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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15 RIGHTHAVEN, LLC, a Nevada limited liability
16 company,

17 Plaintiff,

18 vs.

19 BILL HYATT, an individual

20 Defendant.

Case No. 2:10-cv-01736

***AMICUS CURIAE'S REPLY TO
RIGHTHAVEN LLC'S REPOSE TO
MEDIA BLOGGERS
ASSOCIATION'S MOTION TO FILE
AMICUS CURIAE BRIEF OR,
ALTERNATIVELY, APPLICATION
FOR BRIEFING SCHEDULE TO
RESPOND TO PROPOSED AMICUS
CURIAE BRIEF***

23 **AMICUS CURIAE'S REPLY TO RIGHTHAVEN, LLC'S RESPONSE,**
24 **OR APPLICATION FOR BRIEFING SCHEDULE**

25 Non-party organization Media Bloggers Association (hereinafter, the "*Amicus*") hereby
26 replies to Plaintiff Righthaven LLC's (hereinafter, "Righthaven[']s" or the "Plaintiff[']s")
27 Response to Media Bloggers Association's Motion to File Amicus Curiae Brief or, alternatively,

1 Application for Briefing Schedule to Respond to Proposed Amicus Curiae Brief (hereinafter, the
2 “Opposition”) (Doc. # 22).

3 **I. Introduction**

4 In its Opposition, Righthaven raises a number of misdirected and highly irrelevant
5 arguments in an effort to keep *Amicus*’ research and analysis away from the Court’s eyes.
6 Righthaven claims that *Amicus*’ proposed *amicus curiae* Brief (Doc. #19-1) (hereinafter, the
7 “Brief”), which addressed the constitutional limit on damages that a court can award upon
8 default, should be denied as untimely. But *Amicus*, whose members enforce their own
9 copyrights, does not contest the entry of default judgment, and thus any earlier entry into this
10 case would have been improper. *Amicus*’ only interest here is Righthaven’s attempt to secure
11 unconscionable damages that have no relationship to any harm Righthaven has actually suffered
12 or any other basis. *Amicus*’ concern is with how such a damages award would affect its
13 members’ interests, and it therefore has spoken only at a juncture appropriate to consideration of
14 what it has to say.

15 Contrary to the insinuation by Righthaven, there is no alliance between *Amicus* and
16 Defendant Bill Hyatt (hereinafter “Hyatt,” or the “Defendant”). *Amicus* has made this submission
17 to protect the interests of its own membership. Neither *Amicus* nor *Amicus*’ counsel represent
18 Hyatt, nor have they had any communications with him. Decl. of Ronald D. Coleman ¶¶ 2-3;
19 Decl. of J. Malcolm DeVoy ¶¶ 2-3. Moreover, *Amicus*’ motion and accompanying brief (Doc. #
20 19, 19-1) are not a Rule 55(c) motion to set aside the default judgment; nor does *Amicus* wish to
21 see the default set aside. In fact, *Amicus*’ interests are aligned with those of Righthaven when it
22 comes to whether a defaulting party in a copyright infringement lawsuit should be held liable for
23 the claims in the complaint. *Amicus*’ position is that a party that fails to answer a complaint
24 *should* be deemed to have waived his right to contest the allegations therein. As stated above,
25 however, *Amicus*’ sole assertion concerns the amount and nature of damages that Righthaven
26 should be able to recover in this case. To the extent it matters, and to resolve any doubt, *Amicus*
27 stipulates that a default judgment should be imposed against Hyatt. *Amicus*’ sole interest is in

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1 edifying the Court on factual and legal issues, so as to inform the Court's application of its
2 discretion to fashion an award in this case.

3 Having eliminated the "default" strawman, and acknowledging that the only issue before
4 the Court is Righthaven's damages for copyright infringement, it is respectfully submitted that
5 *Amicus* has made the proper argument at the proper time: the award of damages, both in terms of
6 the recovery to which Righthaven is entitled and the constitutional limits governing this Court's
7 ultimate award.

8 **II. Statement of Facts**

9 Righthaven commenced its action against Defendant on October 6, 2010 (Doc. #1).
10 Defendant failed to appear or otherwise answer the Complaint filed against him, and the Court's
11 clerk entered judgment against Defendant on January 12, 2011. (Doc. #9.) Righthaven filed its
12 Motion for Default Judgment (Doc. #12) on February 8, 2011, followed by its Amended Motion
13 for Entry of Default Judgment (Doc. #17) on February 10, 2011. *Amicus* filed its Motion for
14 Leave and Brief (Docs. #19, 19-1) on February 23, 2011, which Righthaven opposed on March
15 10, 2011 (Doc. #22).

16 **III. Argument**

17 *Amicus'* Motion for Leave and accompanying Brief (Docs. #19, 19-1) are properly before
18 this Court. Given *Amicus'* stake in this Court's damages award, and the Defendant's complete
19 lack of participation in this important case, it is perfectly appropriate for *Amicus* to participate
20 and have its Brief considered by this Court. The arguments and information set forth within the
21 Brief are useful to the Court, and will, *Amicus* respectfully submits, inform the Court's
22 determination of damages. Because *Amicus'* Brief addresses the damages that Righthaven is
23 entitled to by law and the circumstances of this case, and not the propriety of the entry of a
24 default judgment, *Amicus'* Motion and Brief are timely before this Court, as it has not yet ruled
25 on that issue.

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1 **A. The Court Should Grant Amicus' Leave to File the Motion.**

2 ***1. Amicus' Participation in this Case is Appropriate Given Amicus' Nature,***
 3 ***Membership and Relationship to this Issues at Bar.***

4 *Amicus'* participation in this case is appropriate because of its stake in this litigation's
 5 outcome, particularly the Court's award of damages to Righthaven. In its reliance on *Long v.*
 6 *Coast Resorts, Incorporated*, 49 F. Supp. 2d 1177 (D. Nev. 1999), Righthaven overlooks more
 7 recent trend in this District of allowing *amicus* briefs by parties interested in the litigation. *See*
 8 *U.S. v. Perelman*, Case No. 2:09-CR-00443-KJD-LRL, 2010 WL 3312627 (D. Nev. Aug. 19,
 9 2010) (accepting non-participant's *amicus* brief); *PEST Committee v. Miller*, 648 F. Supp. 2d
 10 1202, 1214 (D. Nev. 2009) (treating motions to intervene as *amicus* briefs). Righthaven itself
 11 has, in some of its many recent cases, been faced with courts allowing *amicus* briefs to be
 12 submitted by outside parties who may be affected by the case, despite the fact that they are not
 13 direct participants. *Righthaven LLC v. Ctr. For Intercultural Organizing*, Case No. 2:10-cv-
 14 01322, Doc. # 19 (D. Nev., Filed Dec. 15, 2010).

15 The applicable rule is general, permissive, and commits the fundamental decision to the
 16 Court's discretion. A party may appear and submit briefing as *amicus curiae* if, as here, "the
 17 *amicus* has unique information or perspective that can help the court," and if the information
 18 offered is both timely and useful. *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*,
 19 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003); *Long*, 49 F. Supp. 2d at 1178, (quoting *Waste Mgmt.*
 20 *of Pennsylvania v. City of York*, 162 F.R.D. 34 (M.D. Pa. 1995)). The primary purpose of
 21 allowing *amicus* briefs is that the *amicus curiae* offers "insights not available from the parties,"
 22 aiding the Court in making its decision. *Citizens Against Casino Gambling v. Kempthorne*, 471
 23 F. Supp. 2d 295, 311 (W.D.N.Y. 2007). In this case, critical issue of law and policy that ought to
 24 inform the Court's award of damages have not been placed before the Court by the parties.
 25 Absent the voice of *Amicus*, the only presentation of the issue before the Court would be
 26 Righthaven's request for, and thin justification of, an unconscionable award of \$150,000.

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1 Righthaven takes the position that the *Amicus* is an improper friend of the court because
2 it is not “neutral.” But there is no requirement that an *amicus* be impartial, and indeed the very
3 notion of an impartial *amicus* is impossible to square with Fed. R. App. P. 29, which requires an
4 *amicus* to have some “interest” in the case. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128
5 (3d Cir. 2002). If an *amicus* had no view of the issues at bar it would have no occasion to file
6 papers in the first place.

7 As a party with an interest in the outcome of this litigation, but no direct involvement as
8 plaintiff or defendant, *Amicus* has standing to submit an *amicus curiae* brief in this case. *Ctr. For*
9 *Intercultural Organizing*, Case No. 2:10-cv-01322, Doc. # 19. *Amicus* has not entered this case
10 on Defendant’s behalf, nor does it seek to overturn the Court’s entry of default judgment against
11 Defendant under Rule 55(c). *Amicus*’ participation is limited to the submission of its Motion for
12 Leave and attached Brief (Docs. # 19, 19-1) relating to damages. As explained below, *Amicus*’
13 submission satisfies the requirements that all *amicus* briefs be useful and timely submitted.

14 ***2. Amicus’ Brief is Useful to the Court in Determining Damages***

15 For a court to properly consider an *amicus* brief, the *amicus*’ submission must be useful.
16 The basis for meeting this test is found in the submitting party’s “unique information or
17 perspective” found in its brief. *Sonoma Falls*, 272 F. Supp. 2d at 925. This unique viewpoint is
18 most needed when, as here, the submission contains a perspective or information that is “not
19 available from the parties,” and upon satisfying themselves that an *amicus* offers it, courts are
20 likely to grant leave to file an *amicus* brief in cases, such as this one, involving matters of public
21 interest. *Andersen v. Leavitt*, Case No. 03-cv-6115 (DRH) (ARL) 2007 U.S. Dist. LEXIS 59108
22 at *6-7 (E.D.N.Y. Aug. 13, 2007). Moreover, under *Ryan v. Commodity Futures Trading*
23 *Comm.*, 125 F.3d 1062, 1063 (7th Cir. 1997) – the reasoning of which was adopted in *Long*,
24 which Righthaven cites in its opposition (Doc. # 22 at 3:23-24) – *amicus* briefs should normally
25 be allowed when, as here, “**a party is not represented competently or not represented at all.**”
26 *Ryan*, 125 F.3d at 1063; *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008);
27 *Citizens Against Casino Gaming*, 471 F. Supp. 2d at 311; *Cobell v. Norton*, 246 F. Supp. 2d 59,

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1 62 (D.D.C. 2003); *Long*, 49 F. Supp. 2d at 1178; *Nat'l Petrochemical & Refiners Ass'n v.*
2 *Goldstene*, Case No. CV-F-10-163 2010 U.S. Dist. LEXIS 61394 at *4-5 (E.D. Cal. June 3,
3 2010); *Rocky Mtn. Farmers Union v. Goldstene*, Case No. CV-F-10-2234 2010 U.S. Dist LEXIS
4 56493 at *5-6 (E.D. Cal. May 11, 2010).

5 *Amicus'* Brief satisfies all of these requirements. *Amicus* is the first and only entity to
6 supply this Court with briefing drawing attention to the due process limitations on Righthaven's
7 request for damages (Doc. #19-1). Additionally, *Amicus* has supplied this Court with
8 information about Righthaven's business model, the gossamer harms it has "suffered" as a result
9 of Defendant's actions, and broader operating context – all of which are relevant to the question
10 of the proper measure of damages due to Righthaven.

11 The perspective offered by *Amicus* is also relevant to its usefulness to the Court. *Amicus*
12 represents bloggers who produce original content and base their research, at least in part, on
13 traditional news outlets – the types of which have dubiously assigned their Copyrights to
14 Righthaven (Doc. #19-1 at 5:18-23, Exh. 1). As a group that is familiar with Defendant's
15 situation, while not stepping into Defendant's shoes, *Amicus* is uniquely positioned to discuss the
16 full panoply of ramifications both in terms of this Court's mandate to do justice and for the free
17 flow of information generally if Righthaven would be awarded the insane damages award it
18 seeks. The constitutionally-protected expressive activities of *Amicus'* members would certainly
19 be chilled by such an unjust result, as would their legally-protected use of excerpts from
20 mainstream news publications fairly regarded as Fair Use under 17 U.S.C. § 107. If the penalty
21 for guessing wrong on a Fair Use judgment call is potentially \$150,000, *Amicus'* membership
22 would simply have to restrict its free speech far more than if an errant Fair Use judgment call
23 comes with a potential \$750 price tag. In short, the *Amicus* not only has a vested interest in how
24 this court calculates the damages, but it is uniquely positioned to bring the most relevant
25 perspective possible to the arsenal of understanding the Court will use when rendering its
26 decision.

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1 Indeed, this case, like other Righthaven cases, and like Righthaven's general manner of
 2 operations, has received significant media attention. (Doc. #19-1 at 9 n. 6.) Many articles have
 3 appeared in publications with regional and national audiences inquiring into Righthaven's
 4 litigation tactics and its business model of suing bloggers and small websites. (*Id.*) The public
 5 interest surrounding these cases weighs strongly in favor of the Court considering the *Amicus*
 6 brief.

7 Yet absent the *Amicus* brief, the only information and argument on damages is that which
 8 Righthaven has offered this Court: the half-truth that the Copyright Act allows for \$150,000 in
 9 statutory damages for willful infringement,¹ plus costs and attorneys' fees. (*See* Doc. #17.)

10 Where Defendant has failed to respond to the Complaint at all, *Amicus* cannot effectively
 11 pick up where his briefing left off, as Righthaven's use of *Long* suggests to argue. (Doc. #22 at
 12 4.) The information set forth by *Amicus* in its brief is helpful to this Court in determining
 13 Righthaven's damage award, and is of particular importance – and admissibility – because of
 14 Defendant's lack of representation. There is, consequently, no other source by which the
 15 arguments set forth by *Amicus* can come before the Court, which in dispensing justice deserves
 16 the opportunity to review both sides of a matter before rendering a decision – especially a
 17 decision that could send a cold wind blowing across the fields of free expression nationwide.
 18 What might once have been an unremarkable infringement case involving unremarkable
 19 copyrights has, because of the Righthaven business model and its outrageous damages request,
 20 suddenly vested this Court's damages ruling with implications of national importance. A
 21 decision with such potentially far-reaching consequences, and of constitutional scope, should not
 22 be made by a Court hearing only one side of the issue.

23 ***3. Amicus' Motion for Leave and Brief are Timely Submitted to this Court.***

24 *Amicus'* brief, which addresses solely the issue of damages to be awarded by this Court,
 25 has timely been filed. While Righthaven claims that it is too late to overturn Defendant's default
 26 judgment, *Amicus* has no interest in doing so, and Righthaven's argument is irrelevant to the
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28 ¹ 17 U.S.C. § 504(c).

1 contents of *Amicus*' proposed submission (Doc. #19-1). In contrast, the issue that is addressed
2 by *Amicus*' brief, the measure of damages that the Court is to award Righthaven in this case, has
3 not yet been decided, as the issue of damages is still pending before this Court.

4 Moreover, Righthaven's claim that *Amicus* is too late to participate in this case is not
5 supported by case law. In *Andersen v. Leavitt*, the *amicus*-submitting party requested leave only
6 after the parties had submitted cross-motions for summary judgment. 2007 U.S. Dist. LEXIS
7 59108 at *17-18. Refusing to penalize the *amicus* there, the court reasoned that because the
8 *amicus curiae* brief and accompanying motion for leave did not delay the court in ruling on the
9 parties' cross-motions, and because the case was theretofore not widely publicized, there was no
10 reason for the party submitting the *amicus* brief to act sooner, and the brief was accepted. *Id.*
11 Nor is mere "delay" a sufficient basis for deeming an *amicus* submission untimely; the proper
12 standard is whether granting *Amicus*' motion for leave will create "unreasonable" delay. *Id.* at
13 *17, citing *Long*, 49 F. Supp. 2d at 1178. Here *Amicus* does not seek to stand in as defense
14 counsel for Mr. Hyatt; *Amicus* only seeks to defend due process with respect to an issue of
15 critical concern to its members. *Amicus* entered this case at the relevant time, and not sooner –
16 for prior to the Plaintiff's phenomenal request for \$150,000 in damages, *Amicus* had nothing to
17 say – and not a moment too late.

18 **B. Righthaven Should Not Be Allowed to Treat *Amicus*' Brief as an Adverse**
19 **Motion, and a Briefing Schedule Should Not be Ordered.**

20 Righthaven's request for a briefing schedule in response to *Amicus*' Brief, if the Court
21 grants leave for it to be filed, should be denied. Despite Righthaven's mischaracterizations,
22 *Amicus*' brief is not a motion to set aside default judgment under Rule 55(c), nor is it brought on
23 behalf of the defendant; it is a collection of facts and arguments presented by an interested entity
24 that is not a defendant or plaintiff in this action, solely to inform the court on the amount of
25 damages – an issue that is completely within the Court's discretion. As such, it should not be
26 treated as an adverse motion that requires a briefing schedule and entitles Righthaven to an
27 opportunity to respond. Local Rule 7-2 allows for opposition and reply briefing for motions, but

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1 an *amicus curiae* brief, such as *Amicus*' proposed submission here, is not a motion – it is simply
2 information and argumentation submitted to the Court for its consideration with respect to a
3 pending substantive decision already before it. Once the Court decides on *Amicus*' procedural
4 Motion for Leave (Doc. #19), no additional briefing is needed or justified. Thus, for example, no
5 briefing schedule was set for the *amicus curiae* brief accepted by the Court in *Ctr. For*
6 *Intercultural Organizing*, Case No. 2:10-cv-01322, Doc. # 19.

7 Ironically, the delay Righthaven alleges *Amicus* to have imposed upon this case (Doc.
8 #22 at 5:14-17) would be exacerbated by allowing it time to file a response brief, especially one
9 requiring such extraordinary duration to prepare – 21 days, whereas *Amicus*' initial brief was
10 filed a mere 13 days after Righthaven's outrageous demand for \$150,000 – and ignoring the
11 opposition already filed by Righthaven and to which this paper is a reply.

12 Ultimately, providing Righthaven yet another opportunity for opposition briefing in
13 response to an *amicus* brief is unsupported by precedent. Such a submission would only slow
14 matters down even further. Righthaven's request for it, then, belies its supposed concerns for
15 procedure and delay – and demonstrates that it is concerned only about not getting the final word
16 in a case where it has already secured a default judgment.

17 **Conclusion**

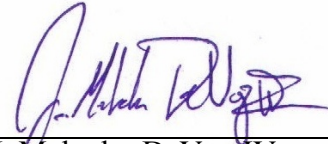
18 This Court is justified in granting *Amicus*' Motion for Leave and should do so, allowing
19 the Media Bloggers Association's *Amicus* Brief to be part of the record in this case. As the
20 defendant has not participated in this case, an *Amicus* brief is particularly appropriate. *Ryan*, 125
21 F.3d at 1063. *Amicus*' brief is not a motion to set aside Defendant's default judgment -- not in
22 any form, including "in disguise" as Righthaven argues – but is, rather, a presentation of the
23 utmost relevance to the Court in assessing the damages Righthaven may be awarded here in light
24 of applicable precedent and constitutional considerations. *Amicus*' submissions contain relevant
25 information that is not available from any other party, and is unique for that reason alone, but it
26 is of additional value because of *Amicus*' perspective as the representative of bloggers similarly
27 situated to Defendant.

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1 As the Court has yet to rule on the damages issue, *Amicus*' Brief and Motion for Leave
2 are timely submitted, and should be granted. Moreover, *Amicus*' Brief should not be treated as
3 an adverse filing. Amicus is not acting for the Defendant or otherwise intervening; it is filing
4 only an *amicus curiae* brief, to which a response is not justified. As such, Righthaven's request
5 for a briefing schedule so it may respond to the *Amicus Brief* – despite its stated concerns
6 regarding delay in this case – should be denied.

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8 Dated March 14, 2011

Respectfully Submitted,
RANDAZZA LEGAL GROUP

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J. Malcolm DeVoy IV
Marc J. Randazza

14 Ronald D. Coleman
GOETZ FITZPATRICK LLP

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Attorneys for *Amicus Curiae*,
Media Bloggers Association

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Randazza Legal Group and that on this 14th day of March, 2011, I caused documents entitled:

AMICUS CURIAE'S REPLY TO RIGHTHAVEN LLC'S REPOSE TO MEDIA BLOGGERS ASSOCIATION'S MOTION TO FILE AMICUS CURIAE BRIEF OR, ALTERNATIVELY, APPLICATION FOR BRIEFING SCHEDULE TO RESPOND TO PROPOSED AMICUS CURIAE BRIEF

to be served as follows:

- by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne Avenue, Suite 210, Las Vegas, Nevada, 89129-7701; and/or
- by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Bill Hyatt, 848 Luther Road, East Greenbush, NY, 12061; upon which first class postage was fully prepaid; and/or
- Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or
- to be hand-delivered;
- by the Court's CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy