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10  
11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**

13 RIGHTHAVEN LLC, a Nevada limited-  
liability company,

14 Plaintiff,

15 vs.

16 PAHRUMP LIFE, an entity of unknown origin  
17 and nature; MAREN SCACCIA, an individual; and  
MICHAEL SCACCIA, an individual,

18 Defendants.  
19

Case No.: 2:10-cv-01575-JCM-PAL

**PLAINTIFF RIGHTHAVEN LLC'S  
OMNIBUS RESPONSE TO THE  
AMICUS CURIAE BRIEFS OF  
DEMOCRATIC UNDERGROUND AND  
PROFESSOR JASON SCHULTZ**

20  
21 Pursuant to the Court's June 17, 2011 Order (Doc. # 41), Righthaven LLC ("Righthaven")  
22 hereby responds to the Amicus Curiae briefs of Democratic Underground (Doc. # 32) and Professor  
23 Jason Schultz (Doc. # 36) (collectively, the "*amici*"), which relate to whether Righthaven has  
24 standing. The hearing for the Court's April 28, 2011 Order to Show Cause why Righthaven's  
25 Complaint should not be dismissed for lack of standing (Doc. # 20) is currently set for June 30,  
26 2011, at 10:30 a.m. (Doc. # 38.)  
27  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Over 200 years ago, the framers of the U.S. Constitution recognized that written works and  
4 other forms of artistic expression were deserving of legal protection. U.S. CONST. art. I, § 8. These  
5 fundamental principles regarding protecting and fostering artistic creation did not disappear simply  
6 because artistic works have transitioned from tangible to digital. *Metro-Goldwyn-Mayer Studios Inc.*  
7 *v. Grokster, Ltd.*, 545 U.S. 913, 928-929 (2005) (citing the concern that “digital distribution of  
8 copyrighted material threatens copyright holders as never before”). The digital age, however, has  
9 allowed infringement to occur on a massive scale. As pointed out by *amici*, Righthaven was created  
10 precisely to stem this tide of unabashed copyright infringement on the Internet brought about by the  
11 technological ease of copying. While *amici* go to great lengths to portray Righthaven’s business  
12 purpose in a negative light, there is nothing wrong with a party focused on protecting intellectual  
13 property—except, of course, from the perspective of an infringer.

14 But Righthaven’s business purpose, whether laudable or not, has nothing to do with the issue  
15 the Court must decide—whether Righthaven has standing to maintain this lawsuit. Righthaven  
16 undoubtedly owns the copyright under the recently executed Amendment.<sup>1</sup> Through that agreement,  
17 Righthaven obtained all right, title and interest in the infringed work, and licensed back only a non-  
18 exclusive right to exploit the work. No authority cited by *amici* suggests that such a structure is  
19 insufficient to convey standing to pursue past—or future—claims of infringement simply because  
20 the assignee was created to enforce the intellectual property rights it acquired. Indeed, if that were  
21 the law, countless non-practicing entities would be deprived of standing to bring patent infringement

22 <sup>1</sup> As set forth in its previous memorandum, Righthaven believes that the original Assignment and  
23 SAA between Righthaven and Stephens Media were sufficient to give Righthaven standing to sue.  
24 But since this Court issued its Order to Show Cause, another court in this District has held that these  
25 agreements failed to effect a copyright assignment to Righthaven. *Righthaven LLC v. Democratic*  
26 *Underground, LLC*, Doc. # 116, Case. No. 2:10-cv-01356-RLH-GWF (D. Nev.) (Hunt, J.). While  
27 Righthaven respectfully disagrees with Judge Hunt’s decision, it will not burden this Court with  
28 those arguments and will instead address its arguments to the Amendment. Another court in this  
District has also recently held that Righthaven lacks standing, even under the Amendment.  
*Righthaven LLC v. Hoehn*, Doc. # 28, Case. No. 2:11-CV-00050-PMP-RJJ (D. Nev.) (Pro, J.).  
Righthaven disagrees with that decision and intends to appeal. Nonetheless, Righthaven and  
Stephens Media are considering further amending their agreements in order to prevent other courts  
from erroneously concluding that Righthaven lacks standing. If and when the parties do so, they will  
promptly provide the Court with all amended agreements.

1 claims.

2 Nor do the contingent rights retained by Stephens Media have any impact on Righthaven's  
3 ability to bring this suit. It is well-established that limitations or restrictions do not invalidate an  
4 otherwise valid assignment. Indeed, Courts of Appeals throughout the country have rejected the  
5 very argument that *amici* make here, *i.e.*, that such limitations suggest a sham.

6 Finally, *amici*'s arguments that the Amendment should not be considered because standing  
7 must exist at the time the lawsuit is filed threaten to elevate form over substance at the expense of  
8 judicial resources. As explained in detail below, in situations analogous to this one, numerous courts  
9 have allowed the plaintiff to continue with the lawsuit after an original defect in standing has been  
10 remedied. Here, as in those cases, allowing Righthaven to pursue its claim without having to re-file  
11 its complaint promotes efficiency and judicial economy; the result urged by *amici* does not.<sup>2</sup>

12 Because Righthaven now unquestionably owns the copyright at issue, and because any  
13 original defect in standing has been cured by the Amendment, Righthaven respectfully requests that  
14 the Court not dismiss its complaint.<sup>3</sup>

## 15 **II. ARGUMENT**

### 16 **A. Righthaven Is the Sole Copyright Owner and Sole Party with Standing to Sue.**

17 It is black-letter law that a copyright owner has standing to bring a claim for infringement.  
18 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled  
19 ... to institute an action for any infringement of that particular right ...."). A copyright owner need  
20 not have been the author or original owner; indeed, copyright law recognizes the transferability of  
21 the rights protected by copyright. 17 U.S.C. § 101 ("A 'transfer of copyright ownership' is an  
22 assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a  
23 copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in  
24

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25 <sup>2</sup> For example, as a result of Judge Hunt's decision to dismiss Righthaven's complaint despite the  
26 fact that it presently has standing, Righthaven must now either intervene in the still-pending action  
or re-file its complaint in an entirely new action, needlessly wasting the time and resources of both  
the parties and the court.

27 <sup>3</sup> Righthaven will also move this Court for leave to file an amended complaint in order to remedy  
28 any procedural standing defect arising under the original complaint. Righthaven intends to file its  
motion for leave to amend in the next few days.

1 time or place of effect, but not including a nonexclusive license.”) It is also black-letter law that a  
2 non-exclusive licensee lacks standing to sue for infringement. *See id.*; *Silvers v. Sony Pictures*  
3 *Entm’t, Inc.*, 402 F.3d 881, 898 n. 7 (9th Cir. 2005).

4 Pursuant to the Amendment, there can be no question that Righthaven obtained “all right,  
5 title and interest to said Work such that Righthaven shall be recognized as the copyright owner of the  
6 Work, shall have the right to register said Work with the United States Copyright Office, and shall  
7 have the right to pursue past, present and future infringements of the copyright in and to the Work.”  
8 (Doc. # 26, Ex. 3.) As the owner of the copyright,<sup>4</sup> Righthaven has the ability to exploit its exclusive  
9 rights as it sees fit. Righthaven may reproduce the copyrighted work, create derivative works, assign  
10 the copyright, grant licenses, receive royalty payments and sue for copyright infringement. In short,  
11 Righthaven may utilize the entire bundle of exclusive rights that accompany copyright ownership.  
12 Nothing in the Assignment, Amendment or Operating Agreement (Doc. # 32-2) prevents Righthaven  
13 from doing so. Righthaven granted a non-exclusive license back to Stephens Media to use the  
14 copyrighted work (Doc. #26, Ex. 3 at § 7.2), but that license does not divest Righthaven of its rights.  
15 *See Silvers*, 402 F.3d at 898 n. 7.

16 Nonetheless, *amici* argue that this valid assignment somehow failed to convey the rights  
17 necessary to bring suit for past infringement. The cases on which they rely, however, are factually  
18 distinguishable in all key respects. First, in *Silvers*, the copyright owner executed an “Assignment of  
19 Claims and Causes of Action” in favor of the plaintiff, retaining ownership of the underlying  
20 copyright and assigning to the plaintiff only “all right, title and interest in and to any **claims and**  
21 **causes of action.**” 402 F.3d at 883 (emphasis added). The copyright owner in *Silvers* never  
22 purported to assign the underlying work itself, or any rights protected by copyright. Thus in *Silvers*,  
23 the **only** right, title and interest assigned was the right, title and interest in litigation. That is not the  
24 case here.

25 \_\_\_\_\_  
26 <sup>4</sup> To credit *amici*’s argument, the Court must find that ownership of the infringed work was not  
27 actually transferred. No doubt, a creditor of Righthaven would seek to lien its copyrights in the  
28 event of a default, and no doubt, if Righthaven were ever to file bankruptcy, a bankruptcy court  
would recognize those copyrights as assets of the debtor. *See, e.g., In re Movie Gallery, Inc.*, 2010  
WL 6618894, at \*7 (Bkrcty. E.D. Va. Feb. 25, 2010); *In re Peregrine Entm’t, Ltd.*, 116 B.R. 194,  
203 (C.D. Cal. 1990).

1           The second case relied on by *amici*, *Nafal v. Carter*, 540 F. Supp. 2d 1128 (C.D. Cal. 2007),  
2 is similarly inapposite. As a preliminary matter, *Nafal* was decided under the more narrow 1909  
3 Copyright Act (*id.* at 1138), which, in contrast to the 1976 Copyright Act, did not allow the bundle  
4 of rights protected by copyright to be separable. *Silvers*, 402 F.3d 881 at 896. Moreover, the  
5 plaintiff never alleged that he owned the copyright at issue. Instead he was assigned a purported  
6 one-half interest to an exclusive licensee's rights but lacked any ability to exercise any rights under  
7 the copyright. 540 F. Supp. 2d at 1143. Moreover, in *Nafal*, the plaintiff was not a party to the  
8 original exclusive license agreement with the copyright owner (*id.* at 1141) and the plaintiff was not  
9 actually a co-exclusive licensee because he lacked any of the rights held by the other co-licensee (*id.*  
10 at 1142). Here, by contrast, the original copyright owner, Stephens Media, assigned its entire  
11 copyright directly to Righthaven, and Righthaven granted back to Stephens Media only the right to  
12 exploit the copyright on a non-exclusive basis. Under these circumstances, the only party to the  
13 transaction with any exclusive rights and the only party with standing to sue for copyright  
14 infringement is Righthaven.

15           Finally, Democratic Underground also cites *Althin CD Med., Inc., v. W. Suburban Kidney*  
16 *Ctr., S.C.*, another case where standing was denied to a plaintiff that claimed to have standing not as  
17 the copyright assignee, but as an exclusive licensee under a chain of prior agreements. 874 F. Supp.  
18 837, 840 (N.D. Ill. 1994). Again, the facts in that case are markedly different from those at issue  
19 here. There, the owner-licensor retained the sole right to determine whether or not to bring an  
20 infringement action and gave virtually no right to transfer or assign the license agreement. *Id.* at  
21 843. Thus, the licensee, who then granted a sublicense to the plaintiff, could not have granted  
22 exclusive rights. *Id.*

23           *Amici's* argument, while devoid of authority, is undeniably clever. As *amici* well know, the  
24 assignment and non-exclusive license back structure at issue here effectively deprives the assignor,  
25 Stephens Media, of standing to bring a claim for infringement. If the Court were to endorse *amici's*  
26 argument, it would effectively find that no party has standing to bring suit against the infringer here.  
27 While certain *amici*—such as accused infringer Democratic Underground—would no doubt  
28 welcome such a ruling, the result would not only be unprecedented, it would be directly at odds with



1 the Constitutionally-based system of granting copyright owners exclusive rights to their works in  
2 order to incentivize creativity.

3 **B. Neither the Purpose of the Transaction nor Stephens Media’s Retention of**  
4 **Certain Rights Invalidates the Assignment.**

5 Democratic Underground argues at length that Righthaven’s assignment is merely a “sham”  
6 because of Righthaven’s business purpose and the existence of two provisions in the Amendment: a  
7 provision giving Stephens Media 30 days written notice prior to exploiting the Infringed Work (Doc.  
8 #26, Ex. 3 at § 7.2) and a separate provision giving Stephens Media the option to re-purchase the  
9 copyright (Doc. # 32-1 at 7.). Democratic Underground is wrong.

10 Parties routinely enter into complex agreements transferring intellectual property rights. It is  
11 well-established that these transfers are not invalid simply because the original owner retains some  
12 rights. *See, e.g., Vittoria N. Am., L.L.C. v. Euro-Asia Imports Inc.*, 278 F.3d 1076, 1082 (10th Cir.  
13 2001) (holding that a “thirty-day reassignment clause does not establish that [the trademark  
14 assignment] is a sham”) (citing *Premier Dental Prods. Co. v. Darby Dental Supply Co.*, 794 F.2d  
15 850, 855-56 (3d Cir. 1986) (“[L]imitations in an otherwise valid assignment do not invalidate it”));  
16 *Int’l Armament Corp. v. Matra Manurhin Int’l, Inc.*, 630 F. Supp. 741, 746 (E.D. Va. 1986)  
17 (“Plaintiff’s ownership of the marks is subject to conditions on its license agreement with Carl  
18 Walther, which make that distributorship revocable by Walther for violation of ‘essential’ clauses.  
19 Such limitations on an assignment do not invalidate or make it a sham, however.”)

20 Moreover, the Ninth Circuit, more than 40 years ago, rejected the argument that an  
21 assignment made solely to facilitate a lawsuit is somehow improper. In *Rawlings v. Nat’l Molasses*  
22 *Co.*, 394 F.2d 645, 648 (9th Cir. 1968), the Ninth Circuit held:

23 Defendants make the further point that the arrangement between plaintiff and  
24 [assignor] was accomplished for the sole purpose of permitting plaintiff to bring this  
25 action without joining [assignor] as a party plaintiff or defendant. We assume that to  
26 be true. Defendants urge that the transaction was a sham. The documents were in  
27 fact executed and nothing in the record indicates that as between [assignor] and  
28 plaintiff they are either void or voidable. If not, then the purpose underlying their  
execution is of no concern to the defendants.

Thus, the Ninth Circuit long ago rejected the argument that the purpose behind a business transaction  
or a business itself has any bearing on the issue of standing.

1 Finally, the very case on which *amici* most heavily rely advises the Court to reject *amici*'s  
2 argument. As the Ninth Circuit held in *Silvers*, courts "should interpret the Copyright Act  
3 consistently with the requirement of the Patent Act" because of the fundamental similarity between  
4 the two types of intellectual property rights. 402 F.3d at 888; *see also Davis v. Blige*, 505 F.3d 90,  
5 104 (2nd Cir. 2007) ("Although patent and copyright law function somewhat differently, courts  
6 considering one have historically looked to the other for guidance where precedent is lacking . . . .  
7 Licenses in patent and copyright function similarly . . . .").

8 *Amici* pay no heed to that aspect of *Silvers* and ignore that courts in numerous patent cases  
9 have rejected the argument that an otherwise valid transfer of intellectual property rights made to  
10 confer standing is somehow defective, or a sham, because the motivating business purpose is  
11 litigation. For example, in a highly analogous case in the patent context, the Federal Circuit held  
12 that patent assignments made for the sole purpose of bringing suit are nonetheless valid. *SGS-*  
13 *Thomson Microelectronics, Inc. v. Int'l Rectifier Corp.*, 1994 WL 374529 (Fed. Cir. Jul. 14, 1994).  
14 There, the defendant urged the court to ignore the patent assignment between related corporate  
15 entities because, like here, the agreement was entered for the purpose of conferring standing to sue  
16 for infringement. The defendant also argued "sham" because the assignment required the plaintiff to  
17 assign the patents back at the conclusion of the litigation, a much greater restriction than that present  
18 in this case. *Id.* at \*6. The court rejected defendant's arguments, ruling that "[t]his court and other  
19 courts have held that an assignment that explicitly provides for possible transfer back to the assignor  
20 is nevertheless effective to give the assignee standing." *Id.* The court further held that:

21 the district court erred in granting summary judgment on the ground that the  
22 assignments of the . . . patents were shams because the sole purpose of the assignment  
23 was to facilitate litigation. In so ruling, the trial court ignored the express language in  
24 the assignments and in effect created a new requirement, not found in any case law,  
25 that a patent assignment must have an "independent business purpose."

26 *Id.* Thus, in the very context that *Silvers* advises courts to consider, the Federal Circuit explicitly  
27 ruled that the motive or purpose of an assignment is irrelevant to the assignee's standing to enforce  
28 the exclusive rights conferred and that the assignor's ability to re-acquire its rights does not deprive  
the assignee of its right to bring suit. *Id.* at \*6-7. If the Court were to follow this reasoning, as  
*Silvers* holds it should, *amici*'s arguments must be rejected.

1 In yet another case decided by the Federal Circuit, the court held that a grant of patent rights  
2 was sufficient to confer standing notwithstanding the fact that the grantor retained several rights  
3 relating to the patent. *See Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d  
4 870 (Fed. Cir. 1991). In *Vaupel*, the grantor retained “1) a veto right on sublicensing by Vaupel; 2)  
5 the right to obtain patents on the invention in other countries; 3) a reversionary right to the patent in  
6 the event of bankruptcy or termination of production by Vaupel; and 4) a right to receive  
7 infringement damages.” *Id.* at 875. Despite the grantor’s retention of these rights, the court held  
8 that “none of these reserved rights was so substantial as to reduce the transfer to a mere license or  
9 indicate an intent not to transfer all substantial rights.” *Id.* Here, as in *Vaupel*, the rights retained by  
10 Stephens Media do not negate the exclusive rights conferred to Righthaven; thus, Righthaven is the  
11 owner of the copyright and has standing to sue for infringement.

12 **C. Righthaven’s Status as Assignee and its Standing to Sue for Infringement Are**  
13 **Aligned with Longstanding Principles of Copyright Law.**

14 It is well-established that in copyright law, as in patent and trademark law, parties other than  
15 the original owner-creator may acquire the intellectual property rights and sue for infringement. *See,*  
16 *e.g., Nafal*, 540 F. Supp. 2d at 1132 (rights to copyrighted work, which was created in 1960, had  
17 passed from original owner to heirs by death). Nevertheless, *amicus* Jason Schultz claims, without  
18 citation to *any authority*, that “Congress recognized that if the right to sue could be severed from  
19 copyright ownership, the link between enforcement and creativity would be severed, thus negating  
20 the benefits copyright is meant to ensure.” In other words, Mr. Schultz’s argument presupposes that  
21 the right to sue inalienably lies with the creator of the work. That presupposition is demonstrably  
22 wrong: if the ability to enforce a copyright were limited only to the creator of the work, copyrights  
23 would not be assignable at all, let alone assignable as separate pieces of a bundle of exclusive rights,  
24 as contemplated by the 1976 Act. *See Silvers*, 402 F.3d at 886. By revising the Copyright Act to  
25 allow for the bundle of exclusive rights to be held by separate parties, Congress recognized the right  
26 to separate copyright ownership and its inherent right of enforcement from the creative aspect of the  
27 work. Indeed, it is commonplace in the entertainment industry for the original creator of the work to  
28 be far-removed from the eventual holder of the copyright. To say that only the original creator has

1 the ability to sue for enforcement of copyrights would dramatically change the way corporate  
2 intellectual property transactions occur on a daily basis.

3         Second, and contrary to Mr. Schultz’s contention that Righthaven has “no connection to the  
4 creative or publishing process,” Righthaven was created in order to assist media organizations in  
5 pursuing the infringement of copyrighted works. Without the cooperation of these organizations,  
6 Righthaven would have no assigned copyrights to enforce. The originators of news stories invest  
7 considerable sums paying reporters to investigate and write the news stories, in addition to paying  
8 editors, copywriters and the others necessary to publishing a newspaper, only to have their propriety  
9 content illegally copied and posted elsewhere. As a result of this copyright infringement, these news  
10 organizations are losing revenue, advertisers and readers. Yet, Mr. Schultz does not explain—  
11 because he cannot—how this infringement or its consequences foster creation or further the purposes  
12 of the Copyright Act, as opposed to free-riding copiers. Nor does he address the serious adverse  
13 effects of online copyright infringement to media organizations whose existence depends upon  
14 advertisements and paid subscriptions to their websites. The inconvenient truth behind *amici’s*  
15 posturing is that if Internet infringement of content continues to go unchecked, there will be less  
16 financial incentive to create content, resulting in less content available to the public. While Mr.  
17 Schultz, in his ivory tower of Berkeley, sees fit to cast judgment on Righthaven’s business model,  
18 the fact remains that, in the real world, it is difficult for people to stay in business without a return on  
19 their investment. There are legitimate, and legal, ways of acquiring content that provide a fair return  
20 to the copyright owner. Unfortunately, we have not yet reached a time where those methods are  
21 utilized for most of the content posted online.

22         As the assignee of a valid copyright, Righthaven has the power to exclude others from  
23 unauthorized copying—a power wholly consistent with the purposes of the Copyright Act: to foster  
24 creativity.

25         **D.         Dismissing the Case Now Would Needlessly Exalt Form over Substance.**

26         Finally, *amici’s* position that the Court should disregard Righthaven’s current standing as  
27 copyright owner and dismiss the case if it concludes that standing did not exist under the original  
28 agreements needlessly expends the parties’ and the court’s resources. Under similar circumstances,

1 another district court in this Circuit recognized that requiring a dismissal of the original complaint  
2 after a standing defect was cured “elevates form over substance.” *Northstar Fin. Advisors, Inc. v.*  
3 *Schwab Inv.*, 2011 WL 1312044, at \*3-4 (N.D. Cal. Mar. 2, 2011). In *Northstar*, the Court  
4 effectively allowed the plaintiff to file an amended complaint based on a post-filing assignment in  
5 order to cure the original defect in standing. *Id.* (noting that the cases defendants relied upon simply  
6 recited the rule that standing is considered at the outset of the litigation but failed to address how a  
7 court should treat a post-filing assignment of claim).

8 No doubt there are courts, including some in this District, that will simply dismiss a  
9 complaint if standing did not exist at the inception of the lawsuit. Such cases were cited by *amici*.  
10 Nevertheless, there is a clear split of authority on this issue, and many courts have found good  
11 reason to come to the opposite conclusion and have allowed a plaintiff to proceed with the lawsuit  
12 once a standing defect had been cured. *See, e.g., Gray v. Preferred Bank*, 2010 WL 3895188, at \*3  
13 (S.D. Cal. Sept. 30, 2010) (“Because the defect in standing has been cured, the Court declines to  
14 dismiss the [Second Amended Complaint] on this basis and proceeds to discuss Plaintiffs’ claims for  
15 relief.”); *Bushnell, Inc. v. Brunton Co.*, 659 F. Supp. 2d 1150, 1160-1161 (D. Kan. 2009) (“The  
16 question remains whether the proposed amended complaint which alleges standing as of now would  
17 be sufficient. The Court agrees with *Randolph-Rand* that forcing plaintiff to file a new suit would be  
18 a waste of resources.”); *Haddad Bros. Inc. v. Little Things Mean A Lot, Inc.*, 2000 WL 1099866, at  
19 \*9 (S.D.N.Y. Aug. 4, 2000) (“Initial defects in standing are remediable through an amended  
20 complaint. Where an amendment cures a standing defect, nothing in the nature of that amendment  
21 would prohibit it from relating back to the initial complaint.”); *Valmet Paper Mach., Inc. v. Beloit*  
22 *Corp.*, 868 F. Supp. 1085, 1089-1090 (W.D. Wis. 1994) (“[A] decision that the written assignment  
23 did not cure the standing defect would simply lead plaintiffs to amend the complaint to add the  
24 assignor and then dismiss it as an unnecessary party, or simply to reinstate the lawsuit. Either  
25 alternative would result in needless delay and needless expenditure of the parties’ and the court’s  
26 resources. Thus, holding that the written assignment executed only thirteen days after suit was  
27 commenced did not cure plaintiffs’ standing defect would only ‘exalt form over substance.’”).

28 Given Righthaven’s current standing to sue under the Amendment, dismissal of the lawsuit at

1 this juncture is unwarranted.<sup>5</sup> The parties have already been litigating this action for over one year,  
2 and the issue of standing under the Amendment should be resolved on the merits now, without  
3 further expenditure of judicial resources.

4 **III. CONCLUSION**

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

7  
8 Dated this 22nd day of June, 2011

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<sup>5</sup> If the Court nonetheless concludes that the lawsuit must be dismissed for lack of standing, such dismissal should be without prejudice. *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (“Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment.”); *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332-1334 (Fed. Cir. 2009) (“A dismissal for lack of standing is jurisdictional and is not an adjudication on the merits . . . . The Third Circuit and this court, as well as other regional circuit courts, have repeatedly emphasized that a dismissal for lack of standing should generally be without prejudice, particularly when the defect is curable”); *HT Litig. Trust v. Jess Rae Booth*, 2008 WL 5227300, at \*1 (9th Cir. Dec. 16, 2008) (“Dismissal with prejudice and without leave to amend is not appropriate unless it is clear, upon *de novo* review, that the complaint could not be saved by amendment.”).

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 22nd day of June, 2011, I caused the foregoing document to be served by the Court's CM/ECF system and to be served via U.S. Mail and electronic mail to:

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