purpose of it, is to make sure that the Court becomes
7 aware, as soon as possible, of any need to recuse itself
8 because of any conflict of interest. But it's the
9 violation of the rule, in addition to all of the other
10 things that took place in this case and any other cases
11 that the Court has in front of it -- and I think there
12 are -- I think there are or were 34 cases that were
13 assigned to me by Righthaven in this case. I do not
14 understand the argument that an agreement whereby
15 Stephens Media got half of any recovery or settlement
16 could any -- in any way be construed as not having a
17 direct pecuniary interest.

18 And, again, I'm not here to sanction Mr. Coons or
19 Mr. Chu. And I will tell you now that I do not think
20 that the Court's sanction power is limited to sanction
21 Mr. Chu or Mr. Coons. The Court does have the right to
22 sanction an attorney when he violates it.

23 I don't have any evidence that they intentionally
24 kept this from the Court. But I have a lot of evidence
25 that Righthaven intentionally kept it. This is not an

1 issue of negligence, in the Court's view. It goes to
2 the evidence of an intentional avoidance of disclosing
3 information and specific direct statements contrary to
4 that.

5 I think I have sufficient inherent power to
6 sanction. And I think Rule 11 gives me even additional
7 power to sanction for violation of this rule under these
8 circumstances.

9 Counsel that was representing Righthaven,
10 Mr. Coons and Mr. Chu, were both in-house counsel, if
11 you will.

12 Mr. Gibson, who took over and I think was counsel
13 at the time that the SAA was disclosed is the CEO of
14 Righthaven. So I think for purposes of the language of
15 7.1-1, in this instance, Righthaven qualifies as a party
16 acting pro se. Because it's their in-house people doing
17 it, it's not outside counsel as they have now.

18 In the Court's view, the arrangement between
19 Righthaven and Stephens Media is nothing more nor less
20 than a law firm, which, incidentally, I don't think is
21 licensed to practice law in this state, but a law firm
22 with a contingent fee agreement masquerading as a
23 company that's a party.

24 There was a clear pecuniary interest, in the
25 Court's view, by Stephens Media. Mr. Gibson negotiated

1 the agreement. He signed the agreement. He certainly
2 knew the agreement and its contents. He has a
3 significant amount of experience. At least that is
4 represented to me. I think this has been part of a
5 concerted effort to hide Stephens Media's role in this
6 litigation.

7 Plaintiff claimed that it had various exclusive
8 rights when it knew that the ability to exercise those
9 rights were retained exclusively by Stephens Media. It
10 constantly and consistently refused to produce the
11 agreement. And it wasn't until after the Court ordered
12 that it be disclosed and then unsealed that they started
13 admitting their reasons.

14 There was, in fact, in the -- in Stephens Media's
15 reply to their motion -- in support of their motion to
16 dismiss, that they state, and I quote, "Stephens Media
17 has never been identified or disclosed as a party who
18 has a direct pecuniary interest in the outcome of any
19 Righthaven case, and for good reason," close quote.

20 The representations about the relationship and
21 the rights of Righthaven were misrepresentations. They
22 were misleading. And that -- the failure to disclose
23 them -- and you can speak and argue that there's no case
24 law or there are no -- there's no definition in the rule
25 that lays out what a direct pecuniary interest is. I

1 don't know how more direct you can get. The fact that
2 it has to go to Righthaven first and then go to Stephens
3 Media, in the Court's view, does not remove it from
4 being a direct pecuniary interest. It was there. They
5 had the right to have -- they had the right, actually,
6 to settle claims on their own.

7 And the Court finds it troubling, quite frankly,
8 in all of the cases that I'm aware of filed in this
9 district, and I've lost count as to how many there were,
10 that not only were the terms of the agreement disclosed,
11 but that there was a consistent, repeated failure to
12 identify Stephens Media as having any interest in this
13 lawsuit.

14 And it isn't enough to say, well, the Court
15 should have been on notice of it. The Court has the
16 right to accept the representations made by a party
17 through counsel. And when it finds that those
18 representations are not true and, having looked at all
19 this evidence, finds that they are intentionally untrue,
20 the Court feels that there is a necessity of and finds
21 that there is an obligation on the Court to sanction
22 Stephens Media.

23 I've given a lot of thought as to what kind of
24 sanction is required. I appreciate the fact that
25 counsel has attempted to rectify the problem that has

1 existed. It does not change or affect the Court's
2 opinion as to whether or not it was an accident or a
3 misunderstanding as opposed to being an intentional --
4 I'll call it failure to disclose, for want of a stronger
5 term, although I think a stronger term is justified.
6 But as part of the sanction, the Court is going to order
7 that every case Righthaven has in any jurisdiction in
8 this country must be provided with a copy of this
9 Court's decision about the agreement, the one on
10 standing, and that the agreement be disclosed to parties
11 that Righthaven has sued.

12 The Court is also going to order a monetary
13 sanction against Righthaven, itself, in the amount of
14 \$5,000 and order that Local Rule 7.1-1 will be properly
15 complied with, either retrospectively or prospectively,
16 in all cases that are filed by Righthaven with respect
17 to this agreement.

18 Is there anything -- yes, counsel?

19 Incidentally, that monetary sanction will be paid
20 within two weeks to the clerk of court.

21 MR. MANGANO: Your Honor, just a couple points
22 of clarification. And I understand that you will be
23 issuing a written opinion based upon what we -- based
24 upon this hearing, I assume?

25 THE COURT: I'm not sure I will, counsel.

1 I'll give that some consideration.

2 MR. MANGANO: Okay. Well, in view of that
3 uncertainty, I'd just --

4 THE COURT: If I do issue a written opinion,
5 counsel, I'm also going to direct that it be provided,
6 filed in every other case that Righthaven has against
7 anybody on this --

8 MR. MANGANO: Okay.

9 THE COURT: Along these issues.

10 MR. MANGANO: Okay. Your Honor, just for
11 point of clarification, you've mentioned a couple bases
12 for your sanction power; and it's not to challenge your
13 sanction powers, but to clarify the record.

14 You've mentioned Rule 11, you've mentioned the
15 inherent power, and you've mentioned the local rule.
16 These sanctions that you just enumerated, do those fall
17 under, one, all or -- one specific sanction power or
18 under all your inherent power --

19 THE COURT: I'm invoking all of them, counsel.

20 MR. MANGANO: Okay. Thank you, Your Honor.

21 And a second point of clarification is that you
22 said that parties -- all parties who are sued to be
23 provided with a copy of the agreement, the strategic
24 alliance agreement.

25 THE COURT: That will not apply to those cases

1 that have been dismissed, unless there's going to be an
2 appeal in those cases.

3 MR. MANGANO: Okay. So all -- essentially all
4 pending matters, would that be --

5 THE COURT: Yes.

6 MR. MANGANO: Okay. And would your order
7 include -- since as the Court, I'm sure, is aware, we
8 have a clarification and we have what's now a restated
9 version of the SAA, restated and amended version, would
10 you like those provided as well?

11 THE COURT: No.

12 MR. MANGANO: Just the SAA?

13 THE COURT: And no -- any revisions,
14 amendments after the fact, in the Court's view, is
15 irrelevant to this issue.

16 MR. MANGANO: Okay. Thank you, Your Honor.

17 THE COURT: Thank you.

18 Any questions from other defendant?

19 MR. OPSAHL: It may also be useful for some of
20 those cases to have a copy of Righthaven's operating
21 agreement.

22 THE COURT: I beg your pardon?

23 MR. OPSAHL: It may also be useful to -- for
24 the defendants in those cases to have a copy of
25 Righthaven's operating agreement along with the

1 strategic alliance.

2 THE COURT: I think that was part of my order,
3 counsel, is that the operating -- well, are you talking
4 about the strategic alliance agreement?

5 MR. OPSAHL: There's a strategic alliance
6 agreement as between Stephens Media and Righthaven; then
7 there's also the Righthaven operating agreement, which
8 is the organizational document for Righthaven.

9 MR. MANGANO: Your Honor, that's -- the issue
10 here is the failure to disclose Stephens Media, which is
11 a party to the --

12 THE COURT: Yes. I will not include that,
13 counsel. I don't think it's relevant to this.

14 MR. OPSAHL: Okay. Thank you, Your Honor.

15 MR. MANGANO: And, Your Honor, there are cases
16 pending, such as in the District of Colorado, which
17 involve -- do not involve Stephens Media, but they
18 involve MediaNews Group as the holder of the work that's
19 been assigned.

20 Would your order require a production of the SAA
21 or the production of the operative agreement, which I
22 believe has been publicly filed already in the lead case
23 that's resulted in a stay of some 34 actions?

24 THE COURT: In Colorado, you're talking about?

25 MR. MANGANO: Yes. All the Colorado

1 actions -- all the Colorado actions, to my knowledge, do
2 not involve Stephens Media content.

3 I just want to make sure that when you say
4 produced in all jurisdictions, it's not all -- not all
5 jurisdictions involve Stephens Media content. So --

6 THE COURT: Are the agreements, the strategic
7 agreements the same?

8 MR. MANGANO: No. They are in a different
9 form. The content is significantly -- it looks
10 different. It's very -- the document that controls
11 those agreements has been produced and has not been
12 sealed.

13 THE COURT: All right.

14 MR. MANGANO: So the only other jurisdiction
15 would be there's a pending action in South Carolina, and
16 there are the pending actions in this jurisdiction that
17 involve Stephens Media.

18 THE COURT: You are obligated to the one in
19 South Carolina, but you're also obligated to advise the
20 Colorado court of this decision.

21 MR. MANGANO: Thank you, Your Honor.

22 MR. PULGRAM: And, finally, Your Honor,
23 Laurence Pulgram. You stated that if you issued a
24 ruling in writing on this matter today, on this OSC,
25 that you would ask that it be provided to the other

1 courts.

2 In the absence of that written ruling, would it
3 make sense for the transcript of your ruling, up to the
4 colloquy here, to be provided to other courts in lieu of
5 a written order, to save Your Honor from having to write
6 the written order?

7 MR. MANGANO: I think that's the
8 understanding. If there's no order, I'm to produce the
9 transcript, correct?

10 THE COURT: Yes. I think that's a good
11 suggestion. And that will be the order if it wasn't
12 clear otherwise.

13 Anything else?

14 MR. MANGANO: No, Your Honor.

15 MR. OPSAHL: No, Your Honor.

16 THE COURT: We'll be in recess.

17 (The proceedings were concluded at
18 9:35 a.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



7/14/11

Donna Davidson, RDR, CRR, CCR #318
Official Reporter

Date