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16 UNITED STATES DISTRICT COURT  
17 FOR THE DISTRICT OF NEVADA

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18 RIGHTHAVEN LLC, a Nevada limited liability  
19 company,

20 Plaintiff,

21 v.

22 PAHRUMP LIFE, an entity of unknown origin  
23 and nature; MAREN SCACCIA, an individual;  
24 and MICHAEL SCACCIA, an individual,

25 Defendants.

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

**[PROPOSED] ORDER DISMISSING  
RIGHTHAVEN'S COMPLAINT AND  
DENYING PLAINTIFF'S MOTION TO  
AMEND ITS COMPLAINT**

1 Presently before the Court is the Order to Show Cause why the Court should not dismiss  
2 the instant action for lack of standing (Dkt. # 21) and Plaintiff Righthaven's Motion for Leave to  
3 Amend its Complaint (Dkt. # 45).

4 Righthaven has filed a Response to the Order to Show Cause (Dkt. # 25), an Omnibus  
5 Reply Brief to various *amicus* briefs (Dkt. # 44), the abovementioned Motion for Leave to Amend  
6 (Dkt. # 45), a Supplemental Brief to its Motion for Leave to Amend (Dkt. # 57), and a  
7 Supplemental Reply Memorandum (Dkt. # 62). Defendant Michael Scaccia has filed a Response  
8 to the Order to Show Cause (Dkt. # 30). *Amicus* Democratic Underground has filed a Reply to  
9 Righthaven's Response (Dkt. # 32) and a Response to the Motion to Amend (Dkt. #57). *Amicus*  
10 Professor Jason Schultz has filed an Amicus Brief and Reply Brief (Dkt. # 36 and 46). *Amicus*  
11 Citizens Against Lawsuit Abuse, Inc. has filed an Amicus Brief (Dkt. # 48). *Amici* Democratic  
12 Underground, Professor Schultz, and Citizens Against Lawsuit Abuse have together filed an  
13 Omnibus Reply to Righthaven's Supplemental Brief (Dkt. # 58). *Amicus* Media Bloggers  
14 Association did not file a brief but argued at the hearing. Having considered all of those filings  
15 and the arguments of counsel, the Court makes the following findings and order:

### 16 **BACKGROUND**

17 On January 18, 2010, attorney Steven A. Gibson (through his company Net Sortie  
18 Systems LLC), along with the family of Warren Stephens (through their investment vehicle SI  
19 Content Monitor LLC), executed the Righthaven Operating Agreement ("RHOA," Dkt. # 32-2,  
20 Exh. 1), creating Plaintiff, Righthaven LLC. The RHOA describes Righthaven's business  
21 objectives. Righthaven seeks a "limited, revocable assignment (with a license-back) of copyright  
22 from third Persons." RHOA § 3.2(c). It then obtains copyright registrations listing itself as the  
23 copyright owner and files lawsuits with the understanding that the real copyright owner "would  
24 ultimately enjoy the copyright registration." *Id.* §§ 3.2(c), (d). Righthaven's initial partner was  
25 Stephens Media, LLC ("Stephens Media") (also part of the Stephens family's investments), the  
26 publisher of the *Las Vegas Review-Journal*.

27 Within two months of the execution of the RHOA, Righthaven's litigation campaign  
28 began. *See* Complaint, *Righthaven LLC v. MoneyReign, Inc.*, No. 2:10-cv-00350 (D. Nev. Mar.

1 13, 2010). Since then, Righthaven has filed over 200 lawsuits in this district, including this case,  
 2 which was filed on September 14, 2010. Each of those lawsuits was premised on the allegation  
 3 that Stephens Media assigned various copyrights to Righthaven, which were documented by a  
 4 purported “Assignment” of a *Las Vegas Review-Journal* article.<sup>1</sup> The Assignment in this present  
 5 matter (Dkt. # 26, Exh. 1) purportedly transfers “all copyrights requisite to have Righthaven  
 6 recognized as the copyright owner of the Work for purposes of Righthaven being able to claim  
 7 ownership as well as the right to seek redress for past, present and future infringements of the  
 8 copyright.” In this case, Righthaven asserts that Stephens Media assigned it the copyright to an  
 9 August 14, 2010 *Las Vegas Review-Journal* article entitled “Warden, other employees resign  
 10 from prison in escape fallout.”<sup>2</sup>

11 However, Stephens Media and Righthaven entered into a Strategic Alliance Agreement  
 12 (“SAA,” Dkt. # 26, Exh. 2) that explains what actually happens “[d]espite any such Copyright  
 13 Assignment.” SAA, Section 7.2. The SAA was not disclosed to the public or to this Court until  
 14 recently as a result of other litigation. (*Righthaven LLC v. Democratic Underground, LLC*, 2011  
 15 WL 1457743 (D. Nev. April 14, 2011) (unsealing the SAA)). Instead of the usual benefits of  
 16 copyright ownership, under the SAA “Righthaven shall have no right or license to Exploit or  
 17 participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned  
 18 Copyrights other than the right to proceeds in association with a Recovery.” SAA, Section 7.2. In  
 19 addition, the SAA provided that “Stephens Media shall have the right at any time to terminate, in  
 20 good faith, any Copyright Assignment (the “Assignment Termination”) and enjoy a right of  
 21 complete reversion to the ownership of any copyright that is subject of a Copyright Assignment.”  
 22 SAA, Section 8. While Stephens Media is entitled to half of the recovery from Righthaven’s  
 23 lawsuits (less costs) (SAA, Section 5) when Righthaven filed its complaints, it did not list  
 24 Stephens Media as a party with “a direct, pecuniary interest in the outcome of the case” as  
 25

26 <sup>1</sup>To the Court’s knowledge, the sole exception is *Righthaven v. Allec*, Case No. 2:2011-cv-00532-KJD (filed April 8,  
 27 2011), in which Righthaven allegedly acquired the copyright at issue from a different third party.

28 <sup>2</sup>The article is available, for no charge, on the *Las Vegas Review-Journal* website: [http://www.lvrj.com/news/warden-  
 other-employees-resign-from-prison-in-escape-fallout-100678314.html](http://www.lvrj.com/news/warden-other-employees-resign-from-prison-in-escape-fallout-100678314.html).

1 required by Local Rule 7.1-1 (Dkt. # 5).<sup>3</sup> This failure to disclose Stephens Media's interest  
2 subsequently resulted in an order of sanctions. *Democratic Underground*, Dkt. 138.

3 Before the SAA was disclosed publicly, Righthaven misled "the district judges of this  
4 district to believe that it was the true owner of the copyright in the relevant news articles."  
5 *Democratic Underground*, 2011 WL 2378186 at \*6. It obtained numerous settlements of its  
6 cases. Once the SAA became publicly known, however, several defendants challenged  
7 Righthaven's right to bring its lawsuits, contending that the arrangement between Righthaven and  
8 Stephens Media failed to convey any of the exclusive rights under the Copyright Act, leaving  
9 Righthaven without a cause of action. On April 29, 2011, this Court issued an Order to Show  
10 Cause why it should not dismiss this case for lack of standing.

11 On May 9, 2011, the day its response to this Court's Order to Show Cause was due,  
12 Righthaven and Stephens Media executed a document entitled the "Clarification and Amendment  
13 to Strategic Alliance Agreement." ("Clarification," Dkt. # 26, Exh. 3). The Clarification states  
14 that it amends sections 7.2 and 8 of the SAA and replaces them with new sections 7.2, 8.1 and  
15 8.2. *Id.* On June 14, Judge Hunt found that Righthaven did not own the copyright under the  
16 original SAA. *Righthaven LLC v. Democratic Underground, LLC*, No. 2:10-cv-01356-RLH, \_\_  
17 F. Supp. 2d \_\_, 2011 WL 2378186 (D. Nev., June 14, 2011). On June 20, Judge Pro concurred  
18 and also found that Righthaven did not own the copyright under the Clarification. *Righthaven,*  
19 *LLC v. Hoehn*, No. 2:11-cv-00050-PMP, 2011 WL 2441020 (D. Nev. June 20, 2011).

20 On June 23, 2011, Righthaven moved to amend its complaint pursuant to Rule 15(a),  
21 seeking to add the May 9 Clarification to the allegations in its complaint (Dkt. #45). On July 7,  
22 2011, Righthaven and Stephens Media executed a document entitled the "Amended and Restated  
23 Strategic Alliance Agreement" (the "Restated SAA," Dkt. 57, Exh. 1). On July 11, 2011,  
24 Righthaven filed a Supplemental Brief (Dkt. # 57), seeking leave to file a different amended  
25 complaint that includes allegations about both the Clarification and the Restated SAA.

26  
27  
28 <sup>3</sup>Following an Order to Show Cause why it should not be sanctioned for failing to disclose Stephens Media's interest  
issued in the *Democratic Underground* case, Righthaven filed a revised Certificate of Interested Parties (Dkt. #43).

**DISCUSSION**

To show standing, Righthaven must plead an injury in fact at the time of the complaint. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)) (standing is based upon the facts when the complaint is filed).

Moreover, “[t]he right to sue for an accrued claim for infringement is not an exclusive right under § 106.” *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 884 (2005). “Exclusive rights in a copyright may be transferred and owned separately, but . . . [there are] no exclusive rights other than those listed in § 106.” *Id.* at 885. These rights include reproduction, preparation of derivative works, distribution, and display of copies. 17 U.S.C. § 106(1)-(6).

Accordingly, pursuant to Section 501(b) of the Copyright Act, a plaintiff “must have a legal or beneficial interest in at least one of the exclusive rights described in § 106” to bring a copyright infringement action. *Id.* Thus, “only copyright owners and exclusive licensees of copyright may enforce a copyright.” *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008); *see also Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) (ownership of the copyrighted work is an element of a copyright claim); *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (same). Moreover, “[T]he Copyright Act [does not] permit[] holders of rights under copyrights to choose third parties to bring suits on their behalf.” *Silvers*, 402 F.3d at 889, citing *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 n. 3 (2d Cir. 1982).

Several decisions in this District have examined the SAA and correctly found that it does not transfer true ownership of the copyrighted work to Righthaven. “[T]he SAA in its original form qualifies the Assignment with restrictions or rights of reversion, such that in the end, Righthaven is not left with ownership of any exclusive rights.” *Hoehn*, 2011 WL 2441020, \*5; *accord Righthaven, LLC v. DiBiase*, No. 2:10-cv-01343-RLH, 2011 WL 2473531 (D. Nev. June 22, 2011); *Righthaven, LLC v. Barham*, No. 2:10-cv-02150-RLH, 2011 WL 2473602 (D. Nev. June 22, 2011). “[T]he SAA prevents Plaintiff from obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement action.” *Righthaven, LLC v. Mostofi*,

1 No. 2:10-cv-01066-KJD-GWF, 2011 WL 2746315, \*5 (D. Nev. July 13, 2011). “[T]he plain  
 2 language of the SAA conveys the intent to deprive Righthaven of any right, save for the right to  
 3 sue alleged infringers and profit from such lawsuits.” *Democratic Underground*, 2011 WL  
 4 2378186, \*4. “[T]he SAA makes abundantly clear [that] Stephens Media *retained* the exclusive  
 5 rights, never actually transferring them to Righthaven.” *Id.* at \*6 (emphasis original).

6 Moreover, it is clear from the language of the RHOA that it was never the intent of the  
 7 parties that created Righthaven for true copyright ownership to vest. Instead, Righthaven was  
 8 created solely to acquire a “limited, revocable assignment (with a license-back) of copyright from  
 9 third Persons.” RHOA § 3.2(c). That further supports the finding that Righthaven lacks the  
 10 requisite ownership rights to assert standing in this action.

11 In the wake of multiple decisions finding that Righthaven did not own the copyright,  
 12 Righthaven and Stephens Media signed what they described as a “Clarification” to the SAA on  
 13 May 9, 2011. In its Motion for Leave to Amend (Dkt. # 45), Righthaven initially urged this Court  
 14 to consider the Clarification instead of the original SAA.<sup>4</sup> However, the Clarification fails  
 15 because it is merely an attempt by Righthaven and Stephens Media to impermissibly change the  
 16 facts as pleaded in the Complaint to manufacture standing instead of truly clarifying an ambiguity  
 17 or honest mistake in alleging those facts as they originally stood at the time this lawsuit was  
 18 initiated. *See Democratic Underground*, 2011 WL 2378186, at \*4. Moreover, as Judge Pro  
 19 found, the “May 9, 2011 Clarification . . . does not provide Righthaven with any exclusive rights  
 20 necessary to bring suit.” *Hoehn*, 2011 WL 2441020 at \*6.

21 After the *Hoehn* decision found that the Clarification did not succeed, Righthaven and  
 22 Stephens Media tried once again to alter the SAA, creating the Restated SAA on July 7, 2011,  
 23 and now seek permission in this case to file and serve a second amended complaint, alleging the  
 24 Restated SAA as the basis for standing in this action. However, this approach fails for two

25 \_\_\_\_\_  
 26 <sup>4</sup>Righthaven moved to amend pursuant to Rule 15(a)(2). Rule 15(d) is the appropriate rule for “setting out any  
 27 transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Fed.R.Civ.Proc.  
 28 15(d); *U.S. for Use and Benefit of Wulff v. CMA, Inc.*, 890 F. 2d 1070, 1073 (9th Cir.1989). Because the execution  
 of both the Clarification and the Restated SAA happened after the date of the Complaint that Righthaven seeks to  
 supplement, Righthaven’s motion should have been pursuant to Rule 15(d). *Id.* The Court will treat the motion as a  
 motion to supplement.

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1 reasons. First, as with the Clarification, the Restated SAA does not simply attempt to clarify or  
2 supplement the facts pleaded in the Complaint with additional facts that were present at the time  
3 of filing; rather, the Restated SAA presents a new set of facts with respect to the alleged  
4 copyright ownership for the Court to consider. That is impermissible under the Supreme Court’s  
5 jurisprudence on standing. See *Newman-Green*, 490 U.S. at 830. Second, while Plaintiff  
6 attempts to present the Restated SAA as simply “restating” the original SAA document, the  
7 Restated SAA’s terms substantially contradict the original SAA and the Clarification, as well as  
8 the business objectives of the RHOA. These contradictions cannot be reconciled with the original  
9 Complaint.

10 Righthaven cannot cure its lack of ownership at the initiation of this lawsuit by means of a  
11 *nunc pro tunc* amendment. See *Bushnell, Inc. v. Brunton Co.*, 659 F. Supp. 2d 1150, 1160-61 (D.  
12 Kan. 2009). Defective allegations may be amended, but not defects in the facts themselves.  
13 Because Righthaven has failed to show it possessed an exclusive right under 17 U.S.C. § 106 to  
14 exploit the copyright at issue here at the time it filed suit, this case must be dismissed and the  
15 Motion for Leave to Amend must be denied. *Silvers*, 402 F.3d at 890; *Democratic Underground*,  
16 2011 WL 2378186 at \*4; *Mostofi*, 2011 WL 2746315 at \*2.

17 **CONCLUSION**

18 IT IS THEREFORE ORDERED that Plaintiff’s Motion to Amend the Complaint is  
19 DENIED and Plaintiff’s Complaint is hereby DISMISSED without prejudice.

20  
21 Dated: \_\_\_\_\_

By: \_\_\_\_\_  
The Hon. James C. Mahan  
United States District Court Judge