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

RIGHTHAVEN LLC,

Plaintiff,

v.

PAHRUMP LIFE, MAREN SCACCIA, and
MICHAEL SCACCIA,

Defendants.

Case No.: 2:10-CV-01575-JCM-(PAL)

REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT THAT USE OF
WORK WAS FAIR USE

Date: To Be Set by Court

Time: To Be Set by Court

I. PLAINTIFF HAS FAILED TO SUBMIT EVIDENCE SUPPORTING FACTS THAT WOULD ESTABLISH A GENUINE ISSUE FOR TRIAL RELATING TO FAIR USE

The Response filed by Plaintiff Righthaven LLC (hereinafter sometimes "Righthaven" or "Plaintiff") to the Motion for Summary Judgment filed by Defendant Michael Scaccia (hereinafter sometimes "Scaccia" or "Defendant") purports to set forth the standards a court must consider in connection with a motion for summary judgment.

Plaintiff omitted the part about Righthaven's having to provide to the court specific facts demonstrating a genuine issue of facts to avoid summary judgment because Defendant has met its burden of making at least an initial showing that judgment should be issued in Defendant's favor.

That is, summary judgment shall be granted if "the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Material

1 facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*,
2 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is
3 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving
4 party. *Id.* The court must view the facts in the light most favorable to the non-moving party and
5 give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec.*
6 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).
7 The court must not weigh the evidence or determine the truth of the matter, but only determine
8 whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th
9 Cir.1999).

10 A party seeking summary judgment bears the initial burden of informing the court of the
11 basis for its motion, and of identifying those portions of the pleadings and discovery responses
12 that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
13 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party will have the
14 burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could
15 find other than for the moving party. On an issue where the nonmoving party will bear the
16 burden of proof at trial, the moving party can prevail merely by pointing out to the district court
17 that there is an absence of evidence to support the nonmoving party's case. *Id.* If the moving
18 party meets its initial burden, the opposing party "may not rely merely on allegations or denials
19 in its own pleading;" rather, it must set forth "specific facts showing a genuine issue for trial."
20 See Fed.R.Civ.P. 56(e)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505,
21 91 L.Ed.2d 202 (1986). If the nonmoving party fails to show that there is a genuine issue for
22 trial, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323, 106
23 S.Ct. 2548.

24 In connection with its Response, Plaintiff submitted no evidence at all - no declarations
25 and no authenticated exhibits - **nothing**.

26 So, it follows that since Defendant has made an initial showing that he is entitled to
27 summary judgment, Righthaven's Response, devoid of any evidence whatsoever, is insufficient
28 to prevent issuance of summary judgment in Defendant's favor.

1
2 II. PLAINTIFF HAS FAILED TO SUBMIT EVIDENCE SUPPORTING FACTS THAT
3 WOULD ESTABLISH A GENUINE ISSUE FOR TRIAL

4 Plaintiff makes a specious argument against the undisputed (and undisputable) evidence
5 provided by Scaccia. Plaintiff states:

6 Defendant's declaration completely fails to set forth the basis for his alleged
7 personal knowledge of any particular fact or assertion upon which he relies. (Id.)
8 Moreover, Defendant's declaration fails to delineate what the factual assertions
9 are and how the factual assertions constitute admissible evidence. (Id.)
10 Furthermore, Defendant's declaration fails to identify what, if any, factual
11 assertions are premised on "information and belief."

12 It is hard to believe that Plaintiff believes its own statement. To illustrate the obvious for
13 Plaintiff, filed with this Reply is a Supplemental Declaration of Michael Scaccia that points out
14 statements of fact from the original motion that Defendant has declared to be true of his own
15 personal knowledge and those stated on information and belief.

16 Contrary to Plaintiff's argument, the Motion is supported by admissible evidence,
17 including evidence that Plaintiff itself relies upon in its Complaint.

18 III. PLAINTIFF'S ARGUMENT FAILS TO SHOW THAT THE FOUR FACTOR FAIR
19 USE TEST DOES NOT WEIGH IN FAVOR OF THE DEFENSE

20 A. Purpose and Character of Use

21 The first factor is "the purpose and character of the use, including whether such use is of
22 a commercial nature or is for nonprofit educational purposes." 17 USC § 107.

23 There is no dispute that Defendant's use is **not** commercial, and **is** for nonprofit
24 educational purposes.

25 Plaintiff instead argues about the transformative nature of the use of the reproduced
26 Article.

27 There is no dispute that the Article is only 12 sentences long, includes less than 300
28 words, and is merely a recitation of facts. **The Article is in Exhibit 1 of Plaintiff's own
Complaint.**

Contrary to Plaintiff's unsupported argument, the Article reproduced on Defendant's
Pahrump Life blog is accompanied by commentary written by Defendant. (The text of the
commentary was set forth on page 5 of the Motion for Summary Judgment for the Court's

1 convenience.) There is no dispute that there are over 100 words of commentary. **The**
2 **commentary accompanying the Article is in Exhibit 2 of Plaintiff's own Complaint.**

3 So, to the extent that the transformative nature, or not, of the reproduction of a work
4 relates to the first factor, the substantial commentary accompanying Defendant's reproduction of
5 the Article supports the conclusion that the first factor weighs in favor of Defendant.

6 Plaintiff's citations of Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), A&M
7 Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), Los Angeles News Service v. CBS
8 Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002), Worldwide Church of God v. Philadelphia
9 Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000), Walt Disney Prods. v. Air Pirates, 581 F.2d
10 751 (9th Cir. 1978), and the two versions of the court's opinion in Los Angeles Times v. Free
11 Republic, No. 98-7840, 1999 WL 33644483 (C.D. Cal. Nov. 8, 1999) and Los Angeles Times v.
12 Free Republic, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000), do not help Plaintiff.

13 Campbell, 510 US 569, at 579, specifically pointed out that a transformative use is not
14 absolutely necessary for a finding of fair use, citing Sony Corp. of America v. Universal City
15 Studios, Inc., 464 U.S. 417 (1984).

16 In Worldwide Church, plaintiff and defendant were, essentially, **competing** churches, and
17 use of plaintiff's work financially benefited defendant by, for example, attracting tithing
18 members. Worldwide Church, 227 F.3d 1110, at 1124.

19 In A&M Records the court held, 239 F.3d 1004, at 1015, with respect to the key aspect of
20 this factor:

21 The district court determined that Napster users engage in commercial use
22 of the copyrighted materials largely because (1) "a host user sending a file cannot
23 be said to engage in a personal use when distributing that file to an anonymous
24 requester" and (2) "Napster users get for free something they would ordinarily
25 have to buy." Napster, 114 F.Supp.2d at 912. The district court's findings are not
26 clearly erroneous.

25 In Air Pirates, the defendants published comic books with derogatory depictions of
26 Disney characters. The commercial nature of the use was undisputed.

27 In Los Angeles News Service the court found that the purpose and character of use factor
28 weighed in favor of defendant Court TV because of the use of the work in news reporting,

1 despite the otherwise commercial nature of the use (i.e., Court TV did news reporting for profit).
 2 Los Angeles News Service, 305 F.3d 924, at 938-940.

3 In the Free Republic opinions, the court pointed out that defendant is a for-profit entity,
 4 and donations to defendants were solicited, and defendants' website said its readers "can often
 5 find breaking news and up to the minute updates." So, defendants' use of plaintiff's works was
 6 commercial in nature, and in competition with plaintiff.

7 Plaintiff has not rebutted the evidence that Defendant's use of the Article was not
 8 commercial, and was for news reporting and comment. This factor weighs heavily in favor of
 9 finding fair use.

10 B. Nature of the Copyrighted Work

11 Plaintiff does not dispute that the Article is a short recitation of facts, and Plaintiff does
 12 not dispute that the information in the Article is of important public concern. Further, Plaintiff
 13 does not dispute that, as pointed out in Defendant's original Motion, Los Angeles News Service ,
 14 305 F.3d 924, at 940, supports finding that this factor weighs in favor of fair use for Defendant.

15 Plaintiff has provided a misleading citation of Free Republic II in connection with this
 16 factor. Here is the court's holding that this factor, with respect to news articles, even copied in
 17 their entirety, favored a finding of fair use in that case (emphasis added):

18 2. The Nature Of The Copyrighted Work

19 The second factor identified in § 107 recognizes "that some works are
 20 closer to the core of intended copyright protection than others, with the
 21 consequence that fair use is more difficult to establish when the former works are
 22 copied." Campbell, supra, 510 U.S. at 586. Thus, "the more creative a work, the
 23 more protection it should be accorded from copying; correlatively, the more
 24 informational or functional the plaintiff's work, the broader should be the scope of
 25 the fair use defense." NIMMER, supra, § 13.05[A][2][a]. Newspaper articles to a
 26 large extent gather and report facts. Nonetheless, a news reporter must determine
 27 which facts are significant and recount them in an interesting and appealing
 28 manner. See Harper & Row, supra, 471 U.S. at 547 ("creation of a nonfiction
 work, even a compilation of pure fact, entails originality").

A number of cases that have analyzed alleged copying of news articles or
 videotapes of news events have concluded that the second fair use factor weighs
 in the defendant's favor. See Reuters Television, supra, 149 F.3d at 994 (the court
 held that the second factor weighed in favor of defendants that copied news
 footage); Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119,
 1122 (9th Cir. 1997) (the second factor weighed in favor of a finding of fair use
 where defendants copied news footage); Los Angeles News Service v. Tullo, 973
 F.2d 791, 792, 798 (9th Cir. 1992) (the second factor favored a video news
 clipping service that used portions of copyrighted videotapes of newsworthy

1 events). See also *American Geophysical*, supra, 60 F.3d at 925 (given the
 2 "manifestly factual character of the . . . articles" from scientific and medical
 3 journals copied by defendant, the court held that the second factor weighed in
 4 favor of fair use); *Television Digest*, supra, 841 F. Supp. at 10 (the court found
 5 that the second factor weighed in favor of a defendant that copied a newsletter
 6 containing original news stories). Compare *Nihon Keizai Shimbun*, supra, 166
 7 F.3d at 72-73 (in a suit by a newspaper publisher against a defendant that gathered
 8 news articles from various sources and sold "abstracts" of them to its customers,
 9 the court recognized that newspaper articles are predominantly factual in nature
 and that expressive elements do not dominate, but nonetheless concluded that the
 second "factor is at most neutral on the question of fair use").

While plaintiffs' news articles certainly contain expressive elements, they
 are predominantly factual. Consequently, defendants' fair use claim is stronger
 than it would be had the works been purely fictional. See *Sony*, supra, 464 U.S. at
 455, n. 40 ("Copying a news broadcast may have a stronger claim to fair use than
 copying a motion picture"). **The court concludes that the second factor weighs
 in favor of a finding a fair use of the news articles by defendants in this case.**

10 Plaintiff's citation of Worldwide Church in connection with this factor is inappropriate.

11 In that case, an entire book was copied.

12 Plaintiff's citation of Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 US 539
 13 (1985) is similarly inappropriate. In that case, the work that was copied was an unpublished
 14 work, and the Court concluded, "the unpublished nature of a work is [a] key, though not
 15 necessarily determinative, factor tending to negate a defense of fair use." Harper & Row, 471 US
 16 539, at 554. (Internal quotation marks omitted.) In the present case, the Article was already
 17 published.

18 C. The Amount Used in Relation to the Copyrighted Work as a Whole

19 Here, Plaintiff has happily agreed that the Article was reproduced in its entirety.

20 However, Plaintiff disputes the weight to be accorded this factor. It relies on Worldwide
 21 Church, but this reliance is inappropriate. In that case, the work was an **entire book** that was
 22 copied, except the attribution to the actual copyright holder was deleted. Worldwide Church,
 23 227 F.3d 1110, at 1118-1119.

24 Here, only a very short, fact-laden work was copied.

25 So, this factor should be considered neutral.

26 D. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

27 Plaintiff expends more test on this factor than any other. Yet, Plaintiff offers no evidence
 28 of any negative effect on the potential market for or value of the Article.

1 This Court is asked to take notice that to the extent the market for, or the value of, the
2 Article has been diminished, evidence of such diminishment is totally within **Plaintiff's control**.
3 Yet, no such evidence has been offered to the Court.

4 What we do have is Plaintiff arguing that Defendant could have done something
5 different, yet in making its argument Plaintiff resorts to making a generic use of the trademark of
6 a third party. That trademark is "Xerox," and Plaintiff uses it generically **three** times. Plaintiff
7 does not argue with "clean hands."

8 Despite Plaintiff's extensive protests, this factor weighs heavily in favor of the fair use
9 defense.

10 **II. CONCLUSION**

11 Defendant asks the Court to note that the evidence before the Court includes exhibits
12 from Plaintiff's own Complaint and from the website of Plaintiff's purported assignor.

13 For the reasons set forth in Defendant's Motion for Summary Judgment and as set forth
14 above, Defendant asserts that, in view of the undisputed facts, summary judgment should be
15 granted in favor of Defendant with respect to the fair use defense, even if all evidence is weighed
16 in favor of Plaintiff.

17 Further, Defendant reminds the Court that Defendant's daughter, Maren Scaccia, who has
18 never resided in Nevada, has been named a defendant but has never been served with a summons
19 or the Complaint. In addition, she has had no involvement in the ownership or content of the
20 *Pahrump Life* blog. So, in any event, she should be dismissed from this suit.

21
22 Respectfully submitted,



23
24 Dated: March 14, 2011

By:

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