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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**  
**THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING**

RIGHTHAVEN, LLC,  
Plaintiff,

vs. **NO. 2:10-CV-1575-JCM-PAL**

PAHRUMP LIFE, et al., **MOTION HEARING**  
Defendants.

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**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

WEDNESDAY, JULY 27, 2011  
10:00 A.M.

**APPEARANCES:**

For the Plaintiff: SHAWN MANGANO, ESQ.  
DALE CENDALI, ESQ.

For the Defendants: LAURENCE F. PULGRAM, ESQ.  
CLYDE DeWITT, ESQ.  
J. MALCOLM DeVOY, ESQ.

Amicus Curiae: PROFESSOR JASON SCHULTZ

Reported by: Joy Garner, CCR 275  
Official Federal Court Reporter

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LAS VEGAS, NEVADA, WEDNESDAY, JULY 27, 2011

10:00 A.M.

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P R O C E E D I N G S

THE CLERK: This is the time set for the show cause hearing and plaintiff's motion to amend or correct complaint, Civil Case Number 2:10-CV-1575-JCM-PAL; Righthaven, LLC versus Pahrump Life, and all others.

Counsel, please note your appearance for the record.

THE COURT: Mr. Mangano.

MR. MANGANO: Good morning, your Honor, Shawn Mangano on behalf of Righthaven.

THE COURT: Thank you.

MR. MANGANO: With me is Dale Cendali who has been admitted pro hac vice.

MS. CENDALI: Thank you, your Honor.

THE COURT: Cendali, is that right?

MS. CENDALI: That's right, your Honor.

THE COURT: Thank you. All right.

MR. PULGRAM: Good morning, your Honor, for Amicus Democratic Underground, Laurence Pulgram of the law firm of Fenwick and West.

1 With me is Curt Apsal (phonetic) of the  
2 Electronic Frontier Foundation.

3 THE COURT: Yes, sir.

4 MR. SCHULTZ: Good morning, your Honor,  
5 Jason Schultz. I'm one of the amici as well.

6 MR. DeWITT: Good morning, your Honor,  
7 Clyde DeWitt for Citizens Against Litigation  
8 Abuse, Amicus Curiae. We were allowed to appear  
9 based on your order of June 29th.

10 MR. DEVOY: Good morning, your Honor,  
11 J. Malcolm DeVoy of Randazza Legal Group here on  
12 behalf of Amicus Media Bloggers Association  
13 pursuant to this Court's order. Thank you.

14 THE COURT: Yes, sir. And those of you  
15 who have appeared in front of me before know that  
16 I welcome the amicus people. And I want to hear  
17 other voices I guess and not to say, well, let's  
18 not have a hearing, we'll just decide it on the  
19 papers, or whatever. I always like to give  
20 everybody a chance to be heard. I was going to  
21 say something, but if you want to say something  
22 first, go ahead.

23 MR. MANGANO: No. Go ahead, your  
24 Honor.

25 THE COURT: I've reviewed this with my

1 brain trust. Let me tell you what I'm inclined  
2 to do and I'll give everybody a chance to argue.

3 Righthaven has been involved in  
4 litigation with, you know, in this building, you  
5 know, where other judges have decided cases, you  
6 know, which are interesting but not necessarily  
7 controlling on my thinking. So as I look at  
8 this, though, to cut right to the heart of the  
9 matter, and it's kind of a procedural thing, but  
10 I don't think Righthaven has standing based on  
11 Lujan versus Defenders of Wildlife, 504 U.S. 555  
12 at 571. In footnote 4 it says, the existence of  
13 federal jurisdiction ordinarily depends on the  
14 facts as they exist when the complaint is filed.

15 And then there is a follow-up  
16 case, which I have somewhere here in my  
17 paperwork, Newman-Green versus Alfonzo-Larrain,  
18 490 U.S. 826, 109 S.Ct. 2218. The existence of  
19 federal jurisdiction ordinarily -- this is Roman  
20 numeral number II in the opinion -- let's see,  
21 it's page 2222 of the Supreme Court Reporter and  
22 488 of -- no, I'm sorry, it's at page 2222 of the  
23 Supreme Court Reporter.

24 The existence of federal  
25 jurisdiction ordinarily depends on the facts as

1 they exist when the complaint is filed. And then  
2 it notes there are two exceptions, the defective  
3 under Title 28 USC, Section 1653, defective  
4 allegations of jurisdiction may be amended upon  
5 terms in the trial of appellate court, and that  
6 is to say it again, defective allegations of  
7 jurisdiction which suggests that it addresses  
8 only incorrect statements about jurisdiction that  
9 actually exist and not the affects of the  
10 jurisdictional facts themselves.

11 And then the second exception is  
12 Rule 21 which has since been amended, but anyway  
13 this case where it has been interpreted by the  
14 Second Circuit in Herrick, H-E-R-R-I-C-K,  
15 Company, Inc. versus SCS Communications, Inc.,  
16 251 F.3d, 315 at 329, Second Circuit, a 2001  
17 case. And it says, quote, as a result where the  
18 facts necessary to the establishment of diversity  
19 jurisdiction are subsequently determined to have  
20 obtained all along, a federal court may simply  
21 allow a complaint to be amended to assert those  
22 necessary facts. And again the allegations that  
23 need to be corrected, then we can correct the  
24 allegations, and then treat diversity  
25 jurisdictions having existed from the beginning,

1 but no such amendment is possible when the  
2 underlying facts (and not merely the pleadings)  
3 are inadequate to support federal jurisdiction.  
4 For curing jurisdiction in such a circumstance  
5 requires more than just changing the pleadings.

6 And the facts here are that, and  
7 now I'm going to rely on other decisions as well,  
8 but as other courts have found, you know, there  
9 was no federal jurisdiction under the agreement  
10 with Stephens Media. So what I'm inclined to do  
11 is to dismiss the case based on lack of  
12 jurisdiction. Now I'll be glad to hear whatever  
13 people have to say.

14 MS. CENDALI: Your Honor, may I take  
15 the podium?

16 THE COURT: Yes, ma'am, sure.

17 MS. CENDALI: Thank you.

18 First off, thank you, your  
19 Honor, for granting my pro hac petition and for  
20 letting me be here today.

21 THE COURT: Ms. Cendali, put your right  
22 hand on the slant and find the button on the  
23 slant. That's how you adjust the microphone. So  
24 that's your tax dollars at work. So hit the  
25 button again and it will go down.

1 MS. CENDALI: Does that seem the best  
2 angle there?

3 THE COURT: I think so.

4 MS. CENDALI: All right, thank you very  
5 much. I had a similar problem once at the United  
6 States Supreme Court, and Judge Scalia suggested  
7 I lower the podium to the maximum extent possible  
8 so I think I'll do the same here today.

9 THE COURT: Oh, all right, that's fine.

10 MS. CENDALI: In any case, your Honor,  
11 Righthaven does have standing today with regard  
12 to the restated and amended Strategic Alliance  
13 Agreement. No court has construed that  
14 agreement. That agreement is on all fours with  
15 the Silvers case in the Ninth Circuit. It is not  
16 a bare right to sue but fully grants the right to  
17 Righthaven in all rights to the copyrights at  
18 issue in this case including the right to sue.

19 THE COURT: You speaking now of the  
20 amendment, is that right?

21 MS. CENDALI: That's right.

22 THE COURT: Okay, but we go by the  
23 facts as they existed at the time the lawsuit was  
24 filed.

25 MS. CENDALI: So let's focus on that.

1 Your point is that in the Lujan case you need to  
2 look at the facts as they existed at the time the  
3 complaint was filed. Well, we have cited cases  
4 which our opponents have not tried to distinguish  
5 such as --

6 THE COURT: Oh, just wait, just wait.

7 MS. CENDALI: Well, such as Valmont,  
8 Travelers, Gallans, Novende (all phonetic), all  
9 of which accepted post filing facts as giving  
10 rise to standing. And those courts, and I think  
11 the Northstar decision in the Northern District  
12 of California, a 2011 decision, is particularly  
13 helpful and say that --

14 THE COURT: So you're saying I should  
15 follow the Northern District of California rather  
16 than the Supreme Court?

17 MS. CENDALI: No. The difference is  
18 you have to read the rule that, of course, we're  
19 not arguing that standing is not to be considered  
20 at the time the complaint is filed, but almost  
21 all of those cases, and as far as I know all of  
22 the cases that have discussed this, have not also  
23 dealt with the issue of a motion for leave to  
24 amend to supplement the pleadings to plead the  
25 new jurisdictional facts.



1                   In fact, the Haddad (phonetic)  
2 case in the Second Circuit specifically noted  
3 that while a lot of cases cite the old saw that  
4 you need to look at the facts at the time the  
5 complaint was filed, they don't deal with the  
6 more sophisticated issue of when you have a  
7 motion for leave to amend in light of subsequent  
8 events.

9                   THE COURT: But I mean the facts have  
10 changed?

11                   MS. CENDALI: Yes, the facts have  
12 changed, fundamentally have changed. The  
13 business agreement that was originally entered  
14 into is no longer the same business agreement  
15 that it is today and what the Northstar case in  
16 the -- in the --

17                   THE COURT: But I mean what Supreme  
18 Court cases say is that allegations, you can  
19 change allegations, but you can't -- you can  
20 amend, well, where you want additional  
21 allegations, but not where you want to change the  
22 facts.

23                   MS. CENDALI: But the issue is how you  
24 reconcile that with the issue of a motion for  
25 leave to amend which we've liberally granted.

1 Again in the Northstar case, it discusses the  
2 fact that there the argument, similar to what's  
3 being made here by the amici, is that, well, it's  
4 too late because we looked at what happened on  
5 the day of the original filing, that's all you  
6 looked at.

7                   And the court said that this  
8 argument elevates form over substance and goes on  
9 to say that although there's no published Ninth  
10 Circuit authority on this point, courts in other  
11 circuits have found that parties may cure  
12 standing deficiencies through supplemental  
13 pleadings. And thus, because in that case there  
14 was a subsequent assignment that cured in that  
15 case the admitted lack of existing standing  
16 originally, because there was that subsequent  
17 assignment, the court said, I'm going to deny the  
18 motion for -- the motion to dismiss and permit  
19 the supplemental pleading.

20                   And the court did this for a  
21 very practical reason because the alternative, as  
22 we know, standing is a jurisdictional issue with  
23 dismissal without prejudice. The complaint can  
24 be re-filed tomorrow based on the new restated  
25 and amended Strategic Alliance Agreement which

1 has never been viewed by any court, and we would  
2 end up delayed but in the same position we are in  
3 now, and the courts recognize why go through that  
4 as a matter of judicial economy. Isn't it  
5 practical under Rule 15 to permit an amendment?  
6 There's relation back under Rule 15, let it amend  
7 back, relate back, to the original filing and  
8 let's get on with it.

9                   There's already been an answer  
10 filed. Let's get to the merits and we'd very  
11 much like to get to the merits, your Honor. So  
12 our point is that there is a line of cases.  
13 Northstar I thought was helpful because it's  
14 2011, and it summarized a lot of the law.  
15 There's a line of cases that say, yes, absolutely  
16 you need to look at standing at the time of  
17 filing, but you also need to read that in  
18 conjunction with subsequent facts and a motion  
19 for supplemental pleading.

20                   And in light of those cases and  
21 in light of the practicality, it makes more sense  
22 we respectfully submit to accept the  
23 supplemental -- or grant our motion for leave to  
24 amend and let the case proceed to the merits  
25 phase because alternatively your Honor will

1 dismiss without prejudice which is the rule and  
2 we'll be re-filing, and it will just take that  
3 much longer to get to the actual merits of the  
4 copyright infringement here.

5 Thank you.

6 THE COURT: All right. Opposition?

7 MR. PULGRAM: Thank you, your Honor.

8 THE COURT: Yes, sir. Mr. Pulgram?

9 MR. PULGRAM: Yes, sir.

10 THE COURT: Yes.

11 MR. PULGRAM: Thank you for allowing  
12 the amici to appear because this is an important  
13 issue and the particular issue that you have is a  
14 slightly progressed version of what has come  
15 before the other courts here. Your Honor is  
16 exactly correct that the case should be dismissed  
17 for lack of standing under the Lujan line of  
18 cases and five cases in this jurisdiction have so  
19 held. Those aren't binding on your Honor as  
20 precedent, but we do believe and we'll talk about  
21 in a moment about whether they are collateral  
22 estoppel.

23 Second, all of those cases have  
24 held, as your Honor is stating, that when they  
25 not manufacture facts to create jurisdiction,

1 that was the language used by Judge Dawson in the  
2 Mostofi case, which is a final judgment in which  
3 he said, plaintiffs and Stephens Media attempt to  
4 impermissibly amend the facts to manufacture  
5 standing. That just doesn't work as a matter of  
6 federal practice. And I think the argument being  
7 made here is twofold on the part of plaintiffs.

8 First, we would like to amend  
9 even though we can't, and if you don't let us,  
10 we'll have to sue again. And our position, your  
11 Honor, is that this is not after a finding that  
12 there was no standing because there was no  
13 ownership of the copyright. That is not going to  
14 be a dismissal without prejudice and, in fact,  
15 those cases that have already dismissed on the  
16 basis of lack of ownership of Righthaven, all of  
17 which are the five cases before yours, all of  
18 those cases also have preclusive effect here, and  
19 let me explain if I may.

20 In the typical situation of a  
21 copyright case there are two elements that need  
22 to be shown, ownership of a copyright and a  
23 copyright. The element of ownership is an  
24 element of the claim. Now, in addition, the  
25 element of ownership is an element of standing.

1 And so when Judge Hunt, Judge Dawson, Judge Pro  
2 concluded there was no ownership under the SAA in  
3 Righthaven, they concluded that an element of the  
4 claim of copyright is missing.

5 THE COURT: And just for the record,  
6 SAA is the Strategic Alliance Agreement for the  
7 record, but go ahead.

8 MR. PULGRAM: I'm sorry to use the  
9 jargon but exactly right, and that was the  
10 agreement that existed at the beginning of this  
11 case and, Judge, in the Hoehn case Judge Pro even  
12 went on to say that the clarification so-called  
13 did not create an ownership interest. Now it  
14 has, therefore, been settled that under the SAA  
15 there is no ownership interest in Righthaven and  
16 that isn't --

17 THE COURT: But they respond what about  
18 this second -- I'm going to use the wrong  
19 terminology -- but the second amendment, if you  
20 will, to the Strategic Alliance Agreement?

21 MR. PULGRAM: So we have --

22 THE COURT: And understand what I'm  
23 saying, I'm saying, okay, I understand these  
24 other judges ruled against Righthaven, but now  
25 with the second amendment to the Strategic

1 Alliance Agreement, that cures all of that.

2 MR. PULGRAM: And the answer to that  
3 is, it does not because it has already been  
4 concluded that under the Strategic Alliance  
5 Agreement whether you amend it later or not,  
6 under the Strategic Alliance Agreement there is  
7 no ownership. You cannot after a judgment of a  
8 court, of which there have been four saying that  
9 this is no ownership, come back, change the facts  
10 and avoid preclusive effect.

11 And I think there are two cases  
12 that I would like to provide to your Honor and  
13 your brain trust on this point because we  
14 received yesterday a brief at 6:58 in the morning  
15 that for the first time addressed this question  
16 of collateral estoppel. We briefed the issue in  
17 our June 27th brief. We got their first brief on  
18 this yesterday and, if I may, I'll hand you  
19 copies of the cases.

20 THE COURT: Sure, yes, sir. Have you  
21 provided --

22 MS. CENDALI: They provided it moments  
23 ago, your Honor.

24 THE COURT: Well, this case I think we  
25 originally set for hearing back in May I think,

1 and somebody wants to file something and, like I  
2 say, it's my preference is I want to hear more  
3 rather than less so --

4 MR. PULGRAM: These are two multiple  
5 copies of two cases.

6 THE COURT: Okay.

7 MR. PULGRAM: And I did provide them as  
8 soon we got copies from Kinko's this morning  
9 before the hearing, but the first case is a case  
10 out of the Northern District of Illinois, Judge  
11 Shadur, and it was affirmed in the Seventh  
12 Circuit. And the place to start is the very last  
13 page which is his first decision.

14 And the last paragraph says  
15 because Hyperquest is not an exclusive licensee  
16 of any of the rights that it now claims, it is  
17 without standing to bring the current action.  
18 Accordingly both the complaint and this action  
19 are dismissed for lack of subject matter  
20 jurisdiction. So just like all the courts and  
21 your Honor can find no ownership, no exclusive  
22 rights, no standing, to dismiss this, and he  
23 calls it lack of subject matter jurisdiction.

24 If you turn to the second page  
25 of this, he explains because one of the parties



1 said, Judge, that was a dismissal without  
2 prejudice, that was just subject matter  
3 jurisdiction. And in the bottom right-hand  
4 corner, he explains, no, that was with prejudice,  
5 and I'll read that paragraph.

6 THE COURT: Yes, sir.

7 MR. PULGRAM: By sharp contrast, what  
8 was at issue in this case was not subject matter  
9 jurisdiction in the real sense, but rather the  
10 standing, or more accurately the lack of  
11 standing, of Hyperquest to file suit in a case in  
12 which, one, a copyright indisputably existed and;  
13 two, this court had ample power to decide all  
14 issues of that copyright's validity and its  
15 claimed infringement. And then he says, in the  
16 order, this court rejected HQ's litigative effort  
17 definitively and with prejudice because of its  
18 lack of standing, not because of the absence of  
19 power of subject matter jurisdiction.

20 And so what Judge Shadur said  
21 and what the Seventh Circuit said is, I dismissed  
22 it because there was no ownership of an exclusive  
23 right. I called it lack of jurisdiction, but  
24 it's the part of jurisdiction standing that is  
25 about justiciability not about power and,

1 therefore, it's a dismissal with prejudice. And  
2 that's why, your Honor, those decisions by the  
3 other courts have collateral estoppel effect  
4 here, and it's why your Honor when you dismiss  
5 because the SAA has no -- has no ownership  
6 interest in Righthaven, it should be a dismissal  
7 with prejudice.

8                   Now, the plaintiffs argue we  
9 just want to re-file with this new restated  
10 agreement and that's where the second case that I  
11 handed you, the Penonia (phonetic) case, comes  
12 in. The plaintiffs have in their brief yesterday  
13 cited a lot of cases that say a dismissal for  
14 lack of jurisdiction, a dismissal just for lack  
15 of jurisdiction, is not collateral estoppel. So  
16 all that Judge Hunt and Judge Mahan decided was  
17 there was no jurisdiction because we didn't own  
18 the copyright, that's not collateral estoppel.

19                   They cited a lot of cases for  
20 that proposition, none of which dealt with  
21 ownerships of copyrights, not any, and none of  
22 which dealt with this case, the situation where  
23 the merits are intertwined with standing,  
24 intertwined with jurisdiction, and what the  
25 Penonia Farms case shows is that where a court

1 has dismissed a claim based on lack of ownership,  
2 that is collateral estoppel, and I would direct  
3 the point to the -- the court to the third of the  
4 pages of this decision, the paragraph ending  
5 two-thirds down on the right-hand side.

6 THE COURT: I was looking at the head  
7 notes. I'm sorry, the first page?

8 MR. PULGRAM: On the third page.

9 THE COURT: On the third page, I'm  
10 sorry, let me catch up to you. Oh, on the  
11 right-hand side, yes, sir.

12 MR. PULGRAM: Right. At the bottom of  
13 that paragraph there is a sentence that begins  
14 about seven lines up, the bottom of the last full  
15 paragraph. This court finds that the Southern  
16 District of New York Federal Court thoroughly  
17 investigated the effect of the 1990 settlement  
18 agreement in Penonia Farm's ownership interest in  
19 Penonia One, reconsidered the issue in Penonia  
20 Two. Therefore, a court of competent  
21 jurisdiction did actually and necessarily  
22 determine the standing issue, thus satisfying the  
23 second prong of the Yamaha test, and the Yamaha  
24 test is the test for issue preclusion. So what  
25 we have is a decision because it decided

1 ownership that is preclusive.

2 THE COURT: But their response is,  
3 well, we've amended the Strategic Alliance  
4 Agreement, now we do have ownership.

5 MR. PULGRAM: That's right.

6 THE COURT: And no court has addressed  
7 that.

8 MR. PULGRAM: That's exactly what they  
9 say, your Honor, and they say pay no attention to  
10 the fact that the agreement that was litigated on  
11 which we sued has been conclusively determined to  
12 not grant standing. We are changing nunc pro  
13 tunc what happened in the last year-and-a-half,  
14 and I know Judge Hunt said, I know Judge Hunt  
15 ruled, and I know the DiBiasi decision entered  
16 judgment that, quote, the plain language of the  
17 SAA conveys the intent to deprive Righthaven of  
18 any right save for the right to sue alleged  
19 infringers and profits from such lawsuits.

20 I know that's what has been  
21 decided to be what happened in this case, but  
22 we're changing all of that now. We're coming in  
23 after a judgment was entered, after preclusive  
24 effect has been obtained, and we're now creating  
25 a new set of facts. And we want to sue on it,

1 and we want to sue on the same SAA, the exact  
2 same contract. We're just restating it because  
3 we get, when we don't like the decision that has  
4 come down in a prior case, to paper over it by  
5 changing the language of the contract.

6 THE COURT: But I mean parties can  
7 amend their agreements any time they want to.

8 MR. PULGRAM: They sure can.

9 THE COURT: And so here we've got  
10 this -- if I can call it the Strategic Alliance  
11 Agreement One, Strategic Alliance Agreement Two,  
12 and by my count, and you bicker with me and say,  
13 no, it's three, or two, or whatever, but now it  
14 looks like the third incarnation of the Strategic  
15 Alliance Agreement.

16 MR. PULGRAM: That's right.

17 THE COURT: No judge has determined  
18 this Strategic Alliance Agreement doesn't confer  
19 ownership, or I mean there's just no judge has  
20 addressed that, no court has addressed that.

21 MR. PULGRAM: No court has determined  
22 whether or not if this had been the original  
23 Strategic Alliance Agreement, it could have  
24 created ownership, but the courts are not time  
25 travelers, and I would respectfully suggest that

1 my esteemed New York counsel isn't either such  
2 that they can go back to the time that the SAA  
3 was entered and decide I know there's been a  
4 final adjudication, but the intent was to give  
5 Righthaven nothing.

6 We're changing that after the  
7 fact. We are undoing -- we're undoing the rule  
8 on what the SAA meet and we're -- because we can  
9 because we want to nunc pro tunc say the  
10 opposite. The Strategic Alliance Agreement issue  
11 number three, version number three says, recites,  
12 that it is the intention of the parties -- that  
13 it was the intention of the parties that  
14 Righthaven receive all rights of an ownership and  
15 the copyright. It's been decided exactly the  
16 opposite that that's not what the SAA did.

17 And so if you come in after the  
18 fact and you try to rewrite an agreement to  
19 create a claim that has already been denied,  
20 that's undoing the courts' decisions. And I  
21 think it goes back to the question of what is  
22 collateral estoppel issue preclusion about? And  
23 the Supreme Court has made that pretty clear in  
24 explaining that the doctrine is invoked by the  
25 courts to promote conclusive resolution of

1 disputes.

2 I'm quoting here from Montana  
3 versus United States, 440 U.S. 147 at 153. The  
4 doctrine is invoked by the courts to promote  
5 conclusive resolution of the disputes thereby  
6 protecting parties from the expense of multiple  
7 lawsuits, conserving judicial resources, and  
8 increasing the reliability and consistency of  
9 judicial decisions. That's exactly why we should  
10 only have one adjudication about the SAA in this  
11 case and that's exactly why the plaintiffs can't  
12 come in after that.

13 We cited the FM Industries case  
14 for the proposition that a party cannot simply  
15 amend its agreement to get around a judgment.  
16 It's not been responded to by the plaintiffs, and  
17 that court specifically was a copyright case  
18 where the parties came in after the judgment and  
19 they asked for relief. I think it was under Rule  
20 59 or 60, and the court said, no, I'm not going  
21 to allow you to change my judgment by rewriting  
22 the agreement. And that's what's happening here.

23 Now, that's why the procedure  
24 says this case is over. There are other reasons  
25 why the substance of the restated agreement

1 couldn't amount to a claim anyway, and I believe  
2 that is sufficiently before the Court. Our  
3 procedural position is that your Honor shouldn't  
4 allow them in because Lujan prohibits it and  
5 because all of these other cases were decisions  
6 on the merits.

7           If you get past that issue, then  
8 we're talking about whether or not this restated  
9 agreement is real and whether it's something that  
10 could be amended, and our position is that it is  
11 not. And our position is that, in fact, this is  
12 further propagating or perpetuating the fraud on  
13 the court that Judge Hunt explained in his  
14 sanctions order. I don't know if you've had a  
15 chance to read it, but it was two weeks ago and  
16 he ordered it delivered to every other court in  
17 this jurisdiction and in Colorado that had these  
18 issues.

19           The new agreement contradicts in  
20 its recitation of intent the express findings  
21 that Judge Hunt has made. It contradicts the  
22 prior agreements. The prior agreements said that  
23 after Righthaven was to be given so-called  
24 exclusive rights, it was going to license back  
25 all-exclusive rights. That was the SAA. The



1 first amendment, the so-called clarification  
2 said, when we said that the license back to  
3 Stephens Media was exclusive, we didn't really  
4 mean that. We meant that it was nonexclusive,  
5 and they inserted the word "non" and then they  
6 said, but Stephens Media has a right to veto any  
7 further license or use by Righthaven.

8           And once Judge Pro rejected that  
9 in the Hoehn case, they said, oh, third  
10 clarification, now the nonexclusive license back  
11 to Stephens Media doesn't have Stephens Media  
12 with the right to veto anymore. So the point is  
13 that each of these agreements are just  
14 contradictory. They are not statements of true  
15 intent. They are not what the parties agreed to  
16 or were doing. They are efforts above all else  
17 to create some status, some possible patina for a  
18 claim, and that's not a basis upon which a new  
19 claim can be made here.

20           I would just add that the  
21 restated amendment also contradicts history. For  
22 the last eighteen months, Righthaven has acted  
23 exclusively as an agent to sue people. The  
24 restated agreement purports on its face to say  
25 during those eighteen months, that was not its

1 status, it was an actual licensee with a right to  
2 license people. And, in fact, we have before  
3 your Court, your Honor, a copy of the LLC  
4 Operating Agreement for Righthaven, and even that  
5 says that its job is to sue people, and at the  
6 end of those lawsuits the copyrights will, must,  
7 be given back to the party who gave them.

8 The restated agreement would  
9 just perpetuate the very fraud for which they  
10 were sanctioned, and for that reason even if you  
11 assume that there was any basis under Lujan and  
12 under collateral estoppel rules that it could be  
13 added, even if you assume that, it's not a basis  
14 upon which a claim could be made now in this case  
15 or in the future.

16 You know, it was interesting to  
17 me to read the brief that we received yesterday  
18 morning which said that the defendants in this  
19 case or my law firm is interested in creating a  
20 copyright free zone on the Internet.

21 THE COURT: A copyright free zone?

22 MR. PULGRAM: A copyright free zone was  
23 the rhetoric, and what's also interesting is that  
24 every case that is brought by Righthaven that has  
25 gotten to the question of infringement has been

1 lost by Righthaven. Every single case in which  
2 there's been a determination of whether there's  
3 infringement or not, at least three have come out  
4 at summary judgment to the contrary.

5                   What we are defending, your  
6 Honor, what the amici are here about is to  
7 establish a shakedown free zone where real  
8 lawsuits are filed by real parties who have real  
9 grievances and real ownership interest and not by  
10 people who can easily file hundreds of actions  
11 against the unrepresented, against people who  
12 have to go out to get pro bono counsel all over  
13 the country in an effort to shakedown nuisance  
14 settlements.

15                   That's why we're here and we  
16 think that your Honor has before you all the  
17 facts to do exactly what you started with today  
18 to dismiss this case, to dismiss it with  
19 prejudice, and to end this lawsuit by this party  
20 under this agreement, the SAA restated or not,  
21 against this defendant.

22                   THE COURT: All right. Thank you, Mr.  
23 Pulgram.

24                   MS. CENDALI: Your Honor, may I respond  
25 to this, please?

1 THE COURT: No, you'll get a chance to  
2 respond at the end. I've got another hearing  
3 that started twelve minutes ago.

4 MR. PULGRAM: I apologize, your Honor.

5 THE COURT: No, no, I mean it just so  
6 happens this got continued so often that I wanted  
7 to get it on calendar as quickly as possible.

8 Professor, good to see you  
9 again.

10 PROFESSOR SCHULTZ: Good to see you,  
11 thank you, your Honor. I'll try and keep this  
12 brief as well. I want to just add two points in  
13 trying to focus a little bit more on copyright  
14 policy and the Copyright Act and the Silvers  
15 decision because I think from the sort of big  
16 picture point of view, I want to make sure that  
17 what happens here is consistent for all the  
18 cases, not just Righthaven cases, but all  
19 copyright cases.

20 So I want to start with one  
21 solid reason why it might make sense to dismiss  
22 this case and not allow amendment, and that is  
23 that one important policy that's in the Copyright  
24 Act is that when you have a prevailing party,  
25 attorney's fees are available and costs. And

1 that's something that is used quite often on both  
2 sides, both the copyright plaintiffs to get fees  
3 when they win and defendants when they win.

4           And, in fact, you know it's  
5 certainly one of the things that is at issue here  
6 in a lot of these cases, and so one of the things  
7 that I think I saw going on with these amendments  
8 was that there's sort of this language about  
9 restatement clarification, but I think I agree  
10 with you, your Honor, that in some ways it's not  
11 a do-over. It's not like they are trying to do  
12 the same thing over and over, but yet a series  
13 like, you know, you make a movie, and then a  
14 sequel, and then a third one, and you're sort of  
15 trying to get it, you know, kind of down the  
16 road.

17           And it actually makes a  
18 substantive difference, all right, because if you  
19 don't have a valid copyright claim when you file  
20 your complaint, then you are subject to fees and  
21 costs if you lose and the defendant wins. And so  
22 I think in Section 505 of the Copyright Act,  
23 which clearly states that a prevailing party is  
24 eligible for fees and costs, that's an important  
25 policy that actually would back up a reason for

1 dismissing the case is not just allowing  
2 perpetual amendments.

3           The second point that I would  
4 like to make is to actually take a look at the  
5 Silvers case a little closer as to a few  
6 different places where the Ninth Circuit talked  
7 about why the rule they instituted was important  
8 and actually talked about why Congress passed  
9 Section 501(b) specifically in the statute  
10 because I think it's easy on some level to say  
11 that maybe this new agreement, if you read  
12 specific words in it, meets the single line  
13 holding in Silvers.

14           But I actually don't think  
15 that's true when you look at what the agreement  
16 is really trying to do and also what Silvers is  
17 trying to do, what the Ninth Circuit en banc  
18 decision was trying to do because actually what  
19 was interesting to me is how little discussion of  
20 Silvers there was in detail in the plaintiff's  
21 briefing, and I just wanted to highlight a couple  
22 of things that I find there.

23           First is that there's an  
24 explicit statement that the Copyright Act does  
25 not permit copyright parties to choose third

1 parties to sue on their behalf, and in that  
2 specific instance it was that there was an  
3 assignment of the bare right to sue. So the  
4 screen writer in Silvers who, you know, the  
5 writer had claimed that the movie was copied from  
6 her writings. She got a bare right to sue, and  
7 the court said, no, that you don't have standing,  
8 but the reason was for this fundamental principle  
9 that you can't outsource your enforcement, and  
10 that the court talks about the kind of history of  
11 who could sue.

12                   And I don't want to go into a  
13 lecture, but let me just focus on one area which  
14 is that originally actually under the 1909  
15 Copyright Act, not only did the copyright owner  
16 have to be the one who sued, but you couldn't  
17 even split up a copyright. There are lots of  
18 different parts of a copyright you can have  
19 exclusive rights to reproduce, to distribute, to  
20 perform publically a song, or a movie, or  
21 something like those little pieces of it, a  
22 bundle of sticks as they say in law school,  
23 right?

24                   And in the 1976 Act, Congress  
25 amended it to say actually, okay, we're going to

1 allow you to split that up, but the reason they  
2 did it, and Silvers says this explicitly, was  
3 because Congress is aware of constraints on  
4 commercial dealings, that there were certain  
5 kinds of exploitations of the copyright. Say you  
6 wrote a book and someone wanted to make a movie  
7 of it, and you wanted to license or give them the  
8 rights to do that exclusively over here, but then  
9 someone wants to do an audio book over here, and  
10 you want to do it a different thing, you are able  
11 to split it up in order to kind of exploit the  
12 copyright to make more works available, to make  
13 money off of it, and that the enforcement that's  
14 written into Section 501(b) is to back that up,  
15 right, it's to allow people who go out and do  
16 business to back it up.

17 So I just wanted to kind of  
18 highlight that because when I look at the  
19 amendments here, again this is -- I don't mean to  
20 sort of, you know, harp on the same point, but it  
21 even though in theory they say that Righthaven  
22 has this right to exploit the copyright, there's  
23 no indication that they're doing anything of that  
24 sort that this is really about litigation, and so  
25 I wanted to just sort of focus on the Silvers



1 case in those two respects because I think if the  
2 Court were -- I agree actually that there might  
3 be a number of procedural issues in Lujan and all  
4 these other cases.

5 But if the Court even does get  
6 to this new agreement, I think the Silvers case  
7 actually talks more broadly about why this right  
8 to sue needs to be really held by the same people  
9 exploiting the copyright and not allowed to  
10 wander and the copyright to become fragmented.  
11 And that's really what Congress's purpose was, so  
12 that aligned with the attorney's fees provision,  
13 I think are two additional reasons why I agree  
14 with your Honor, and I think the decision can  
15 focus in the instructions. So thank you.

16 THE COURT: All right, thank you.

17 Mr. DeWitt?

18 MR. DeWITT: Good morning, your Honor.

19 THE COURT: Good morning.

20 MR. DeWITT: As I said, I represent an  
21 organization called Citizens Against Lawsuit  
22 Abuse, and at their request the single issue I  
23 have written on is that Righthaven is a law firm  
24 engaged in the unauthorized practice of law.  
25 There's only two points I want to make because my

1 other counsel here are much more esteemed than I  
2 am.

3 One is I think just for the  
4 public, you need to write an opinion in this case  
5 and publish it, and I think it's very, very  
6 important to the Scaccias and the other ones of  
7 the world against whom Righthaven is engineering  
8 stickup after stickup after stickup. And the  
9 second point is it's very important this case be  
10 dismissed with prejudice both for the claim  
11 preclusion, issue preclusion, reasons that my  
12 co-counsel has addressed so well, and because if  
13 you dismiss it without prejudice, the defendants  
14 don't have the resources to appeal.

15 They don't know how to do this  
16 and they don't even have a lawyer. And so what's  
17 going to happen if assuming the Ninth Circuit as  
18 I'm confident it would uphold your ruling, then  
19 it will just be another stickup. And it is so  
20 important to get to the prejudice issue because  
21 just a matter of public policy and a matter of  
22 fairness to the defendants in this case and,  
23 goodness knows, how many other defendants.

24 I'm not going to go into what I  
25 put in my brief about why it's a law firm engaged

1 in the unauthorized practice of law, but I can  
2 only make -- there's two points that are  
3 important. One thing that is in my brief, the  
4 attorneys represent Righthaven. Righthaven  
5 represents Stephens Media. Okay, Stephens Media  
6 goes to Righthaven and talks to them about the  
7 cases. It's not a privileged communication.  
8 Righthaven isn't a lawyer, it doesn't claim to be  
9 even though it's a law firm in fact.

10 And as to all these Strategic  
11 Alliance Agreements, the Court needs to look at  
12 substance over form. If you put a duck in a  
13 chicken suit, it's still a duck. And I mean they  
14 can write clever language in a Strategic Alliance  
15 Agreement, which I'm sure they'll have ten more  
16 amendments to in response to the Court's response  
17 to what they're doing, but it's not what the  
18 agreement says, it's what's really going on.

19 And what's really going on is  
20 Righthaven is a law firm. It's engaged in the  
21 unauthorized practice of law, and it's very  
22 important that the Court find that and give the  
23 Ninth Circuit a chance to agree with you, which  
24 I'm confident that it will for the reasons that  
25 are in my brief. Every state that's addressed

1 this has come to that conclusion, and the cases  
2 are all in there. Otherwise, my esteemed  
3 colleagues are doing better than I am, so I'll  
4 let them talk.

5 THE COURT: All right. Thank you, sir.  
6 Mr. Devoy?

7 MR. DEVOY: Thank you, your Honor.

8 THE COURT: Yes, sir.

9 MR. DEVOY: I will be brief. Recapping  
10 what my colleagues have said, I'm specifically  
11 addressing the Court's need to not allow  
12 Righthaven to have leave to amend its brief.  
13 Specifically doing so would be futile. First of  
14 all, it is moot because Righthaven does not have  
15 standing and there is no way that amending its  
16 complaint will simply cure that. It cannot go  
17 back in time and change this with another  
18 amendment to an agreement that has already been  
19 found to not confer its standing from a  
20 standpoint of justiciability.

21 What Righthaven has done the  
22 first time is to put -- to have in its agreement,  
23 and now by restating it again, it's put a beard  
24 on it as Mr. DeWitt pointed out, and as  
25 Righthaven somewhat hypocritically points out by

1 arguing about form over substance, Righthaven's  
2 relationship with Stephens Media and its lack of  
3 ownership of these copyrights is not going to  
4 change until its conduct changes, and its conduct  
5 is not going to change. What Righthaven is doing  
6 in this case and has been doing in other cases is  
7 attempting to create an army of zombie lawsuits,  
8 things that have been settled, things that have  
9 been set aside, in an effort to undermine this  
10 Court's principles of finality and of preclusive  
11 effects, and of prejudice in order to keep these  
12 lawsuits alive for whatever purpose it's  
13 accomplished.

14                   These don't deserve to be alive.  
15 They shouldn't be. They should have all have  
16 been dismissed, and in many cases they have been  
17 resolved for a point of judgment, yet they are  
18 being re-filed under the pretense, the mistaken  
19 pretense, that changing an agreement after the  
20 fact and after the rights have transferred  
21 somehow changes the facts many years in the past.  
22 The other problem is that even if Righthaven got  
23 everything that it wanted, it wouldn't change the  
24 fact that these lawsuits ignore important First  
25 Amendment principles.

1                   Most importantly, every single  
2 case where a motion for summary judgment has been  
3 brought by counsel, I understand that in this  
4 case it hasn't happened because the defendants  
5 have been pro per, but when evidence is put on  
6 the record, Righthaven has not won a single  
7 dispute on fair use because it is not in the same  
8 market as content producers, it is in the market  
9 of lawsuits. It is a separate market and unless  
10 somebody else is claiming ownership of a  
11 copyright and suing on it, it is not competing  
12 with Righthaven.

13                   Allowing Righthaven to re-file  
14 this lawsuit ignores that, and it also allows  
15 them to continue on with this enterprise that  
16 harms the First Amendment. It puts people into  
17 their basement where they're afraid to talk,  
18 they're afraid to entrap one another, and they're  
19 afraid to come out and to produce content because  
20 it might infringe upon what somebody else has  
21 done. Moreover, and as we represent bloggers as  
22 the Media Bloggers Association's counsel, we also  
23 have to uphold the provisions of copyright  
24 owners.

25                   Allowing Righthaven to continue

1 on with this lawsuit and to further amend its  
2 complaint harms the interest of legitimate  
3 producers of content who own their own content  
4 and sue on their own content by retaining  
5 attorneys rather than a complex transfer of  
6 rights that doesn't transfer anything at all.  
7 And Righthaven has done more damage to the  
8 interests of intellectual property holders than  
9 Perfect Ten, Incorporated, which has filed  
10 numerous lawsuits and strengthened the provisions  
11 of fair use and given more protections to website  
12 operators and Internet hosts.

13 It is important to understand  
14 the relationship within the copyright between  
15 content producers and content consumers, however,  
16 the way that this is being done ignores important  
17 First Amendment principles, punishes the most  
18 protected kind of speech that we have in public  
19 forums, such as the Internet, about public  
20 matters of policy, politics, and other issues of  
21 debate and tries to commoditize (phonetic) them  
22 in what Mr. Schultz characterized as a secondary  
23 market for lawsuits.

24 The U.S. Government, it is to  
25 nobody's surprise, heavily regulates these

1 secondary markets, and if it intended to create  
2 one for copyrights, it would be reflected in the  
3 Copyright Act. To allow amendment of this and  
4 for this lawsuit to persist and this model to  
5 proliferate undermines these goals, harms the  
6 court, harms producers, and it harms people who  
7 are trying to exercise their free speech rights  
8 guaranteed by the First Amendment.

9 Thank you.

10 THE COURT: Thank you.

11 Ms. Cendali, now you can get a  
12 chance to reply.

13 MS. CENDALI: Thank you.

14 I will attempt to respond  
15 briefly to the gist of the comments. First, if  
16 there is a dismissal, we still believe that the  
17 Court should grant our motion for leave to amend.  
18 It clearly should be without prejudice. All the  
19 other dismissals in the other district courts in  
20 this -- have ruled on this and have done it  
21 without prejudice because that is what the law is  
22 when it's simply an issue of standing and  
23 jurisdiction that doesn't reach the merits.

24 Second, there's no preclusive  
25 effect here. It's clearly the overriding



1 takeaway that I get from especially Mr. Pulgram's  
2 argument is that the amici want to prevent this  
3 court or any court from ruling on the third  
4 version, the restated amendment, and that's  
5 because conspicuously absent from their brief is  
6 really any challenge to the third amendment of  
7 the restated agreement as to why it doesn't  
8 comply with Silvers.

9                   No court has ruled on the  
10 restated amendment. That's the bottom line.  
11 Because of that to deny us, Righthaven, the right  
12 to file a new lawsuit based on a new agreement is  
13 violation of due process and it fails the issue  
14 preclusion requirement that there has to be an  
15 identity of issues. There's no identity of  
16 issues between the restated amendment and the  
17 original SSA (sic).

18                   Moreover, the case that Mr.  
19 Pulgram mentioned that he copied from Kinko's,  
20 presumably heard about before and he sent it to  
21 Kinko's for copying, was a summary judgment  
22 decision where the court specifically said even  
23 in the language read that there was a full  
24 opportunity for the court to hear and understand  
25 the issues before ruling. This is a motion to

1 dismiss. They want to summarily adjudicate on a  
2 motion to dismiss fundamental property rights.  
3 That's antithetical to both the law and to the  
4 constitution.

5 That's a violation of due  
6 process and is not supported by any authority  
7 that I am aware of. Moreover, conspicuously  
8 absent from their discussion of other cases is  
9 Judge Navarro's decision in Virginia Citizens,  
10 and in that case Judge Navarro denied a motion to  
11 dismiss and that was not either with regard to  
12 the current restated amendment saying that they  
13 pled that they had ownership rights and we'll  
14 test it out in discovery and see.

15 I suggest that Judge Navarro's  
16 approach is also a very practical approach that  
17 this Court should take. She wrote a very recent  
18 opinion. We'd be happy to provide your Honor  
19 with a copy of it if your Honor doesn't have it.  
20 It said that, look, if there is an issue on this,  
21 let's decide it, you know, after a full  
22 development of the record.

23 Finally, on the issue of the  
24 amendment, counsel completely ignores a comment  
25 that your Honor made which is that parties always

1 have the right to amend and enter into new  
2 agreements, and this is something that the United  
3 States Supreme Court in Sprint Communications, a  
4 case cited in our recent brief, specifically said  
5 there, too -- it wasn't a copyright case, but it  
6 was a case similarly where somebody was -- there  
7 were aggregators who were suing on various  
8 collection cases.

9           And the Supreme Court said if  
10 there was some issue with the assignment, the  
11 parties could readily fix it by entering into a  
12 new agreement. So the Supreme Court certainly  
13 believes in the freedom of contract and agrees  
14 that you are not forever bound to whatever  
15 agreement you may have entered into two years ago  
16 and have no ability to change that agreement  
17 based on guidance from the various courts.

18           The other thing is that we've  
19 heard from our opponents is a lot of talk about,  
20 well, you know, you're bad, Righthaven, because  
21 you want to file lawsuits and that's a bad thing.  
22 And I think that counsel, with respect, totally  
23 misconstrues the Silvers case and what it holds  
24 because Silvers simply says if all you have is  
25 the right to sue, you don't have the right to

1 sue.

2                   What Silvers says is that as  
3 long as you have any one of the exclusive rights  
4 under the copyright law, you have the right to  
5 sue that goes with that. They're turning it on  
6 its head and trying to say, well, you can't, your  
7 purpose can't ever be as the copyright order to  
8 file lawsuits, but Silvers said, look to patent  
9 law. Silvers in the key area of the case says  
10 because patent law and copyright law are similar,  
11 especially for issues of assignment, it's  
12 instructive to look to patent law.

13                   And when you look to patent law,  
14 you look to what -- the case I believe is highly  
15 on point here, which is the SGS Thomson case  
16 versus International Rectifier cited in our  
17 omnibus brief that we submitted in the course of  
18 this briefing, and there Judge Michel, Chief  
19 Judge Michel, writing for the federal circuit  
20 rejected a very similar argument that you're  
21 hearing the professor and others making here with  
22 the idea that there's somehow something wrong  
23 with exercising as part of your ownership rights  
24 the right to bring a suit.

25                   The federal circuit found that

1 the district court erred in granting summary  
2 judgment on the grounds that the patent  
3 assignment in issue was a sham because the sole  
4 purpose was to facilitate litigation -- sole  
5 purpose to facilitate litigation. The federal  
6 circuit held in so ruling the trial court ignored  
7 the express language of the assignment and in  
8 effect created a new requirement not found in any  
9 case law that a patent assignment must have an  
10 independent business purpose.

11 The motive or purpose of a  
12 patent assignment is irrelevant to the assignee's  
13 standing to enforce the assigned patent. This is  
14 the key language. Even a motive solely or  
15 expressly to facilitate litigation is of no  
16 concern to the defendant and does not bear on the  
17 effectiveness of the assignment citing the United  
18 States Supreme Court language in discovery  
19 records case. So the idea that there's something  
20 wrong with choosing as part of your ownership  
21 rights to file lawsuits is fundamentally flawed.  
22 And equally fundamentally flawed is the idea that  
23 there's something noble about copying other  
24 people's intellectual property on the Internet.

25 These cases will ultimately I

1 hope be decided on the merits where the court can  
2 look at the facts and properly view under the  
3 First Amendment analysis under the fair use test  
4 and see whether, in fact, there's an  
5 infringement. I was taught if you're taking  
6 somebody else's property wholesale, copying it in  
7 toto, and using it for your own self and selling  
8 ads to make money as a result of it, that's theft  
9 and there's a right to bring that claim.

10 THE COURT: How many times should you  
11 be permitted to amend?

12 MS. CENDALI: Well --

13 THE COURT: I mean because, you know,  
14 you want to amend your complaint, but we're on  
15 the third amendment, frankly, aren't we?

16 MS. CENDALI: We are, your Honor.

17 THE COURT: I mean you understand what  
18 I'm saying, you didn't amend the complaint, but  
19 basically you did because you've amended the  
20 agreement. This is a third incarnation of the  
21 agreement.

22 MS. CENDALI: I don't see any reason to  
23 have to amend after this point.

24 THE COURT: I understand, but should it  
25 be with prejudice or without prejudice because

1 you've had one bite at the apple, two bites at  
2 the apple, and now you want a third bite of the  
3 apple.

4 MS. CENDALI: But there's been no --  
5 there's been no judicial -- it would be -- it  
6 would be --

7 THE COURT: It would be, it's the third  
8 amendment, isn't it? I mean I know you haven't  
9 amended the complaint three times, but you've  
10 amended the contract three times -- two times.

11 MS. CENDALI: But there's been no --  
12 but there's been no judicial ruling as to whether  
13 the amended contract provides standing. They  
14 can't have it two ways. Look at it this way --

15 THE COURT: No, but answer my question.

16 MS. CENDALI: Okay.

17 THE COURT: Right? This is the  
18 third -- I mean you had one amendment, now you've  
19 amended it again. I mean this is like amending  
20 the complaint. I mean somebody comes in and says  
21 I want to amend my complaint. All right, I'll  
22 give you a chance to amend your complaint. Okay,  
23 now they come back. It's still no good. Well,  
24 give me another chance. Okay, here's another  
25 chance. And that's where we are, is it not?

1 MS. CENDALI: There's only been a  
2 single motion to amend before you, your Honor,  
3 and --

4 THE COURT: I know that.

5 MS. CENDALI: But the point is they  
6 can't have --

7 THE COURT: But the point is -- the  
8 point is you've amended the complaint, you've  
9 amended the underlying contract, the Strategic  
10 Alliance Agreement.

11 MS. CENDALI: And we have the right to  
12 do that under the Supreme Court's ruling.

13 THE COURT: That's correct, but you've  
14 amended that which in effect amends the complaint  
15 because it changes the basis upon which the case  
16 is brought.

17 MS. CENDALI: Right, and if that's the  
18 case --

19 THE COURT: So there's one amendment,  
20 two amendments, how many times do you get to  
21 amend?

22 MS. CENDALI: Your Honor, if we -- if  
23 you -- they have just argued to you that you  
24 should not consider the restated and amended  
25 agreement because it wasn't in existence at the



1 time of the original --

2 THE COURT: Well, I can't care what  
3 they say. I mean, right, you've amended it,  
4 you've amended this case --

5 MS. CENDALI: So if the restated if you  
6 want to deem --

7 THE COURT: You've amended this case  
8 twice now.

9 MS. CENDALI: And if you want to deem  
10 the restated and amendment before the court, then  
11 we should have a discussion right now as to  
12 whether the restated and amended agreement is  
13 valid under the Silvers test or not. We believe  
14 that it is valid.

15 THE COURT: Well, we're here because  
16 they're saying you still don't have standing.

17 MS. CENDALI: Right, and what they have  
18 not articulated any reason why version three does  
19 not convey standing. Your point in your  
20 tentative was --

21 THE COURT: Well, except they have.  
22 What you're trying to do is reverse court  
23 decisions. Other courts have said, well, you  
24 don't have any standing, and you say, well, okay,  
25 let me work on this agreement. Well, you still

1 don't have any standing. Okay, well, let me work  
2 on it some more. So you're just trying to create  
3 jurisdiction and you want to amend to keep  
4 creating jurisdiction.

5 MS. CENDALI: Your Honor, all we're  
6 saying is that there has been no decision on  
7 version three of the agreement. As a result of  
8 that, to prohibit us from ever re-filing this  
9 case --

10 THE COURT: Well, you've got other  
11 cases you've filed. There are other cases,  
12 aren't there? Is that the end then, are there no  
13 more Righthaven cases after this?

14 MS. CENDALI: Well, your Honor, you  
15 would have to decide that the restated version  
16 three which wasn't in existence as of the time  
17 the case was --

18 THE COURT: And, in fact, contradicts  
19 the terms of the original agreement.

20 MS. CENDALI: It doesn't contradict the  
21 terms of the original agreement.

22 THE COURT: Well, sure it does because  
23 it says we intend to assign all the rights.  
24 That's not what -- that wasn't in the first  
25 agreement.

1 MS. CENDALI: But that's consistent,  
2 there's no contradiction.

3 THE COURT: Well, sure, so then I don't  
4 need -- then we don't need to have the amendment  
5 because if there's no contradiction, then that's  
6 the same agreement. I've got the same agreement  
7 in front of me I had before then.

8 MS. CENDALI: Your Honor, there has --  
9 on jurisdiction and standing there is no basis  
10 for a decision --

11 THE COURT: Well, no, no, you said  
12 there's no contradiction. There is a  
13 contradiction.

14 MS. CENDALI: There's not a  
15 contradiction. The intent of the parties was  
16 always to --

17 THE COURT: But the intent of the  
18 parties is what they express. We don't say, now  
19 what did you intend? Well, I intended really to  
20 create a brand new hamburger to sell to  
21 McDonald's. Well, that's not what your agreement  
22 says. Well, that's what I intended. And so the  
23 intent of the parties is what they express.

24 They can't say, well, no, I know  
25 what we said. I know we said that we were going

1 to create a car, build a car, but I meant to --  
2 what we intended was I was going to create a  
3 hamburger. Well, I don't care what you say your  
4 intent is, does it square with what the terms of  
5 the agreement are?

6 MS. CENDALI: And it does, your Honor.

7 THE COURT: And it doesn't because you  
8 didn't have the right to sue -- I'm sorry --  
9 that's all you had was the right to sue. You  
10 didn't have the underlying copyright.

11 MS. CENDALI: That's apparently your  
12 view with regard to the original --

13 THE COURT: Well, let's see, let me  
14 call Judge Hunt and see if he agrees, and Judge  
15 Dawson and see if he agrees, and Judge Whoever  
16 and see if they agree.

17 MS. CENDALI: But now we're talking  
18 about the version three.

19 THE COURT: No, now we're talking about  
20 how that contradicts the first two.

21 MS. CENDALI: It doesn't contradict it,  
22 it amends it. It changes it, it's a new set of  
23 facts.

24 THE COURT: It contradicts it. It  
25 doesn't contradict it so that you always have the

1 right -- that you had all of the rights under the  
2 copyright law, right, and you always had that.  
3 Why did you amend it then? Why did you amend it  
4 once? Why did you amend it twice if you already  
5 had those rights? There's no need to amend it,  
6 is there?

7 MS. CENDALI: We amended it because  
8 other courts have found that there was a problem  
9 with standing under the original and under the  
10 second version and in order to moot any issue --

11 THE COURT: Well, what did they find?  
12 They found based on the language of the contract.

13 MS. CENDALI: Under the first and the  
14 second but not the third.

15 THE COURT: Exactly, contradicted.  
16 This contradicts the terms of the first and the  
17 second.

18 MS. CENDALI: But no court found  
19 anything with regard to the third, your Honor,  
20 and that's the key point.

21 THE COURT: But this contradicts the  
22 terms of the first and the second, does it not?

23 MS. CENDALI: No, it doesn't, it  
24 changes it.

25 THE COURT: Well, sure it does. It

1 does because you didn't have these rights,  
2 otherwise, why would you amend it if it didn't  
3 contradict them? You're contradicting it to try  
4 to give us jurisdiction. That's the only reason  
5 you're amending it. So let's amend it again,  
6 let's amend it again. Does it contradict? Of  
7 course, it does because under the first agreement  
8 you didn't have any right to -- you didn't have  
9 all the copyright rights that you are supposed to  
10 have. So then we'll change it. So you changed  
11 it. That contradicts the terms of the first,  
12 doesn't it? Yes, it does, yes, it does.

13 MS. CENDALI: It changes the change of  
14 the first.

15 THE COURT: Yes, it does, it does.

16 MS. CENDALI: It changes the terms of  
17 the first absolutely.

18 THE COURT: It absolutely contradicts  
19 it.

20 MS. CENDALI: It's absolutely different  
21 from the change of the first.

22 THE COURT: Well, thank you, finally.

23 MS. CENDALI: So it totally changes the  
24 terms of the first agreement.

25 THE COURT: And the second.

1 MS. CENDALI: And the second.

2 THE COURT: That's right.

3 MS. CENDALI: Absolutely, and so the  
4 point is that third agreement has not been ruled  
5 on.

6 THE COURT: The point is you've already  
7 amended it twice. You're saying let me amend it  
8 again, let me amend it again. What about the  
9 formation of Righthaven where counsel tells me  
10 that in the formation documents they agree that  
11 at the end of the litigation the copyright gets  
12 returned to Stephens Media. That contradicts the  
13 terms of the third agreement.

14 MS. CENDALI: No, it doesn't contradict  
15 the terms of the third agreement. Right now the  
16 only party with standing to sue is Righthaven  
17 because Stephens Media only has a nonexclusive  
18 license to use the copyright. So if you were to  
19 decide that Righthaven had no ability even under  
20 a new agreement that was not originally before --

21 THE COURT: But answer my question. I  
22 can tell you're a lawyer. You know, yeah, the  
23 parameters of the paradigm are such that the  
24 confluence of factors bearing on the -- what?  
25 What in the world are you saying? Answer my

1 question.

2 MS. CENDALI: What's your question, your  
3 Honor?

4 THE COURT: Should I have the court  
5 reporter read it back? I mean obviously you  
6 weren't listening I guess.

7 MS. CENDALI: Forgive me, I don't  
8 understand it.

9 THE COURT: What about the formation  
10 documents of Righthaven?

11 MS. CENDALI: Right. The formation  
12 documents of Righthaven --

13 THE COURT: They say that at the end of  
14 litigation then the copyright reverts back to  
15 Stephens Media.

16 MS. CENDALI: Right, and that is not  
17 antithetical with the -- in the SGS case, the  
18 federal circuit case that I was discussing  
19 earlier, the federal circuit said the fact that  
20 an assignment provides for a right of reversion  
21 does not mean that it's not a bona fide  
22 assignment that gives the right to sue. They  
23 have cited no case law that that provision in the  
24 operating agreement means that Righthaven --

25 THE COURT: But I mean what we've got



1 here are a series of amendments just trying to  
2 give us jurisdiction. That's the way it seems to  
3 me. I mean there's no other reason for these  
4 amendments other than to try to create  
5 jurisdiction.

6 MS. CENDALI: But the fundamental  
7 business deal has changed, it used to -- that the  
8 original agreement Righthaven got much narrower  
9 rights. Now, under the new agreement it has all  
10 right, title, and interest. Stephens Media only  
11 has a nonexclusive right to use, which doesn't  
12 even give it standing to sue. The copyright law  
13 is clear that there's no standing to sue under  
14 those circumstances.

15 Stephens Media has no ability to  
16 make decisions on who can file a lawsuit or when.  
17 It has no ability to get the copyrights back  
18 whenever it wants it. All the -- if you look at  
19 the Silvers case and the Nafal case and the cases  
20 that find it, under all the decisions in that  
21 case under the third agreement, there's clearly a  
22 grant of copyright to Stephens -- to Righthaven  
23 and with it the right to sue.

24 THE COURT: All right, I'm going to  
25 grant the motion to dismiss, but it's always my

1 preference to do it without prejudice. So I'm  
2 giving you -- but I'm telling you I'm running out  
3 of patience with all of these amendments. Now,  
4 understand and don't be technical and say, oh, we  
5 haven't amended the complaint before. In effect  
6 you have by amending the Strategic Alliance  
7 Agreement, the agreement on which the lawsuit is  
8 based. So there we are. So I'll dismiss it  
9 without prejudice.

10 MS. CENDALI: Thank you, your Honor.

11 MR. PULGRAM: Could I have twenty-two  
12 seconds, your Honor?

13 THE COURT: Twenty-two, you got it.  
14 And understand it's just -- I want people to have  
15 their day in court.

16 MR. PULGRAM: And we appreciate that,  
17 your Honor, you've been very generous.

18 THE COURT: And understand, too, none  
19 of us has focused on this third incarnation, and  
20 it may be Casper, the friendly ghost, or I don't  
21 know what it is, but, you know, I'm just  
22 reluctant to say, no, you are out of time, you're  
23 out of luck.

24 MR. PULGRAM: Then I'll take one minute  
25 and twenty-two seconds.

1 THE COURT: Okay.

2 MR. PULGRAM: All right, first with  
3 respect to the third amendment, there are two  
4 ways and two reasons why it doesn't matter. The  
5 first is that there's already a judgment that the  
6 SAA did not create standing. That is collateral  
7 estoppel. Now, the point I stood up to make is  
8 this, counsel stated that the dismissals by the  
9 other courts on the standing issue were -- was,  
10 quote, without prejudice and with leave to amend.

11 I suggest that those decisions  
12 be reviewed because they do not say that the  
13 dismissal was without prejudice. They do not say  
14 that it was with leave to amend. They say I  
15 dismissed because there was no standing because  
16 there was no ownership and as we looked at the  
17 case earlier, that is a dismissal with prejudice  
18 on the merits. And so that's reason one why you  
19 don't get to the third agreement at all. This is  
20 over. It's been decided. And the second  
21 reason --

22 THE COURT: Wait, wait, let me stop you  
23 right there.

24 MR. PULGRAM: Yes, yes.

25 THE COURT: One thing you don't want to

1 do is mislead a judge.

2 MR. PULGRAM: Absolutely.

3 THE COURT: You told me these were  
4 without prejudice these other dismissals. I mean  
5 I've got this other case and these people have  
6 been waiting patiently to --

7 MS. CENDALI: Your Honor, if this is  
8 helpful, under Federal Rule of Civil Procedure  
9 41, in voluntary dismissals for lack of  
10 jurisdiction is deemed a dismissal without  
11 prejudice unless the court expressly states  
12 otherwise. That's what Federal Rule of Civil  
13 Procedure 41 says. There's nothing as far as I  
14 know in any of these opinions that says, that  
15 states, that it's with prejudice.

16 THE COURT: Well, you didn't say that  
17 before, did you?

18 MS. CENDALI: So that's --

19 THE COURT: You didn't say that before,  
20 did you?

21 MS. CENDALI: I did --

22 THE COURT: You did not say that  
23 before, did you? Rule 41 says that, you didn't  
24 tell me that before. You're relying on Rule 41,  
25 is that what you're telling me now?

1 MS. CENDALI: Yes, it's none of them  
2 say they're with prejudice, that means they are  
3 without prejudice.

4 THE COURT: You didn't say that before.  
5 You said these are dismissals without prejudice.  
6 So I'm looking here to see were they without  
7 prejudice or with prejudice and you're saying,  
8 well, no, I'm relying on Rule 41. Why didn't you  
9 tell me that before? All right, go ahead.

10 MR. PULGRAM: So Rule 41 is not the  
11 rule that applies when you have a determination  
12 of standing and ownership which is a  
13 determination on the merits.

14 THE COURT: I understand.

15 MR. PULGRAM: Second, regardless of the  
16 fact that these agreements are completely -- that  
17 these amendments are foreclosed by the prior  
18 decisions, we've gone through the reasons why all  
19 of those contradictions mean they can't state a  
20 claim. And, therefore, it should be with  
21 prejudice so we don't have to come in here and do  
22 this again. Thank you, your Honor.

23 THE COURT: I appreciate it. And again  
24 my preference is just I want to be sure that  
25 everybody gets their day in court and that we

1 have and full and fair hearing. None of us has  
2 really focused -- and by that I mean the parties  
3 either. I mean you've discussed it more than any  
4 of the courts have, but it's just I want  
5 everybody to have a fair shake at it.

6 So I'm going to order this  
7 dismissal without prejudice, all right?

8 MS. CENDALI: Thank you, your Honor.

9 THE COURT: Thank you. We'll in be  
10 this recess. Oh, Mr. Pulgram, now let me put the  
11 burden on you to prepare an appropriate order if  
12 you would, please.

13 MR. PULGRAM: We will, your Honor.

14 THE COURT: And I realize it's not  
15 your -- your preference was with prejudice, but  
16 prepare an appropriate order and submit that, if  
17 you would, please.

18 MR. MANGANO: Could I review that?

19 THE COURT: Pardon me?

20 MR. MANGANO: Could I review that  
21 before it's submitted?

22 THE COURT: Yeah, but understand they  
23 win, they prevailed. So I mean I'm not going to  
24 say, oh -- I mean I won't let them misstate  
25 anything, but I'm not inclined to give you a lot

1 of leeway.

2 MR. MANGANO: No, I understand.

3 THE COURT: But, yeah, run it by Mr.  
4 Mangano, please.

5

6 (Whereupon, the proceedings concluded.)

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12 I hereby certify that pursuant  
13 to Section 753, Title 28, United States Code, the  
14 foregoing is a true and correct transcript of the  
stenographically reported proceedings held in the  
above-entitled matter.

15 Date: August 29, 2011

/s/ Joy Garner  
JOY GARNER, CCR 275  
U.S. Court Reporter

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