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6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 RIGHTHAVEN LLC, a Nevada limited-
11 liability company,

12 Plaintiff,

13 v.

14 GARRY NEWMAN, an individual; and
15 FACEPUNCH STUDIOS LTD., a limited
16 company formed under the laws of Great
Britain,

17 Defendants.
18

Case No.: 2:10-cv-01762-JCM-PAL

**PLAINTIFF RIGHTHAVEN LLC’S
RESPONSE TO DEFENDANT GARRY
NEWMAN’S MOTION TO DISMISS THE
FIRST AMENDED COMPLAINT FOR
LACK OF SUBJECT MATTER
JURISDICTION AND LACK OF
PERSONAL JURISDICTION**

19 Plaintiff Righthaven LLC (“Righthaven”) hereby responds to Defendant Garry
20 Newman’s (“Defendant”) Motion to Dismiss The First Amended Complaint for Lack of Subject
21 Matter Jurisdiction and Lack of Personal Jurisdiction (Doc. # 25, the “Motion”). Defendant
22 seeks dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure
23 12(b)(1) (“Rule 12(b)(1)”). (*Id.* at 2.) Defendant’s lack of personal jurisdiction dismissal
24 request is made under Federal Rule of Civil Procedure 12(b)(2) (“Rule 12(b)(2)”). (*Id.*) As
25 argued below, the Motion must be denied in its entirety.
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1 Righthaven's response is based upon the below Memorandum of Points and Authorities,
2 the pleadings and papers on file in this action, any permitted oral argument, and any other matter
3 of which this Court takes notice.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5
6 **I. INTRODUCTION**

7 Defendant's Motion challenges Righthaven's standing to maintain this action based upon
8 the allegations contained in its First Amended Complaint (Doc. # 21, the "Amended
9 Complaint"). The Amended Complaint was filed as a matter of right pursuant to Federal Rule of
10 Civil Procedure 15(a)(1)("Rule 15(a)(1)"). By amending as a matter of right, the Amended
11 Complaint supersedes and replaces the jurisdictional facts in existence at the time of the original
12 complaint. *See ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 96 (1st Cir. 2008). Thus, the
13 allegations contained in the Amended Complaint control the Court's analysis under Rule
14 12(b)(1) and Rule 12(b)(2). As argued below, Defendant's Motion must be denied when the
15 allegations at issue are applied under Rule 12(b)(1) and Rule 12(b)(2).

16 **II. STATEMENT OF FACTS**

17 **A. Stephens Media's Assignment Of Ownership And The Right To Sue For Past,
18 Present And Future Infringements To Righthaven.**

19 Righthaven asserts that it is the owner of the copyrighted literary work entitled "'Death
20 ray' scorched hair" (the "Work"), which was originally published by the *Las Vegas Review-*
21 *Journal*. (Doc. # 21 at 4; Doc. # 1-1, Ex. 1.) The Work contains numerous references to the *Las*
22 *Vegas Review-Journal* that indicate it as the source publication. (Doc. # 1-1, Ex. 1.) The Work
23 details an architectural phenomenon occurring at a prominent Las Vegas hotel. (*Id.*)

24 Righthaven obtained ownership of the Work through an assignment (the "Assignment")
25 from Stephens Media LLC ("Stephens Media"), the owner of the *Las Vegas Review Journal*.
26 (Doc. # 21 at 5.) In addition to transferring ownership, the Assignment also granted Righthaven
27 the right to sue for all past, present and future infringements of the Work to Righthaven. (Doc. #
28 21 at 5.) The Assignment occurred after the alleged infringement was committed. (*Id.*)

1 Righthaven maintains that by considered alone, the Assignment fully confers standing to
2 sue for accrued copyright infringement claims. To the extent any decision from this District is
3 believed to address this situation, Righthaven respectfully disagrees that any such analysis has
4 occurred. It is Righthaven's assertion that, with the exception of one potentially advisory
5 opinion mentioned below, the standing decisions within this District have examined the
6 assignments concurrently with the company's original contract with Stephens Media. Simply
7 put, the Assignment represents a transfer of ownership that, at a minimum, vests Righthaven
8 with standing to sue for past infringements under Ninth Circuit case law.

9 **B. The Amended Complaint Presents This Court With Factual Allegations That**
10 **Have Not Been Analyzed Under Rule 12(b)(1).**

11 As the Court is well aware, several Righthaven cases have been dismissed without
12 prejudice for lack of subject matter given the original terms of a Strategic Alliance Agreement
13 (the "SAA") between the company and Stephens Media.¹ The Amended Complaint, however,
14 contains factual allegations that have not been examined under these prior decisions.

15 On January 18, 2010, Righthaven and Stephens Media entered in the SAA. (Doc. # 21 at
16 5.) On May 9, 2011, the parties amended the SAA to clarify the nature of the copyright
17 assignments to Righthaven, to eliminate a right of reversion granted to Stephens Media, and to
18 expressly define Stephens Media as holding a non-exclusive license right to exploit any assigned
19 works (the "Clarification"). (*Id.* at 5-6.) The Clarification has yet to be substantively examined
20 in this District aside from a potentially advisory analysis set forth in *Righthaven LLC v. Hoehn*,
21 Case No. 2:11-cv-00050-PMP-RJJ (D. Nev. June 6, 2011) ("*Hoehn*") (Doc. # 28 at 10). The
22 Clarification is clearly part of the jurisdictional record given the allegations of the Amended
23 Complaint.

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25
26 ¹ See *Righthaven LLC v. Mostofi*, No. 2:10-cv-01066-KJD-GWF (D. Nev. July 13, 2011) (Doc.
27 # 34 at 7, limited to original SAA terms); *Righthaven LLC v. Democratic Underground, LLC*,
28 2011 WL 2378186, at *6 (D. Nev. June 20, 2011) (Doc. # 116 at 8 n.1, limiting analysis to
original SAA and assignment); *Righthaven LLC v. DiBiase*, No. 2:10-cv-01343-RLH-PAL (D.
Nev. June 22, 2011) (Doc. # 72 at 2-3, applying *Democratic Underground's* analysis);

1 The Amended Complaint also explains that on July 7, 2011, Righthaven and Stephens
2 Media amended the SAA a second time to specifically address the concerns stated in the *Hoehn*
3 decision (the “Restated Amendment”). (Doc. # 21 at 6.) The Restated Amendment contains the
4 operative and controlling contractual terms between the parties. (*Id.*) The Restated Amendment
5 grants Stephens Media a non-exclusive license to exploit any assigned works. (*Id.*) Stephens
6 Media can only terminate its non-exclusive license to exploit a work five years after it has
7 assigned ownership to Righthaven. (*Id.*) As with the Clarification, the Restated Amendment is
8 retroactive to the effective date of the SAA. (*Id.* at 6.) No court has considered the Restated
9 Amendment under a subject matter jurisdiction analysis, which is part of the facts set forth in the
10 Amended Complaint. Righthaven is confident that if it is found to not have standing under the
11 Clarification, the Restated Amendment unequivocally establishes standing.

12 **C. The Infringement Allegations.**

13 With regard to the infringement allegations in this case, Righthaven contends the
14 Defendant is one of two owners of Facepunch Studios Ltd., which allegedly is an organization
15 formed under the laws of Great Britain (the “Company” and referred collectively with Defendant
16 Newman as “Defendants”). (Doc. # 21 at 2.) Defendant has been sued in his individual capacity
17 for copyright infringement. (*Id.* at 2-3, 7-9.) Righthaven has also asserted infringement claims
18 against the Company. (*Id.*)

19 The Amended Complaint describes the Defendant’s personal involvement in the alleged
20 infringement. First, the Defendant has admitted that he is the registrant for the Internet domain
21 found at <facepunch.com> (the “Website”). (*Id.* at 2.) Sometime after Righthaven filed this
22 case, the Company replaced the Defendant as the Website registrant. (*Id.*) As of at least July 15,
23 2011, the Defendant was identified as the administrative and technical contact for the Website.
24 (Doc. # 21 at 2, Ex. 1A.)

25 Secondly, the Defendant is alleged to exert substantial control over the Website. (*Id.* at
26 3.) Attached to the Amended Complaint is a copy of the Website’s “Rules”. (*Id.*, Ex. 2A.) In
27 reference to a “Garry” that is believed to be the Defendant, the Website “Rules” boldly proclaim,
28 “Garry doesn’t need to provide a legitimate reason to ban anyone. *These are his forums.*” (*Id.*,

1 emphasis added.) Righthaven will leave the remaining colorful parameters of Garry's authority
2 to the quotation contained in the Amended Complaint. (Doc. # 21 at 3.)

3 The Website unquestionably contains a commercial aspect. Advertising is readily apparent
4 on the "Rules" section of the Website. (*Id.*) The Website also employs user names, passwords
5 and registration login information. (*Id.*) Righthaven's Amended Complaint alleges that the
6 Defendant, either individually or collectively with the Company, monetarily benefits from
7 Website advertising and from visitors clicking on displayed ads in what is referred to as a "pay-
8 per-click" revenue model. (*Id.*) Thus, the Website is operated for a commercial purpose.

9 It is alleged that after being published by the *Las Vegas Review-Journal*, the Defendants
10 displayed, or permitted to be displayed, an unauthorized copy of the Work on the Website. (*Id.*
11 at 4.) The Defendant, is who is believed to be the Website's content monitor, knew or should
12 have known the Work was misappropriated from the *Las Vegas Review-Journal* and that its
13 content discussed an architectural phenomenon at a prominent Las Vegas hotel. (*Id.*) Defendant
14 is alleged to have directly caused, participated in, or contributed to the unauthorized display. (*Id.*)

15 Righthaven has asserted two claims for copyright infringement in this case: (1) direct
16 infringement based on the Defendants having allegedly displayed the unauthorized copy on the
17 Website (*Id.* at 7-8); and (2) vicarious infringement for the alleged failure to stop the
18 unauthorized display of protected works, including the Work, on the Website, while profiting
19 from, among other things, advertising revenues based on visitor and user traffic. (*Id.* at 8-9.)

20 Defendants are accused of willfully infringing the Work. (*Id.* at 8.) Righthaven has,
21 among other things, sought entry of a permanent injunction and an award of statutory damages
22 against Defendants. (*Id.* at 9.) Righthaven has demanded a jury trial in this case. (*Id.* at 10.)

23 **III. APPLICABLE LEGAL STANDARDS**

24 **A. Rule 12(b)(1) Standards.**

25 Rule 12(b)(1) allows for the dismissal of an action for lack of subject matter jurisdiction.
26 FED.R.CIV.P. 12(b)(1). District courts have original subject matter jurisdiction over claims
27 "arising under" federal law relating to patents, copyrights, trademarks and . . . related claims of
28 unfair competition." 28 U.S.C. § 1338(a), (b); *see also Scholastic Ent., Inc. v. Fox Ent. Group,*

1 *Inc.*, 336 F.3d 982, 986 (9th Cir. 2003). A copyright infringement plaintiff is required to allege:
2 (1) ownership of a valid copyright; and (2) the defendant's violation of one or more of the
3 copyright owner's exclusive rights set forth under the Copyright Act. *Ellison v. Robertson*, 357
4 F.3d 1072, 1077 (9th Cir. 2004); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.
5 340, 361 (1991).

6 Under Rule 12(b)(1), the plaintiff bears the burden of establishing the existence of subject
7 matter jurisdiction since it is the party who invoked the court's jurisdiction. *See Kokkonen v.*
8 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-78 (1994). Subject matter jurisdiction must be
9 demonstrated at successive stages of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S.
10 555, 561 (1992). When a party files an amended complaint as a matter of right pursuant to Rule
11 15(a)(1), "the absence of federal subject matter jurisdiction in the original complaint will pose no
12 obstacle to consideration of [the] amended complaint." *ConnectU LLC*, 522 F.3d at 96 (citing
13 *Integrated Tech. & Dev., Inc. v. Rosenfield*, 103 F. Supp. 2d 574, 579 (E.D.N.Y. 2000)). When
14 amended as a matter of right, no court action is required and the amended complaint replaces the
15 jurisdictional facts in existence at the time of the original complaint. *Id.*

16 A Rule 12(b)(1) motion that does not consider extrinsic evidence is commonly referred to
17 as a facial attack.² *Warren v. Fox Family Worldwide, Inc.* 328 F.3d 1136, 1139 (9th Cir. 2003);
18 *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir. 2003); *Li v. Chertoff*, 482 F. Supp.
19 2d 1172, 1175 (S.D. Cal. 2007). A facial attack challenges the sufficiency of the complaint's
20 allegations that federal subject matter has been invoked. *Montez v. Department of Navy*, 392 F.3d
21 147, 149-50 (5th Cir. 2004); *Warren*, 328 F.3d at 1139; *Morrison*, 323 F.3d at 924 n. 5; *Li*, 482
22 F. Supp. 2d at 1175. Under a facial attack, the Court must accept as true all well-pleaded facts

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24 ² The party challenging subject matter jurisdiction under Rule 12(b)(1) may also proffer
25 extrinsic evidence in support of the relief requested under what is sometimes referred to as a
26 factual attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual
27 attack under Rule 12(b)(1) is based on extrinsic evidence significantly separate from the
28 challenged pleading. *See Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000);
Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995). As discussed herein, Defendant
failed to present any extrinsic evidence sufficient to deem his Rule 12(b)(1) dismissal request as
a factual attack.

1 and draw all reasonable inferences in favor of the non-moving party. *See Association of Am.*
2 *Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). In order to survive a Rule
3 12(b)(1) facial attack, the complaint must contain “sufficient jurisdictional facts to state a claim
4 which is plausible on its face.” *Bushnell, Inc. v. Brunton Co.*, 659 F. Supp. 2d 1150, 1157 (D.
5 Kan. 2009).

6 Defendant’s Rule 12(b)(1) dismissal request must be denied in view of the applicable
7 standards because Righthaven’s Amended Complaint contains more than sufficient facts to vest
8 this Court with subject matter jurisdiction.

9 **B. Rule 12(b)(2) Standards.**

10 Defendant’s request for dismissal for lack of personal jurisdiction is brought despite the
11 fact that he is alleged to have engaged in, or permitted the display of, a wholesale, unauthorized
12 copy of the Work, which was obtained from a source publication unquestionably associated with
13 the State of Nevada. The source publication is clearly distributed to and its content is aimed
14 principally at persons associated with, and largely residing in, the greater Las Vegas valley.
15 Moreover, the topic of the misappropriated Work expressly concerned an architectural
16 phenomenon at a Las Vegas hotel. (Doc. # 21 at 4; Doc. # 1-1, Ex. 1.)

17 With the foregoing facts in mind, the Court must evaluate whether these allegations, if
18 true, sufficiently establish personal jurisdiction over the Defendant. *See Data Disc, Inc. v.*
19 *Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1289 (9th Cir. 1977). Where allegations in the
20 Complaint are contested via declarations or other evidence, such evidence must be competent
21 and admissible. *See id.* at 1289 n.5. When a defendant seeks dismissal pursuant to Rule 12(b)(2)
22 in its initial response to the complaint, the plaintiff need only demonstrate a *prima facie* showing
23 that personal jurisdiction exists. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). A *prima*
24 *facie* showing in this regard means the plaintiff has set forth evidence or allegations that, if
25 believed, would be sufficient to justify the exercise of personal jurisdiction. *Cross v. Kloster*
26 *Cruise Lines, Ltd.*, 897 F.Supp. 1304, 1309-10 (D. Or. 1995). Moreover, when dismissal is
27 sought as an initial response to the complaint, all pleadings and declarations must be construed in
28 the plaintiff’s favor given that no opportunity has been given to test the veracity of the

1 defendant's evidence. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911,
2 912 (9th Cir. 1990); *Data Disc, Inc.*, 557 F.2d at 1285.

3 A variety of non-resident defendants have unsuccessfully challenged the exercise of personal
4 jurisdiction in cases brought by Righthaven. This case is no different. Defendant's request for
5 dismissal under Rule 12(b)(2) should similarly be denied.

6 **IV. ARGUMENT**

7 **A. The Court Has Subject Matter Jurisdiction Over This Dispute.**

8 Defendant's attempt to secure dismissal of this action for lack of subject matter
9 jurisdiction is both substantively and procedurally flawed. For instance, Defendant's dismissal
10 request is based in part on decisions from this District that have in found Righthaven lacked
11 standing under facts that are completely distinguishable from those at issue in this case.
12 Defendant's dismissal request is also devoid of any substantive subject matter jurisdiction
13 analysis based on facts alleged in Righthaven's Amended Complaint. In fact, Defendant's Rule
14 12(b)(1) challenge amazingly admits that he "*has no way of assessing Righthaven's standing*
15 based on [the Restated Amendment]" that is at issue under the Amended Complaint. (Doc. # 25
16 at 11:24, emphasis added.)

17 Defendant's excuse for failing to present any substantive analysis as to why subject
18 matter is lacking under the Restated Amendment is because Righthaven has not provided it to
19 him. (*Id.* at 11:22-23.) Of course, Defendant fails to advise the Court that he has never requested
20 a copy of the Restated Amendment from Righthaven's counsel. Defendant also ignores the fact
21 that the Restated Amendment is publicly available since it has been filed in numerous cases in
22 this District. Defendant apparently has the aptitude to find publicly filed documents because he
23 attached a copy of the SAA to his Motion that was not provided by Righthaven.

24 Whatever Defendant claims to be his excuse for failing to substantively address the
25 perceived shortcomings of the Clarification and the Restated Amendment, he certainly was not
26 under pressure to rush to the courthouse for fear of waiving his right to challenge the existence of
27 subject matter jurisdiction. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (recognizing
28 that challenges to subject matter jurisdiction can be raised at any time – even for this first time on

1 appeal). Given these circumstances, Defendant's Rule 12(b)(1) request for dismissal represents a
2 hastily executed plan designed to secure dismissal by relying upon recent decisions from this
3 District that dismissed certain Righthaven cases for lack of standing based jurisdictional facts
4 different from those before this Court. As argued below, Righthaven asserts that it has standing
5 despite Defendant's ill-conceived request for dismissal under Rule 12(b)(1).

6 **1. Unlike other decisions from this District, the Court must analyze**
7 **Righthaven's standing under the jurisdictional facts alleged in the**
8 **Amended Complaint.**

9 Defendant has attempted to cure his apparent inability to present any substantive
10 arguments as to why Righthaven lacks standing under the terms of the Clarification and/or the
11 Restated Amendment by asserting the Court's subject matter jurisdiction analysis must be
12 limited to the jurisdictional facts present at the time the original complaint was filed. (Doc. # 25
13 at 11-12.) Granted, Defendant's "time-of-filing" argument has been applied in this District to
14 dismiss other Righthaven cases for lack of subject matter jurisdiction.³ With the exception of the
15 *Hoehn* decision, these cases were limited to the assignments at issue and the original terms of the
16 SAA. The "time-of-filing" rule, however, is inapplicable to this case because Righthaven filed
17 its Amended Complaint as a matter of right under Rule 15(a)(1).

18 The distinction between a party filing an amended complaint as a matter of right under
19 Rule 15(a)(1) and a party seeking to do so with leave of court under Rule 15(a)(2) presents an
20 important procedural issue in determining whether a subject matter jurisdiction analysis must
21 only consider the allegations in existence as of the time the complaint was filed or whether the
22 analysis must be based on the allegations contained in an amended complaint. Under Rule
23 15(a)(2), "[a] district court is powerless to grant leave to amend when it lacks jurisdiction over
24

25 ³ See *Mostofi*, No. 2:10-cv-01066-KJD-GWF (Doc. # 34 at 7, limited to original SAA terms);
26 *Democratic Underground, LLC*, 2011 WL 2378186, at *6 (Doc. # 116 at 8 n.1, limited to
27 original SAA and assignment); *DiBiase*, No. 2:10-cv-01343-RLH-PAL (Doc. # 72 at 2-3,
28 applying *Democratic Underground's* analysis); *Barham*, No. 2:10-cv-02150-RLH-RJJ (Doc. #
20 at 2-3, applying *Democratic Underground's* analysis); *Pahrump Life*, No. 2:10-cv-01575-
JCM-PAL (D. Nev. Aug. 12, 2011) (Doc. # 67 at 4-6, dismissing case based on original SAA).

1 the original complaint.”⁴ *Morongo Band of Mission Indians v. California State Bd. of*
2 *Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). As recognized by the First Circuit:

3 But, where . . . a plaintiff amends its complaint as of right [under Rule 15(a)(1)],
4 the Civil Rules operate mechanically, and the judge’s authority over the case is
5 not brought to bear. In that event, the absence of federal subject matter
6 jurisdiction in the original complaint will pose no obstacle to the consideration of
7 the amended complaint.

8 *ConnectU LLC*, 522 F.3d at 96 (citing *Integrated Tech. & Dev., Inc.*, 103 F. Supp. 2d at 579)).

9 The First Circuit’s conclusion is substantially supported by a recent Supreme Court
10 decision in which the Justices unequivocally stated “when a plaintiff files a complaint in federal
11 court and then voluntarily amends the complaint, courts look to the amended complaint to
12 determine jurisdiction.” *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 473-74 (2007).
13 The Supreme Court’s decision in *Rockwell Int’l Corp.* further explained that jurisdictional
14 manipulation concerns present in removal and diversity cases that have given rise to the “time-
15 of-filing” rule “simply do not exist” in cases based on federal question jurisdiction. *Id.*, 549 U.S.
16 at 474 n.6; accord *Kabakjian v. United States*, 267 F.3d 208, 212 (3d Cir. 2001) (Recognizing
17 the time-of-filing rule “has been applied only rarely to federal question cases.”). Following the
18 Supreme Court’s policy observation, the First Circuit rejected the time-of-filing rule in cases that
19 properly invoke federal question subject matter jurisdiction through the filing of an amended
20 complaint as a matter of right. *ConnectU LLC*, 522 F.3d at 94, 96.

21 Here, Righthaven’s Amended Complaint was filed pursuant to Rule 15(a)(1). (Doc. #
22 21.) No Court authorization was required for it to do so. While the Defendant may try to
23 characterize Righthaven’s operative pleading as a supplemental complaint for which leave to
24 amend was required, he would be wrong. Typically, an amended complaint contains matters that
25 have taken place prior to the date of pleading. See 6 Charles Alan Wright, Arthur R. Miller &

26 ⁴ It is important to note that even if subject matter jurisdiction is required to grant leave to
27 amend, case law demonstrates that sufficient allegations may exist under an earlier pleading so
28 that a court may constitutionally exercise jurisdiction even though it does not secure solid
jurisdictional footing until a later point in the proceedings. See *ConnectU LLC*, 522 F.3d at 95;
accord *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (involving dropping a
party).

1 Mary Kay Kane, *Federal Practice and Procedure* § 1473 (Supp. 2007). Righthaven's Amended
2 Complaint did just this by amplifying the factual basis for exercising specific personal
3 jurisdiction over the Defendant, which further strengthened its infringement claims through
4 incorporation of these amplified facts. (Doc. # 21 at 2-7.) These pre-filing factual allegations
5 include reference to the SAA, which was entered into long before this action was commenced.
6 (*Id.* at 5.) The Amended Complaint added further support to Righthaven's jurisdictional and
7 infringement allegations by attaching new exhibits such as the Website "Rules," which
8 unquestionably existed before this case was filed. (*Id.*, Ex. 1A-2A.) Given the presence of
9 numerous pre-filing facts and evidence, the inclusion of more detailed ownership allegations
10 that specifically reference amendments to the SAA does not transform Righthaven's Amended
11 Complaint into a supplemental one.

12 In sum, Righthaven properly exercised its right to file the Amended Complaint pursuant
13 to Rule 15(a)(1). The filing of the Amended Complaint did not require Court authorization. As
14 such, the Court's subject matter jurisdiction to act was implicated. Thus, contrary to the
15 Defendant's reliance on the "time-of-filing" rule, the Court's subject matter analysis must be
16 based on the allegations contained in the Amended Complaint, which includes the Clarification
17 and the Restated Amendment. *See ConnectU LLC*, 522 F.3d at 95-96. As noted earlier, no court
18 has decided Righthaven's standing to sue under the jurisdictional record presented to this Court.
19 Righthaven asserts that it has standing under these untested jurisdictional facts.

20 **2. Defendant's Rule 12(b)(1) dismissal request should be deemed a facial**
21 **attack that challenges the sufficiency of the Amended Complaint's**
22 **subject matter allegations.**

23 In support of his request for dismissal pursuant to Rule 12(b)(1), Defendant has attached
24 the original SAA, the copyright registration for the Work and several decisions from this District
25 that have dismissed certain Righthaven cases for lack of standing given the original terms of the
26 SAA. (Doc. # 25.) These materials simply cannot be construed to constitute material extrinsic
27 evidence so that Defendant's dismissal request is magically transformed into a Rule 12(b)(1)
28 factual attack. As noted earlier, a factual attack under Rule 12(b)(1) must be based on extrinsic
evidence significantly separate from the challenged pleading. *See Gould Elecs. Inc.*, 220 F.3d at

1 176; *Holt*, 46 F.3d at 1002-03. Defendant's request for dismissal must be construed as a facial
2 attack under Rule 12(b)(1) given that he has failed to submit any evidence that is factually and
3 materially distinct from the allegations set forth in the Amended Complaint.

4 To begin with, the SAA is publicly available and is substantively referenced in the
5 Amended Complaint. (Doc. # 21 at 5.) The SAA's terms have also been extensively discussed
6 in several publicly available standing decisions from this District. In fact, Defendant has
7 attached copies of these decisions rather than simply citing to them in his Motion. Attaching a
8 copy of a publicly available decision from the same court that issued it certainly does not
9 constitute extrinsic evidence.

10 Furthermore, these decisions are also readily distinguishable because they involve
11 standing determinations based on the original SAA. The Amended Complaint in this case
12 contains jurisdictional facts not considered in the submitted decisions. For example, the
13 Amended Complaint contains specific allegations concerning the Clarification and the Restated
14 Amendment. (Doc. # 21 at 5-6.) The Clarification has only been addressed in a potentially
15 advisory manner in *Hoehn*. See *Hoehn*, Case No. 2:11-cv-00050-PMP-RJJ (Doc. # 28 at 10). The
16 Restated Amendment has never been addressed in this District. Simply put, Defendant's
17 submission of the SAA and the related, publicly available standing decisions do not constitute
18 extrinsic evidence that is so separate and apart from the allegations of the Amended Complaint it
19 justifies converting his dismissal request into a factual attack under Rule 12(b)(1). See *Gould*
20 *Elecs. Inc.*, 220 F.3d at 176; *Holt*, 46 F.3d at 1002-03. To do so would require a completely
21 unwarranted interpretation of extrinsic evidence under Rule 12(b)(1).

22 Substantively, Defendant's dismissal request also demonstrates that it should be
23 construed as a Rule 12(b)(1) facial attack. Defendant's dismissal request contains absolutely no
24 analysis whatsoever as to why subject matter jurisdiction is lacking over this case in view of the
25 Clarification and/or the Restated Amendment. Instead, Defendant submits a copy of the original
26 SAA, which hardly constitutes extrinsic evidence under Rule 12(b)(1) – particularly given that
27 he has also submitted decisions interpreting the original SAA's terms. Given these glaring
28 shortcomings of Defendant's submission, his request to dismiss this case for a lack of subject

1 matter jurisdiction must be construed as a facial attack under Rule 12(b)(1).⁵ Righthaven's
2 Amended Complaint unquestionably set forth sufficient facts to invoke the subject matter
3 jurisdiction of this Court under the standards applicable to such an attack. Accordingly,
4 Defendant's Rule 12(b)(1) dismissal request must be denied.

5 **3. Righthaven's Amended Complaint alleged more than sufficient facts to**
6 **survive Defendant's Rule 12(b)(1) facial attack.**

7 As argued above, Defendant's dismissal request must be construed as a Rule 12(b)(1)
8 facial attack given that he has not submitted extrinsic evidence that is sufficiently removed from
9 the factual allegations of the Amended Complaint. *See Gould Elecs. Inc.*, 220 F.3d at 176; *Holt*,
10 46 F.3d at 1002-03. Defendant has also failed present any substantive analysis or arguments as to
11 why Righthaven lacks standing to maintain this action under the Clarification and/or the Restated
12 Amendment. Defendant's dismissal request must be denied under the standards applicable to a
13 Rule 12(b)(1) facial attack.

14 As noted earlier in this response, a Rule 12(b)(1) facial attack challenges the sufficiency
15 of the complaint's allegations that seek to invoke federal subject matter jurisdiction. *Montez*, 392
16 F.3d at 149-50; *Warren*, 328 F.3d at 1139; *Morrison*, 323 F.3d at 924 n. 5; *Li*, 482 F. Supp. 2d at
17 1175. Under a facial attack, the Court must accept as true all well-pleaded facts and draw all
18 reasonable inferences in favor of the non-moving party. *See Association of Am. Med. Coll.*, 217
19 F.3d at 778-79. "Federal district courts have subject-matter jurisdiction over copyright
20 infringement actions based on 28 U.S.C. §§ 1331 and 1338" *Reed Elsevier, Inc. v.*
21 *Muchnick*, 130 S.Ct. 1237 (2010). To allege a copyright infringement claim a party must plead:
22 (1) ownership of a valid copyright; and (2) the defendant's violation of one or more of the
23 copyright owner's exclusive rights set forth under the Copyright Act. *Ellison*, 357 F.3d at 1077;
24 *see also Feist Publ'ns, Inc.*, 499 U.S. at 361.

25
26
27 ⁵ Defendant relies extensively on the terms of the SAA, which the Amended Complaint
28 expressly states the parties have amended. (Doc. # 25 at 12-13; Doc. # 21 at 5-7.) As mentioned,
Defendant's submission of the SAA hardly constitutes extrinsic evidence outside of the
Amended Complaint to qualify his dismissal request as non-facial attack under Rule 12(b)(1).

1 Pursuant to Section 501(b) of the Copyright Act, only “the legal or beneficial owner of an
2 exclusive right under a copyright” is entitled to sue for infringement. *Silvers*, 402 F.3d at 884.
3 Section 106 of the Act, in turn, defines the exclusive rights that can be held in a copyright (*e.g.*,
4 the right to reproduce, to prepare derivative works, and to distribute copies). Exclusive rights in
5 a copyright may be transferred and owned separately—for example, through assignment or an
6 exclusive license - but no exclusive rights exist other than those listed in Section 106. *Silvers*,
7 402 F.3d at 885. While the right to assert an accrued cause of action for copyright infringement
8 cannot be transferred alone, such a right can be transferred along with one or more of the
9 exclusive rights in a copyright. *See id.* at 890.

10 In *Silvers*, the Ninth Circuit held that an assignor can transfer the ownership interest in an
11 accrued past infringement, but the assignee has standing to sue only if the interest in the past
12 infringement is expressly included in the assignment and the assignee is also granted ownership
13 of an exclusive right in the copyrighted work. *Id.* at 889-90. In so holding, the panel in *Silvers*
14 aligned Ninth Circuit law with that of the Second Circuit as set forth in *ABKCO Music, Inc. v.*
15 *Harrisons Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991), which recognized the right to sue for
16 past infringement when both the copyright and the accrued claims were purchased. *Silvers*, 402
17 F.3d at 889.

18 With these principles in mind, it is clear that Righthaven’s Amended Complaint more
19 than adequately invokes federal question subject matter jurisdiction under the Copyright Act.
20 First, Righthaven’s Amended Complaint contains the following allegations concerning Stephens
21 Media’s assignment of ownership of the Work to Righthaven:

22 After the Infringement, Stephens Media assigned all rights, title and interest in
23 and to the Work to Righthaven (the “Assignment”). In addition to conveying full
24 ownership rights in and to the Work, Stephens Media also expressly conveyed to
25 Righthaven in the right to seek redress for all past, present and future
infringements of the Work through the Assignment.

26 (Doc. # 21 at 6.) The above allegations unequivocally satisfy the Ninth Circuit’s requirements
27 under *Silvers* to confer Righthaven standing to maintain this action because the Assignment
28 “conveys full ownership rights in and to the Work . . .” along with expressly conveying “the right

1 to seek redress for all past, present and future infringements of the Work” See *Silvers*, 402
2 F.3d at 889-90. This conclusion has been confirmed by several decisions from this District that
3 have found that, standing alone, the express language of Righthaven’s copyright assignments
4 comply with the Ninth Circuits requirements under *Sivlers*.⁶ See *Righthaven LLC v.*
5 *Majorwager.com, Inc.*, 2010 WL 4386499, at *2 (D. Nev. Oct. 28, 2010); *Righthaven LLC v. Dr.*
6 *Shezad Malik Law Firm P.C.*, 2010 WL 3522372, at *2 (D. Nev. Sept. 2, 2010); see also
7 *Righthaven LLC v. Vote For The Worst, LLC*, Case No. 2:10-cv-01045-KJD-GWF (D. Nev.
8 March 30, 2011).

9 The Amended Complaint further alleges that Righthaven and Stephens Media entered
10 into the SAA and subsequently amended the agreement through the Clarification and the
11 Restated Amendment. (Doc. # 21 at 5-6.) With regard to the Restated Amendment, the
12 Amended Complaint alleges the following:

13
14 On July 7, 2011, Stephens Media and Righthaven entered into an Amended and Restated
15 Strategic Alliance Agreement (the “Restated Amendment”) to further clarify the parties’
16 intentions regarding copyright assignments to Righthaven, and to, among other things,
17 grant Stephens non-exclusive license to exploit the Work, with a possibility that such
18 non-exclusive license would terminate after five (5) years upon the voluntary election of
19 an optional reversion. The Restated Amendment is retroactive to the effective date of the
SAA. The Restated Amendment has sought to clarify, correct, amend and/or address
issues identified in judicial decisions from this District, which certain Righthaven
copyright infringement actions without prejudice for lack of standing.

20 (*Id.*) The foregoing allegations allege that Stephens Media holds a non-exclusive license to
21 exploit the Work under the Restated Amendment that cannot be terminated for five years. As a
22 non-exclusive licensee, Stephens Media cannot sue for infringement of the Work. See *Davis v.*
23 *Blige*, 505 F.3d 90, 101 (2d Cir. 2007) (a non-exclusive licensee may not sue others for

24 ⁶ As noted in a recent decision issued after the dismissal of Righthaven’s complaint in
25 *Democratic Underground* for lack of standing based on an analysis of the assignment at issue in
26 view of the contractual provisions of the SAA, “the extent of the assignment is generally best
27 determined through the discovery process.” *Righthaven LLC v. Virginia Citizens Defense*
28 *League, Inc.*, Case No. 2:10-cv-01683-GMN-PAL (D. Nev. June 23, 2011) (Doc. # 26 at 13:3-
4,13:14-17, holding that Righthaven’s infringement complaint sufficiently established standing
under the Copyright Act based on the pleading requirements of Federal Rule of Civil Procedure
8(a)).

1 infringement); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (“[A] person holding a
2 nonexclusive license has no standing to sue for copyright infringement.”). In contrast to Stephens
3 Media’s inability to sue for infringement, Righthaven is clearly vested with such authority
4 because it acquired ownership of the Work along with the right to sue for past, present and future
5 infringements under the plain language of the Assignment. *See* 17 U.S.C. § 101; 17 U.S.C. §
6 501(b).

7 The above referenced allegations of the Amended Complaint satisfy Righthaven’s
8 obligation to plead ownership of the Work and the company’s right to sue for past, present and
9 future infringements as required by *Silvers*. (*Id.* at 5-6.) The Amended Complaint’s allegations
10 concerning the Clarification and the Restated Amendment only solidify Righthaven’s ownership
11 of the Work and the company’s standing to maintain this action. (*Id.*) These allegations must be
12 accepted as true given that Defendant’s Rule 12(b)(1) dismissal request constitutes a facial
13 attack. *See Association of Am. Med. Coll.*, 217 F.3d at 778-79.

14 Defendant attempts to divert the Court’s attention away from his failure to assert any
15 material arguments as to why Righthaven lacks standing under the Clarification or the Restated
16 Amendment by claiming “Righthaven has not provided [him] with a copy of the Restated
17 Amendment to the SAA that it claims to have executed with Stephens Media on July 7, 2011.”
18 (Doc. # 25 at 11:22-23.) In addition to his previously referenced omissions, Defendant further
19 neglects to mention that neither initial disclosures nor discovery has commenced because he
20 requested this case be dismissed through his first appearance.⁷

21 Defendant’s attempt to justify his inability to substantively analyze the Clarification or
22 the Restated Amendment by placing blame on Righthaven’s failure to produce copies of these
23 documents, while he has taken the effort to locate and attach a copy of the SAA that was not
24 obtained from Righthaven, is a stroke of comical absurdity. In fact, a fairly reasonable

25
26 ⁷ As noted by Judge Navarro in denying a Rule 12(b)(1) dismissal request, a substantive
27 challenge to the effectiveness of an assignment of rights to Righthaven could be presented
28 through a request for summary judgment after discovery has been conducted. *Righthaven LLC v.*
Virginia Citizens Defense League, Inc., No. 2:10-cv-01683-GMN-PAL (D. Nev. June 23, 2011)
(Doc. # 26 at 13:10-13).

1 interpretation of the circumstances supports an interference that the Defendant is seeking to place
2 the burden of substantively analyzing and justifying standing under these contractual
3 amendments upon Righthaven, while obtaining the benefit of getting in the last word through his
4 reply brief by dissecting Righthaven's analysis. If true, this would constitute an impermissible
5 form of procedural sandbagging. *See Lujan*, 497 U.S. at 894-95 (recognizing the court has
6 discretion to disregard late-filed factual matters); *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175,
7 1186 n. 12 (9th Cir. 2009); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (the "district
8 court need not consider arguments raised for the first time in a reply brief").

9 Whether or not Defendant has attempted to engage in some ploy designed to make
10 Righthaven bear the burden of establishing its ownership under either the Clarification or the
11 Restated Amendment, these observations should in no way be construed that Righthaven is
12 afraid to substantively engage in such an analysis. If Defendant wishes to substantively examine
13 these contractual amendments and articulate a basis for concluding that Righthaven lacks
14 standing under the amendments' terms, then he should withdraw his Rule 12(b)(1) dismissal
15 request and Righthaven will immediately produce copies of the Clarification and the Restated
16 Amendment to him. If after reviewing the Clarification and the Restated Amendment the
17 Defendant determines that dismissal is appropriate, he can submit a filing that contains material
18 arguments and analysis to which Righthaven can respond.

19 Absent providing the Court with arguments based upon the materials it is required to
20 consider, the subject matter jurisdiction analysis must be limited to the sufficiency of the
21 allegations contained in the Amended Complaint. Righthaven's Amended Complaint
22 unquestionably set forth sufficient facts to invoke federal question subject matter jurisdiction.
23 *See Ellison*, 357 F.3d at 1077; *see also Feist Publ'ns, Inc.*, 499 U.S. at 361. Accordingly,
24 Defendant's request for dismissal under Rule 12(b)(1) must be denied.

25 **3. Defendant's claim that subject matter jurisdiction cannot exist because**
26 **the Copyright Act does not apply to extraterritorial infringements must**
27 **be rejected given the allegations of the Amended Complaint.**

28 In what can only be described as a novel attempt at convincing the Court it lacks subject
matter jurisdiction because the he resides in England, Defendant next argues that any alleged

1 infringement occurred outside of the United States. (Doc. # 25 at 13-14.) According to the
2 Defendant, since no acts of infringement occurred within the United States, the Court lacks
3 jurisdiction over this action. (*Id.*)

4 To begin with, in order to accept Defendant's contention that any alleged infringing acts
5 occurred exclusively outside of the United States, the Court would have to swallow his
6 uncontested supporting statements hook, line and sinker. For instance, the Court would have to
7 accept the Defendant's claim that the infringement was confined to the Company's office in
8 England where the Website is purportedly controlled. (*Id.* at 14:18-19, citing Newman Decl. ¶
9 7.) Likewise, Defendant self-servingly asserts that "[n]one of the servers supporting the website
10 are located in Nevada." (*Id.* at 14:22, citing Newman Decl. ¶ 17.) Defendant's statement, even if
11 accepted as true despite having not been subject to examination by Righthaven, only establishes
12 that the Website servers are not located in a single state within the United States of America,
13 which is comprised of 49 additional states (not to mention territories) where the servers could be
14 subject to the enforcement provisions of the Copyright Act. Of course, Righthaven has
15 conducted absolutely no discovery concerning any of these self-serving claims by the Defendant.

16 Defendant's argument also ignores the fundamental nature of the copyright infringement
17 allegations asserted in the Amended Complaint. Righthaven is not asserting infringement claims
18 that are claimed to have exclusively occurred abroad that only have produced a harmful effect in
19 this jurisdiction. Rather, Righthaven's Amended Complaint clearly alleges the Defendant
20 willfully misappropriated copyright protected content from the *Las Vegas Review-Journal* that
21 involves events occurring at a Las Vegas-based hotel. (Doc. # 21 at 4-7.) It is also alleged the
22 Defendant knew the misappropriated content emanated from this forum. Given these allegations,
23 adopting Defendant's skewed interpretation of the Copyright Act's jurisdictional confinement
24 would immunize willful foreign infringers from liability for stealing copyright protected content
25 as long as they employed servers strategically placed just beyond the geographical borders of
26 the United States.

27 In sum, there is simply no reliable factual record upon which the Court could justify
28 dismissing the Amended Complaint on the grounds requested by the Defendant because he has

1 not been subjected to cross-examination or any other forms of discovery authorized under the
2 Federal Rules of Civil Procedure. Moreover, the allegations of the Amended Complaint clearly
3 demonstrate that the alleged infringement is not claimed to have occurred outside of the United
4 States with only some harmful effects occurring within this forum. Rather, the Amended
5 Complaint details the willful misappropriation of content concerning forum-related subject
6 matter from a major forum-based media company by a Defendant alleged to having willfully
7 done so with full knowledge of these facts. Accordingly, the Court must deny Defendant's
8 extraterritorial claim that this Court lacks jurisdiction over the subject matter alleged in the
9 Amended Complaint.

10 **B. The Court Has Personal Jurisdiction Over The Defendant.**

11 **1. Contrary to Defendant's contention, he is subject to personal jurisdiction**
12 **despite his ownership interest in the co-defendant company.**

13 In what appears to be another example of Defendant's hastily conceived attempt secure
14 dismissal of this action, his lack of personal jurisdiction arguments begin with a contention that
15 he is shielded from personal liability based on his ownership interest in the Company without the
16 Amended Complaint containing alter ego allegations. (Doc. # 25 at 15-16.) In advancing this
17 argument, the Defendant appears to be requesting that he be dismissed for the failure to state a
18 claim against him under Federal Rule of Civil Procedure 12(b)(6) while concurrently
19 proclaiming the Court lacks jurisdiction over him in an apparent attempt at invoking the
20 fiduciary shield doctrine. Regardless of the specific nature of the dismissal request Defendant is
21 attempting to assert, it still fails given the allegations of the Amended Complaint.

22 As a threshold matter, Righthaven's Amended Complaint asserts infringement claims
23 under the Copyright Act – not under English law. An officer or director who participates in
24 direct or contributory copyright infringement can be held personally liable, jointly and severally,
25 with a corporate defendant. *See Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d
26 154,160 (3d Cir. 1984); *Samet & Wells, Inc. v. Shalom Toy Co.*, 429 F. Supp. 895, 903-04
27 (E.D.N.Y. 1977). Secondly, Righthaven's Amended Complaint specifically asserts claims
28 against the Defendant in his individual capacity and further asserts claims against the Company.

1 (Doc. # 21 at 2-3, 5-7.) These allegations claim the Defendant and/or the Company committed
2 direct and contributory infringement. (*Id.*) Defendant is also alleged to have willfully infringed
3 the Work. (*Id.*)

4 While Righthaven has not been able to conduct discovery in this case given its procedural
5 posture, and such discovery may justify alter ego allegations directed at the Company, the
6 Amended Complaint sufficiently alleges the Defendant's potential personal liability despite his
7 attempt to hide behind the Company's corporate charter. Accordingly, Defendant's contention
8 that he can only be personally liable if the Company's corporate veil is pierced must be rejected.

9 **2. The Defendant is subject to specific personal jurisdiction.**

10 In requesting dismissal pursuant to Rule 12(b)(2), Defendant contends the Court cannot
11 properly exercise either general or specific personal jurisdiction over him. (Doc. # 25 at 16-24.)
12 Given the absence of any discovery in this case, Righthaven must concede that it simply is
13 unable to justify the of exercise general personal jurisdiction over the Defendant.

14 This concession, however, should not come as a surprise given that Righthaven has
15 secured numerous decisions from this District that have exercised specific personal jurisdiction
16 over non-resident defendants accused of willfully infringing copyright protected content
17 "originated by the forum state's largest local newspaper publisher . . ." concerning forum-related
18 subject matter of interest to people and businesses within the State of Nevada. *Majorwager.com,*
19 *Inc.*, 2010 WL4386499, at *4 (exercising specific personal jurisdiction over Canadian
20 defendant); *Dr. Shezad Malik Law Firm P.C.*, 2010 WL 3522372. Righthaven maintains this
21 case is no different. The Court should deny the Defendant's Rule 12(b)(2) dismissal request by
22 finding that he is subject to specific personal jurisdiction in this forum.

23 In order to exercise specific personal jurisdiction over a non-resident defendant the Court
24 must apply a three-part test: (1) the non-resident defendant must do some act or consummate
25 some transaction within the forum, or perform some act which he purposefully avails himself of
26 the privilege of conducting activities in the forum, thereby invoking its benefits and protections;
27 (2) the claim asserted against the non-resident defendant must be one that arises out of or results
28 from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be

1 reasonable. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997); *Shute v.*
2 *Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990). Application of the foregoing test
3 demonstrates the Court has specific personal jurisdiction over the Defendant.

4 **a) The first prong of the specific jurisdictional analysis is satisfied based**
5 **on the Defendant's willful infringement of material known to emanate**
6 **from this state.**

7 Under the first, purposeful availment, prong of the specific jurisdictional analysis, the
8 Ninth Circuit has held that the defendant must have allegedly: (1) committed an intentional
9 action; (2) aimed at the forum state; and (3) which causes harm that the defendant knows is
10 likely to be suffered in the forum state. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d
11 797, 803 (9th Cir. 2004). The Ninth Circuit has expressly held that willful copyright infringers
12 who reproduce content from a source known to exist in the forum purposefully avail themselves
13 of jurisdiction within said forum. *Columbia Pictures Television v. Krypton Broadcasting of*
14 *Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997) ("*Columbia*"). Specifically, the *Columbia*
15 panel held that the *purposeful availment inquiry ends* in copyright infringement cases where the
16 defendant "willfully infringed copyrights owned by [the plaintiff], which, as [the defendant]
17 knew had its principal place of business in the [forum jurisdiction]." *Id.* The holding in
18 *Columbia* is dispositive of the purposeful availment analysis and has been expressly followed in
19 two recent Righthaven cases. *See Virginia Citizens Defense League, Inc.*, Case No. 2:10-cv-
20 01683-GMN-PAL (Doc. # 26 at 5-6) (finding allegations of willful infringement of content
21 known to emanate from an owner with its principal place of business in the forum alone satisfies
22 the purposeful availment prong); *Righthaven LLC v. South Coast Partners, Inc.*, 2011 WL
23 534046, at *4 (D. Nev. Feb. 8, 2011) (finding purposeful availment prong satisfied through
24 willful infringement of content known to have been owned by forum located business).

25 Courts in this District have held that content appearing in the *Las Vegas Review-Journal*
26 is published and distributed in Las Vegas, Nevada by the party that is alleged to have assigned its
27 rights in the Work to Righthaven. *See, e.g., Virginia Citizens Defense League, Inc.*, No. 2:10-cv-
28 01683-GMN-PAL (Doc. # 26 at 6); *South Coast Partners, Inc.*, 2011 WL 534046, at *4; *Vote*
For The Worst, LLC, et al., No. 2:10-cv-01045-KJD-GWF (Doc. # 28 at 4); *Mostofi*, No. 2:10-

1 cv-01066-KJD-GWF (Doc. # 19 at 3); *Majorwager.com, Inc.*, 2010 WL 4386499, at *3; *Dr.*
2 *Shezad Malik Law Firm P.C.*, 2010 WL 3522372, at *1. The *Las Vegas Review-Journal*
3 unquestionably published the Work in this case. (Doc. # 21 at 4; Doc. # 1-1, Ex. 1.) To the extent
4 the Defendant was somehow unaware of this fact, such knowledge is properly imputed to him.
5 *See Majorwager.com, Inc.*, 2010 WL 4386499, at *3; *accord Virginia Citizens Defense League,*
6 *Inc.*, No. 2:10-cv-01683-GMN-PAL (Doc. # 26 at 6). Moreover, the Work's subject matter
7 specifically relates to an architectural phenomena occurring at a prominent Las Vegas hotel.
8 (Doc. # 21 at 4.) The foregoing facts, coupled with Righthaven's allegations that Defendant
9 willfully infringed its rights in and to the Work are dispositive of the first prong under the Ninth
10 Circuit's specific jurisdictional analysis.

11 **b) The second prong of the specific jurisdictional analysis is satisfied**
12 **because Righthaven's claims arise out of the Defendant's forum-**
13 **related activity.**

14 The second prong of the Ninth Circuit's specific jurisdictional analysis examines whether
15 the plaintiff's claim arises out of the defendant's forum-related activity. *See Schwarzenegger,*
16 *374 F.3d at 803.* The basis for Righthaven's copyright infringement claim in this case is
17 substantively identical to those found to satisfy this analysis prong in cases other cases within
18 this District. *See, e.g., South Coast Partners, Inc.*, 2011 WL 534046, at *4; *Dr. Shezad Malik*
19 *Law Firm P.C.*, 2010 WL 3522372, at *1; *Majorwager.com, Inc.*, 2010 WL 4386499, at *3.
20 Accordingly, the facts before the Court support a finding that Righthaven's claims in this action
21 also arise out of the Defendant's forum-related activity.

22 Specifically, Righthaven contends, at least under its direct infringement claim, the
23 Defendant misappropriated the Work from the *Las Vegas Review-Journal* and posted it on the
24 Website for which he exercises substantial editorial control, is the administrative and technical
25 contact, and was the registrant until the Company assumed this position after the original
26 Complaint was filed. (Doc. # 21 at 2-4.) As stated by Judge Navarro in the *Majorwager.com,*
27 *Inc.* decision, the second prong of the Ninth Circuit's analysis "is easily satisfied as Plaintiff's
28 claim, that Defendant allegedly infringed the copyrighted material, arose from the publication of
the article in the state of Nevada" *Majorwager.com, Inc.*, 2010 WL 4386499, at *3; *accord*

1 *South Coast Partners, Inc.*, 2011 WL 534046, at *4; *Dr. Shezad Malik Law Firm P.C.*, 2010 WL
2 3522372, at *1. This reasoning was most recently echoed in another Righthaven opinion from
3 this District where specific personal jurisdiction was exercised over a non-resident defendant.
4 *See Virginia Citizens Defense League, Inc.*, No. 2:10-cv-01683-GMN-PAL (Doc. # 26 at 6).

5 Defendant has offered no compelling facts or circumstances to deviate from this
6 reasoning or from the reasoning of other members of this Court in examining the second prong
7 of the Ninth Circuit's specific jurisdictional analysis. Accordingly, this prong weighs in favor of
8 this Court exercising specific personal jurisdiction over the Defendant.

9 **c) Exercising specific personal jurisdiction over the Defendant is**
10 **reasonable, thereby satisfying the Ninth Circuit's third analysis**
11 **prong.**

12 Finally, the exercise of specific personal jurisdiction over the Defendant in this case
13 satisfies the third prong of the Ninth Circuit's test in that doing so would be reasonable. *See*
14 *Columbia Pictures Television*, 106 F.3d at 289. "[T]here is a presumption of reasonableness
15 upon a showing that the defendant purposefully directed his action at forum residents which the
16 defendant bears the burden of overcoming by presenting a compelling case that jurisdiction
17 would be unreasonable." *Id.* (quoting *Haisten v. Grass Valley Med. Reimbursement*, 784 F.2d
18 1392, 1397 (9th Cir. 1986)); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)
19 (noting that once the plaintiff has established the first two requirements for specific jurisdiction,
20 the burden shifts to the defendant to "present a compelling case that the presence of some other
21 considerations would render jurisdiction unreasonable."). Righthaven is certainly entitled to
22 such a presumption given the facts and allegations before the Court. *See Virginia Citizens*
23 *Defense League, Inc.*, No. 2:10-cv-01683-GMN-PAL (Doc. # 26 at 8) (finding the third prong
24 satisfied by affording Righthaven a presumption of reasonableness).

25 Absent affording Righthaven such a presumption, the Court must consider the following
26 factors in determining whether the exercise of specific personal jurisdiction would be
27 unreasonable: (1) the extent of the defendant's purposeful interjection into the forum state; (2)
28 the burden on the defendant in defending the suit in the forum state; (3) the extent of conflict
with the sovereignty of the defendant's forum state; (4) the forum state's interest in adjudicating

1 the dispute; (5) the most efficient and convenient forum for adjudicating the dispute; (6) the
2 importance of the chosen forum to the plaintiff's interest in obtaining convenient and effective
3 relief; and (7) the existence of an alternative forum. *Bancroff & Masters, Inc. v. Augusta Nat'l*
4 *Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000); *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1
5 F.3d 848, 851 (9th Cir. 1993). Defendant fails to present a compelling case of unreasonableness
6 under these factors, thereby further supporting the exercise of specific personal jurisdiction over
7 him.

8 Turning to the first factor, the Defendant's purposeful interjection into the forum state
9 parallels the question of minimum contacts, which Righthaven has demonstrated supports the
10 exercise of specific jurisdiction. *See Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199
11 (9th Cir. 1988). While the Defendant contends otherwise, the allegations before the Court
12 clearly demonstrate meritorious copyright infringement claims involving a literary work
13 generated by the "forum state's largest local newspaper publisher written about . . ." a topic
14 involving Las Vegas, Nevada. *See Majorwager.com, Inc.*, 2010 WL 4386499, at *4.
15 Furthermore, the infringing copy of the Work clearly referenced events specific to this forum and
16 the *Las Vegas Review-Journal* was clearly indicated as the source publication. (Doc. # 21 at 4-5;
17 Doc. # 1-1, Exs. 1-2.) The Defendant is also alleged to maintain technical, administrative, and
18 editorial control of the Website's content. (Doc. # 21 at 2-3, Ex. 1A.) In fact, the Website
19 "Rules" sternly advise the forums contained on it are the Defendant's and he has authority to ban
20 anyone for any reason. (*Id.*, Ex. 2A.) These facts clearly support a finding of reasonableness
21 under the purposeful interjection factor.

22 The second factor, the burden on the defendant in defending the action in the forum state,
23 also establishes reasonableness of exercising specific personal jurisdiction in this case. *Bancroff*
24 *& Masters, Inc.*, 223 F.3d at 1088. While Righthaven acknowledges that Defendant would be
25 burdened by defending in this forum given that he is a citizen and resident of Great Britain (Doc.
26 # 25 at 4, 21-22), any such burden does not automatically render the exercise of specific personal
27 jurisdiction unreasonable. Rather, the Court's determination of reasonableness must evaluate all
28 required factors under its specific personal jurisdiction analysis. *See Majorwager.com, Inc.*, 2010

1 WL 4386499, at *4. In fact, one member of this Court has exercised specific personal
2 jurisdiction over a foreign citizen in a Righthaven copyright infringement case. *Id.* (exercising
3 specific personal jurisdiction over a Canadian defendant). Moreover, as a practical matter, any
4 undue burden experienced by the Defendant can be readily mitigated through the use of video
5 conferenced and real time transcribed depositions, as well as the use of other available means to
6 almost eliminate the need for Defendant's to physically travel to this forum during this case. In
7 fact, as the party seeking to establish its copyright infringement claims on multiple theories,
8 Righthaven likely would be required to travel to the Defendant's country to conduct necessary
9 discovery. Accordingly, while this factor does indicate the Defendant would be burdened
10 somewhat in defending in this forum, this burden is not unreasonable.

11 The third reasonableness factor considers the extent of conflict with the sovereignty of
12 the defendant's state. *See Bancroff & Masters, Inc.*, 223 F.3d at 1088; *Amoco Egypt Oil Co.*, 1
13 F.3d at 851. Defendant offers absolutely no meaningful analysis as to the existence of any
14 conflicts or material sovereignty concerns in his discussion of this factor. (Doc. # 25 at 22:6-14.)
15 As such, Defendant has unquestionably failed to present a compelling case for unreasonableness
16 under the third analysis factor. *See Columbia Pictures Television*, 106 F.3d at 289; *see also*
17 *Burger King Corp.*, 471 U.S. at 477. Accordingly, the Court should conclude this factor
18 supports the exercise of specific personal jurisdiction over the Defendant.

19 Likewise, Defendant presents no meaningful argument with regard to the fourth
20 reasonableness factor, which considers the forum state's interest in adjudicating the dispute,
21 beyond rehashing his standing attack, mockingly referring to Righthaven as a worldwide
22 regulator of free speech, and even attacking this Court's own authority to adjudicate internet-
23 related disputes (Doc. # 25 at 22:15-23.). *See Bancroff & Masters, Inc.*, 223 F.3d at 1088;
24 *Amoco Egypt Oil Co.*, 1 F.3d at 851. Once again, Defendant has failed to present a compelling
25 case for unreasonableness under this factor. *See Columbia Pictures Television*, 106 F.3d at 289;
26 *see also Burger King Corp.*, 471 U.S. at 477. This fact alone supports the conclusion that
27 specific personal jurisdiction can be exercised over the Defendant.
28

1 Defendant's analysis under the fourth reasonableness factor additionally ignores other
2 decisions from this District in Righthaven cases that have concluded this forum has a significant
3 interest in adjudicating cases like this one. As noted by Judge Navarro, "the forum state has an
4 interest in adjudicating an infringement upon a news article originated by the forum state's
5 largest local newspaper publisher" *Majorwager.com, Inc.*, 2010 WL 4386499, at *4,
6 accord *Virginia Citizens Defense League, Inc.*, No. 2:10-cv-01683-GMN-PAL (Doc. # 26 at 7).
7 The forum state's interest in this regard further encompasses the subscribers of the *Las Vegas*
8 *Review-Journal* who primarily reside in the state along with local Nevada businesses that
9 advertise with the publisher from whom the content at issue was allegedly misappropriated. See
10 *Majorwager.com, Inc.*, 2010 WL 4386499, at *4. The fact that Stephens Media assigned
11 ownership and, among other things, the right to sue for past infringement to Righthaven does not
12 alter these facts. Moreover, the forum state also has an interest in adjudicating the rights of a
13 plaintiff that is a Nevada limited-liability company that maintains its principal place of business
14 within the forum. Accordingly, the fourth reasonableness factor clearly supports exercising
15 specific personal jurisdiction over the Defendant.

16 The fifth reasonableness factor additionally supports the Court exercising specific
17 personal jurisdiction over the Defendant. This factor considers the most efficient resolution of
18 the dispute. See *Bancroff & Masters, Inc.*, 223 F.3d at 1088; *Amoco Egypt Oil Co.*, 1 F.3d at 851.
19 Defendant's arguments in support of this factor simply set forth completely unpersuasive
20 assertions that because the Website it owned by a British company and its offices are located in
21 England, "the witnesses and evidence *are likely to be located in England.*" (Doc. # 25 at 22:24-
22 28, emphasis added.) This argument clearly fails to demonstrate a compelling case for
23 unreasonableness under the fifth specific jurisdiction analysis factor. See *Columbia Pictures*
24 *Television*, 106 F.3d at 289; see also *Burger King Corp.*, 471 U.S. at 477.

25 The cursory nature of Defendant's unreasonableness arguments under the fifth analysis
26 factor is readily apparent through a complete disregard of the facts at issue in this case. This case
27 involves the infringement of a Work originally published in this forum by a news media
28 company located in the forum that assigned ownership and related enforcement rights in and to

1 the Work to a Nevada limited-liability company that has its principal place of business in this
2 forum. Moreover, given the that a considerable number of copyright infringement actions are
3 pending in or have been adjudicated in this District, which involve or have involved defendants
4 from numerous different states, the interstate judicial system benefits from resolving these
5 matters in the same forum. *See Majorwager.com, Inc.*, 2010 WL 4386499, at *4. Accordingly,
6 the fifth reasonableness factor clearly supports the exercise of specific personal jurisdiction the
7 Defendant.

8 The sixth factor considers the plaintiff's interest in obtaining convenient and effective
9 relief within this forum. *See Bancroff & Masters, Inc.*, 223 F.3d at 1088; *Amoco Egypt Oil Co.*, 1
10 F.3d at 851. Despite having the burden of setting forth a compelling case for unreasonableness,
11 the Defendant merely argues that "Righthaven has not shown that the claim cannot be effectively
12 remedied in England. (Doc. # 25 at 23:1-5.) While Righthaven disputes its requirement to make
13 such showing, it certainly has more than an ample basis establish that it has an interest in
14 obtaining convenient and effective relief in this forum. The Amended Complaint clearly alleges
15 the infringement occurred from a source within this forum, Righthaven has litigated numerous
16 copyright actions involving non-resident defendants in this forum, and it was assigned ownership
17 of the Work from a company located within this forum. (Doc. # 21 at 4-6.) These facts and
18 circumstances, which have no relation to England, clearly satisfy the sixth reasonableness factor.

19 Finally, the seventh reasonableness factor also supports exercising specific personal
20 jurisdiction over the Defendant. This factor considers the existence of an alternative forum. *See*
21 *Bancroff & Masters, Inc.*, 223 F.3d at 1088; *Amoco Egypt Oil Co.*, 1 F.3d at 851. It has been
22 determined in this District that even where a potentially available alternative foreign forum may
23 exist to adjudicate Righthaven-related copyright infringement claims "a United States court is
24 better situated to apply and rule on the law . . ." in such actions. *See Majorwager.com, Inc.*,
25 2010 WL 4386499, at *5. This District is unquestionably familiar with and has repeatedly
26 exercised specific personal jurisdiction over non-resident defendants. *See South Coast Partners,*
27 *Inc.*, 2011 WL 532046, at *4-5; *Majorwager.com, Inc.*, 2010 WL 4386499, at *4-5; *Dr. Shezad*
28 *Malik Law Firm P.C.*, 2010 WL 3522372, at *1; *Righthaven LLC v. Industrial Wind Action*

1 *Corp.*, 2010 WL 3829411, at *1-2 (D. Nev. Sept. 24, 2000); *see also Virginia Citizens Defense*
2 *League, Inc.*, No. 2:10-cv-01683-GMN-PAL (Doc. # 26 at 7-8). Accordingly, the seventh
3 reasonableness factor further supports exercising specific personal jurisdiction over the
4 Defendant.

5 In sum, each and every factor, with the possible exception of the second factor, supports a
6 finding that it would be reasonable to exercise of specific jurisdiction over the Defendant. Thus,
7 Righthaven satisfied all three prongs required by the Ninth Circuit for the Court to properly
8 exercise specific personal jurisdiction over the Defendant. *See Cybersell, Inc.*, 130 F.3d at 416.
9 Accordingly, Defendant's request for dismissal pursuant to Rule 12(b)(2) must be denied.

10 **V. CONCLUSION**

11 For the reasons set forth above, Righthaven respectfully requests the Court deny the
12 Motion by finding that it has subject matter jurisdiction over this action, as well as concluding
13 that specific personal jurisdiction can be exercised over the Defendant. Righthaven further asks
14 the Court to grant such other relief as it deems proper.

15 Dated this 22nd day of August, 2011.

16 SHAWN A. MANGANO, LTD.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that on this 22nd day of August, 2011, I caused **PLAINTIFF RIGHTHAVEN LLC'S RESPONSE TO DEFENDANT GARRY NEWMAN'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND LACK OF PERSONAL JURISDICTION** to be served by the Court's CM/ECF system.

By: /s/ Shawn A. Mangano
Shawn A. Mangano, Esq.
SHAWN A. MANGANO, LTD.