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DISTRICT OF NEVADA

BY _____ DEPUTY

1 Daniel Barham
2 115 Rue Saint Philippe
3 Montreal, Quebec H4C 2T8
4 514-777-7102
5 Private individual

7 **UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF NEVADA**

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

12 *Plaintiff*)

13 v.)

Civil Action No. 2:10-cv-02150

14 DANIEL BARHAM, an individual; and URBAN)

15 NEIGHBOURHOOD, an entity that exists solely)

16 as Mr. Barham's internet based blog.)

17 *Defendant*

20 DEFENDANT, DANIEL BARHAM'S MOTION TO DISMISS

22 INTRODUCTION

24 Daniel Barham is a student who operates an internet blog at www.urbanneighbourhood
25 .com which provides information and commentary related to urban planning and architecture
26 around the world. Urban Neighborhood is a not for profit blog that exists solely as a Mr.
27 Barham's blog. Urban Neighbourhood receives no income and has no paid advertisements, text
28 and an image, herein referred to as "the Work" from an article, herein referred to as "the Article"

1 on the Las Vegas Review-Journal's website was quoted and placed in a post on this blog, herein
2 referred to as "the Post". The suite by the plaintiff alleges that the action of placing the Work
3 within the Post constitutes a violation of copyright. The defendant will show that the plaintiff has
4 failed to prove ownership of the Work, and has only proven ownership of author created text. If
5 ownership of author created text constitutes ownership of the Article and as such ownership of
6 the Work as it was contained within the Article then the defendant will show that the
7 reproduction of a small portion of the Article does not rise to the level of a copyright violation,
8 and is protected under the provisions of fair use. Pursuant to this it will be shown that the
9 Review-Journal encourages bloggers and commentators to copy and reproduce its content. Also
10 the Defendant will show that Righthaven, LLC, herein referred to as "Righthaven" has brought
11 this Complaint before the court with unclean hands, therefore, the Complaint brought by
12 Righthaven against Daniel Barham must be dismissed in its entirety.

13
14
15 POINTS AND AUTHORITIES

16
17 I. STATEMENT OF FACTS

18 Defendant Daniel Barham hereby moves this Court for dismissal of the Complaint filed
19 against him by Righthaven. The gravamen of the claims brought in that Complaint are for
20 copyright infringement, arising out of Mr. Barham's reproduction of an image within an article
21 that appeared in the online version of the Las Vegas Review-Journal (hereinafter "Review-
22 Journal") titled "'Vdara visitor:' Death ray scorched hair." The Article contained factual
23 information about the design of the Vdara Hotel and a quote from a bystander along with the
24 Work.

1 The Article was authored by Joan Whitely, an employee of the Review Journal, which,
2 purportedly, owned the copyrights to the intellectual property created by the author. The
3 ownership of the copyright in the Whitely work has presumably been transferred to Righthaven.
4 The ownership of the Work is listed as Mike Johnson and the Review-Journal and presumably
5 continues as such as the evidence presented by the plaintiff in exhibit 3 of both the Complaint
6 and the Motion lists the author created work as 'text' which one could reasonably assume refers
7 to the Article.

8 9 II. STANDARD OF REVIEW

10 For a defendant to prevail on a motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of his
12 claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957);
13 Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9 Cir. 1993). The purpose of a motion under
14 Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief in
15 the complaint. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9 Cir.1987).

16 17 18 19 III. ARGUMENT

20 21 A. DISMISSAL OF THE CLAIMS OF ALLEGED COPYRIGHT INFRINGEMENT OF 22 THE WORK FOR WHICH NO COPYRIGHT OWNERSHIP HAS BEEN 23 DEMONSTRATED IS WARRANTED

24 The Complaint alleges an instance of alleged copying of an image which they refer to as the
25 Work in their claim, but the application for copyright ownership asserts ownership of author
26 created text, the license does not list author created image, as is demonstrated in exhibit 3 of

1 Civil Action No. 2:10-cv-02150, appended to this motion as exhibit 3. As ownership of the
2 copyright in a work is a prerequisite to bringing a lawsuit to enforce the copyright,¹and as
3 Righthaven has not demonstrated in the Complaint ownership of the copyright for the Work,
4 dismissal is warranted.

5 B. ANY ALLEGED INFRINGEMENT BY DANIEL BARHAM IS ALLOWED UNDER
6 THE FAIR USE DOCTRINE

7 If ownership of Author created text refers to the Article as a whole and as such includes the
8 Work, then Mr. Barham believes that Plaintiff cannot make out a prima facie copyright
9 infringement claim, as the amount copied of the Article was small.² Nevertheless, without
10 waiving his assertion that regarding whether a prima facie case of copyright infringement can be
11 presented, the doctrine of fair use provides a complete defense to such claim. Therefore, the
12 infringement claim should be dismissed.

13 The doctrine of fair use is codified in the Copyright Act of 1976, 17 U.S.C. §107, which
14 states, in part:

15 Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,
16 including such use by reproduction in copies or phonorecords or by any other means specified by
17 that section, for purposes such as criticism, comment, news reporting, teaching (including
18 multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.
19 In determining whether the use made of a work in any particular case is a fair use the factors to
20 be considered shall include ——

- 21
22 (1) the purpose and character of the use, including whether such use is of a commercial
23 nature or is for nonprofit educational purposes;

¹17 U.S.C. 411 (a) states, in pertinent part:

(a) Except for an action brought for a violation of the rights of the author under section 106A (a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.

²The Article, as it appears in Exhibit “1” to Plaintiff’s Complaint, albeit in incomplete form, consists of 109 lines of text, of which, only 13 were copied, and 3 images of which only 1 was copied. The complete Article appears in Exhibit “1” of the Defendant’s motion.

- 1 (2) the nature of the copyrighted work;
- 2 (3) the amount and substantiality of the portion used in relation to the copyrighted work as a
- 3 whole; and
- 4 (4) the effect of the use upon the potential market for or value of the copyrighted work.

5
6 No one factor is conclusive, but all four factors must be weighed. Campbell v. Acuff-Rose
7 Music, Inc., 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).³

8 The fair use doctrine is intended to balance the rights of authors against the creative
9 efforts of others, and to promote the welfare of the public:

10
11 "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials
12 has been thought necessary to fulfill copyright's very purpose...." Campbell, 510 U.S. at 575, 114
13 S.Ct. 1164. "The fair use doctrine thus `permits [and requires] courts to avoid rigid application of
14 the copyright statute when, on occasion, it would stifle the very creativity which that law is
15 designed to foster.'" Id. at 577, 114 S.Ct. 1164 (quoting Stewart v. Abend, 495 U.S. 207, 236,
16 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990)) (alteration in original).

17 * * *

18 The purpose of copyright law is "[t]o promote the Progress of Science and useful Arts," U.S.
19 CONST. art. I, § 8, cl. 8, and to serve "the welfare of the public." Sony Corp. of Am. v.
20 Universal City Studios, Inc., 464 U.S. 417, 429 n. 10, 104 S.Ct. 774, 78 L.Ed.2d 574 (quoting
21 H.R.Rep.No. 2222, 60th Cong., 2d Sess. 7 (1909)).

22
23 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007).

24
25 The alleged infringement by Daniel Barham qualifies as fair use under the four factors of
26 the fair use doctrine.

27 ***1) Purpose and Character of the Use***

28 The most important component of the inquiry into the purpose and character of the use is
29 the question whether the allegedly fair use was "transformative," in other words, whether the
30 second use adds something new, with a further purpose or different character, altering the first

³"The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.... Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

1 with new expression, meaning, or message. Los Angeles News Service v. CBS Broadcasting,
2 Inc., 305 F.3d 924 (9th Cir. 2002).⁴

3 The form in which Mr. Barham chose to republish the material with other material
4 regarding the habits of architects and designers is transformative. Mr. Barham aggregated the
5 quoted material from the Article in the Post with other information and images both from other
6 sources and his own options regarding the actions of people involved with the construction of the
7 Vdara Hotel, thereby transforming the nature of the individual article into a commentary on
8 building design.

9 Indeed, the use of the Work here which was presented as a thumbnail at the base of the
10 article is similar to the use of thumbnail pictures in Perfect 10, Inc. v. Amazon.com, Inc., 508
11 F.3d 1146 (9th Cir. 2007). In that case, Perfect 10 sued Amazon and Google as a result of
12 Google's search engine reproducing thumbnail (reduced size) images of Perfect 10's copyrighted
13 images. In finding that the thumbnail reproduction was "transformative," the court stated:

14 Google's use of thumbnails is highly transformative. In Kelly, we concluded that Arriba's
15 use of thumbnails was transformative because "Arriba's use of the images serve[d] a
16 different function than Kelly's use—improving access to information on the [I]nternet
17 versus artistic expression." Although an image may have been created originally to serve
18 an entertainment, aesthetic, or informative function, a search engine transforms the image
19 into a pointer directing a user to a source of information.⁵

20
21 Similar to the Google thumbnails, the materials presented in the Post serve not only the purpose
22 of gathering different materials related to the state of the architecture profession and attitudes of

⁴Opinion amended by Los Angeles News Service v. CBS Broadcasting, Inc., 313 F.3d 1093 (9th Cir. 2002).

⁵Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) citations omitted.

1 building designers, but the Post also acted as a pointer to the source of the information, the
 2 Review Journal website.⁶

3 As the use of the copied material is in a transformative context, and acted as a pointer to
 4 the source material itself, this factor weighs in favour of a finding of fair use.

5 ***2) Nature of the Copyrighted Work***

6 The nature of the allegedly copied work is factual news reporting. Such information,
 7 which is less endowed with the creative activity than works of fiction, makes it easier to find fair
 8 use. "Works that are creative in nature are closer to the core of intended copyright protection
 9 than are more fact-based works."⁷ "The law generally recognizes a greater need to disseminate
 10 factual works than works of fiction or fantasy."⁸ As explained further in Los Angeles News
 11 Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002):

12 We have analyzed the "nature of the copyrighted work" factor extensively in prior LANS
 13 litigation. "The Denny beating tape is informational and factual and news; each
 14 characteristic strongly favours [the user]. Likewise the fact that the tape was published
 15 before its use by [the alleged infringer]. Although the Videotape is not without creative
 16 aspect in that it is the result of [Marika] Tur's skills with a camera, still this factor makes
 17 it a great deal easier to find fair use." This factor clearly points toward fair use.⁹

18 Moreover, since the article by the Review Journal appeared on the internet before it was copied
 19 to the internet by Mr. Barham, this factor weighs in favour of fair use. "Published works are
 20 more likely to qualify as fair use because the first appearance of the artist's expression has
 21

⁶See Exhibit "2" to the Complaint, at bottom, where it states "Read more at the Las Vegas Review Journal." Mr. Barham's post provided access to the origin of the article, and therefore, would have served as a feeder or pointer to the original source material, not unlike a search engine.

⁷A & M Records v. Napster, 239 F.3d 1004, 1016 (9th Cir. 2001) (citing Campbell, 510 U.S. at 586, 114 S.Ct. 1164) (internal quotation marks omitted).

⁸Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)

⁹305 F.3d at 940; opinion amended by Los Angeles News Service v. CBS Broadcasting, Inc., 313 F.3d 1093 (9th Cir. 2002)..

1 already occurred.”¹⁰ Thus, the “nature of the copyright work” factor, when taken as a whole,
 2 mitigates in favour of a finding of fair use.

3 ***3) Amount of the Copyrighted Work***

4 This factor also favours a finding of fair use; the licence for the copyright is for author
 5 created text as is listed on exhibit 3 and only the portions of the Article that were needed
 6 (including the Work) were copied to illustrate the Post’s commentary. If the plaintiff is claiming
 7 that the licence is for the image and not text then they have failed to provide proof of ownership
 8 of said image. If somehow a licence for author created text can somehow be interpreted as
 9 pertaining only to an image and not text, then “wholesale copying does not preclude fair use per
 10 se, copying an entire work militates against a finding of fair use.”¹¹

11 Case law interpreting this factor, though of course faithful to the statute's direction that
 12 we are to consider the substantiality of the portion used "in relation to the copyrighted
 13 work as a whole," has also noted that the purpose and character of the use are relevant in
 14 evaluating the denominator. See, e.g., *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 943 (9th
 15 Cir. 2002) ("If the secondary user only copies as much as is necessary for his or her
 16 intended use, then this factor will not weigh against him or her.")¹²

17 As stated *supra*, the Article in question, entitled “Vdara visitor: ‘Death ray’ scorched
 18 hair” consists of 108 lines of text of which 13 were quoted, or 66 sentences in 29 paragraphs. Mr.
 19 Barham copied 12 of the 66 sentences, 5 of the 29 paragraphs, or 1 of 3 images¹³ by any of these
 20

¹⁰*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (noting that the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his work weighs against the use of his work before its release).

¹¹*Worldwide Church of God v. Phila.Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000).

¹²*Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 941 (9th Cir.2002); opinion amended by *Los Angeles News Service v. CBS Broadcasting, Inc.*, 313 F.3d 1093 (9th Cir. 2002).

¹³As with Exhibit 1 provided by the Plaintiff Exhibit 2 in the plaintiff’s lawsuit which shows the Post from Urban Neighbourhood is incomplete the full Post is included in Exhibit 2 of this motion.

1 | measures; Mr. Barham copied less than 30% of the Article. This factor does not weigh against a
2 | finding of fair use.

3 | ***4) Effect of the Use Upon the Potential Market***

4 | Because the use of the copied material was transformative, it will likely have no effect on
5 | the market for internet news articles. A transformative work is less likely to have an adverse
6 | impact on the market of the original than a work that merely supersedes the copyrighted work.
7 | Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591, 114 S.Ct. 1164, 127 L.Ed.2d 500
8 | (1994) (stating that a work that supersedes the object of the original serves as a market
9 | replacement for it, making it likely that market harm will occur, but when the second use is
10 | transformative, market substitution is less certain).

11 | Mr. Barham did not profit from advertising on the website where the copied materials
12 | were displayed, unlike the alleged infringers in both the Google¹⁴ and Arriba¹⁵ cases. Blogs, by
13 | their very nature, are informative, and are most are not written for commercial gain. Mr. Barham
14 | has no advertising on Urban Neighbourhood and as such has made no profit from the Post. His
15 | blog in contrast, was created to be informative, not as a source of revenue. The material was
16 | placed into the Post primarily to bring attention to the general public regarding the foolhardy
17 | nature of ignoring natural phenomenon when designing a building. Moreover, because Mr.
18 | Barham's Post was acting as a feeder or pointer to the Review Journal website, it would likely
19 | benefit, not harm the Review Journal's market.

20 | Arriba's use of Kelly's images in its thumbnails does not harm the market for Kelly's
21 | images or the value of his images. By showing the thumbnails on its results page when
22 | users entered terms related to Kelly's images, the search engine would guide users to
23 | Kelly's web site rather than away from it.¹⁶

¹⁴Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

¹⁵Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

¹⁶Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003).

1
2 It is unclear as to whether Righthaven has purchased any right, other than the right to
3 initiate litigation, from the Review-Journal with regards to the Work or the Article. If it is
4 demonstrated that the Plaintiff cannot derive any commercial benefit or royalties from the
5 internet publishing of the Work or the Article, and indeed Righthaven and the Review-Journal
6 has removed the Work from the Review-Journal website and as such can make no profit from
7 it,¹⁷ considerations of effect upon the potential market should automatically be found in favour of
8 Mr. Barham.

9 C. IMPLIED LICENSE

10 Possibly the most important factor in considering the merit of this lawsuit is implied
11 license. “An implied license can be found where the copyright holder engages in conduct from
12 which the other party may properly infer that the owner consents to his use.”¹⁸ The Defendant
13 argues that the Review-Journal not only offered the article to the world for free, encouraged
14 people to save and share the article without restrictions, permitted users to “right-click” and copy
15 the article from its website, but also actively encouraged readers to share and repost the article on
16 other sites and forums. This is made evident when looking at the bottom of the original version
17 of the Article where there were no fewer than 19 different ways to copy and repost the Article
18 and the Work onto other websites and forums.¹⁹ The Plaintiff argues that it gave no such
19 license to the Defendant, it is clear however, from the multiple quick share links at the
20 bottom of the Article that the defendant can reasonably assert that the conduct of the
21 copyright holder at the time of publication on the Review-Journal website encouraged
22 users to copy and distribute the work with the ease of a single click. Moreover at the time

¹⁷See Exhibit 4.

¹⁸*Field*, 412 F. Supp. 2d at 1116 (internal quotation marks omitted).

¹⁹See Exhibit 1.

1 of this writing the Review-Journal and Righthaven have increased the number of ways
2 that the Article and the Work can be shared to 52, no less than 3 of which are blogging
3 platforms, specifically; Blogger, Typepad and Wordpress,²⁰ these quick link and easy
4 share buttons can not be interpreted in any other way than as a license to copy and
5 reproduce the content on external websites without written consent of either the Review-
6 Journal or Righthaven which in light of the infringement lawsuits filed by Righthaven
7 smacks of entrapment as anyone who utilizes the link embedded by the Review-Journal
8 to share on to a blogging platform would no doubt be served with an infringement lawsuit.
9 For this reason the lawsuit should be dismissed.

10 **D. DISMISSAL IS WARRANTED BECAUSE PLAINTIFF BRINGS THE CLAIMSWITH**
11 **UNCLEAN HANDS**

12 Plaintiff brings these claims with unclean hands, which mandates dismissal of this action.
13 The defense of unclean hands can be invoked as a defense in a copyright infringement action.²¹
14 The actions of Plaintiff Righthaven in pursuing the instant action for copyright infringement
15 smack of barratry,²² Righthaven was created by its counsel, Steven Gibson, apparently to pursue
16 violations of the copyrights it purchased from the Review Journal. Righthaven is not the author
17 of the work that was alleged to have been copied. In fact, as per its own motion Righthaven
18 purchased the copyright in the Work sometime after the alleged infringement occurred, and
19 likely purchased the copyright with the specific intention of pursuing this action against Mr.
20 Barham and a number of other bloggers.

²⁰See Exhibit 4.

²¹See 4 Nimmer on Copyright § 13.09[B].

²²Barratry is defined in Black's Law Dictionary (6th Ed.) as "the offense of frequently exciting and stirring up quarrels and suits."

1 Thus, it appears that Mr. Gibson, upon discovering these infringements, purchased the
2 copyrights so as to pursue the infringement actions against the allegedly liable parties. Neither
3 the Review Journal, nor Righthaven after its purchase of the Work, sent a cease and desist letter,
4 nor any other request to discontinue the alleged infringement, prior to initiating this action.
5 Instead, Righthaven has brought this lawsuit (and as of this writing close to 190 others) against
6 alleged infringers, further adding to this Court's overloaded docket. Righthaven's motivation for
7 avoiding the simple act of sending a letter requesting that Mr. Barham cease and desist is simple,
8 it is using these lawsuits as a source of revenue. Such abuse of legal process should be rejected.

9 CONCLUSION

10 In this case, Daniel Barham, has operated a blog for the purpose of educating the
11 general public about the state of urban planning and architecture across the world. His
12 actions in copying a small portion of a Review-Journal article and the Work contained
13 within are consistent with this purpose fall within the fair use doctrine. Furthermore
14 implied licence was given, and continues to be given by the Review-Journal and by
15 extension Righthaven. The nature of a blog is to be informative, and such uses for the
16 internet should be encouraged by copyright law, especially where the author of the blog,
17 as Mr. Barham herein does not derive commercial benefit from the website that displays
18 the blog. Defendant Daniel Barham asks this Court to dismiss the allegations of copyright
19 infringement based upon Plaintiff's lack of ownership of the Work, fair use of copied
20 materials, implied licence, and unclean hands.

21

EXHIBIT 1

EXHIBIT 1

Las Vegas News, Sports, Business, Entertainment and Classifieds

LAS VEGAS REVIEW-JOURNAL

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Vdara visitor: 'Death ray' scorched hair

Chicago lawyer says bag also melted

By LOAN WHITELY
LAS VEGAS REVIEW-JOURNAL



The Vdara Hotel swimming pool was a crowded place on a recent Sunday afternoon. (LOAN WHITELY/LAS VEGAS REVIEW-JOURNAL)

The tall, sleek, curving Vdara Hotel at CityCenter on the Strip is a thing of beauty. But the south-facing tower is also a collector and bouncer of sun rays, which -- if you're at the hotel's swimming pool at the wrong time of day and season -- can singe your hair and melt your plastic drink cups and shopping bags.

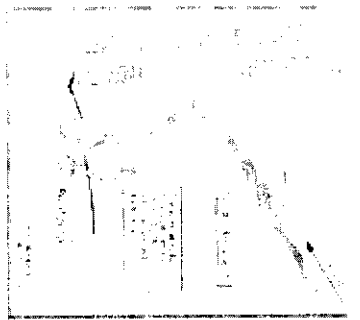
Hotel pool employees call the phenomenon the "Vdara death ray."

A spokesman for MGM Resorts International, which owns Vdara, said he prefers the term "hot spot" or "solar convergence" to describe it. He went on to say that designers are already working with resort staff to



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MIKE JOHNSON/LAS VEGAS REVIEW-JOURNAL

went on to say that designers are already working with resort staff to come up with solutions.

Designers foresaw the issue, and thought they had solved it by installing a high-tech film on the south-facing glass panes, according to Gordon Absher, the MGM spokesman. The film scatters more than 70 percent of reflected rays. But that's not enough, Absher acknowledged, as some pool guests are still uncomfortable.



Bill Pintas, a Chicago lawyer and businessman, took this photo of his melted plastic bag after he was caught unexpectedly at the Vdara pool deck in a "hot spot" of reflected sunlight. COURTESY OF BILL PINTAS

Chicago visitor Bill Pintas experienced Vdara's "death ray" recently. A lawyer, he was here on business for Preferred Capital Lending, which he co-owns. He also co-owns a Vdara condo.

Pintas told the Review-Journal that at midday Sept. 16, after a brief dip in the hotel pool, he was sunning on a recliner. He was on his stomach, relaxed, eyes closed.

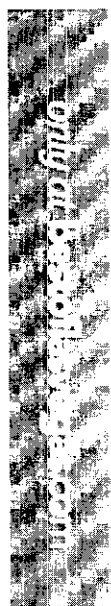
But suddenly, the lawyer became so uncomfortably hot that he leaped up to move. He tried to put on his flip-flop sandals but, inexplicably, they were too hot to touch. So he ran barefoot to the shade.

"I was effectively being cooked," Pintas said. "I started running as fast as I could without looking like a lunatic."

Then he smelled an odor, and realized it was coming from his head, where a bit of hair had been scorched. It was about 12:20 p.m., as best Pintas can recall.

Taking brief refuge at the pool's bar area, Pintas chatted with employees. He said they chuckled when he described what had happened. "Yes, we call it the death ray," he says they told him. Sometimes it causes disposable drink glasses to melt, a cocktail waitress added.

\$350 VOUCHER FOR BALANCED LIFE HYPNOTHERAPY



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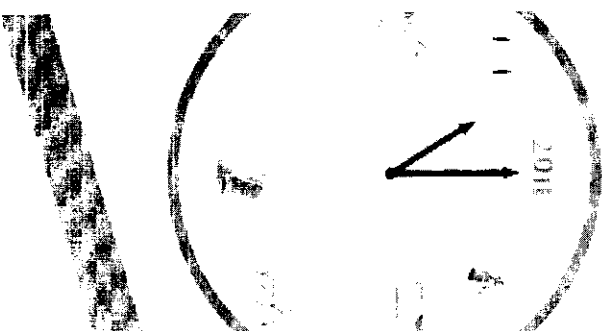
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
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what had happened. "Yes, we call it the death ray," he says they told him. Sometimes it causes disposable drink glasses to melt, a cocktail waitress added.

After the intense reflection had passed, Pintas returned to his lounge chair. He remembered that a patron nearby laughed, and said something like, "It got you, too?"

Then he noticed something more ... a flimsy plastic bag holding his newspaper had partially melted. The portion of bag bearing the name Vdara had entirely melted away. Holes marked where the letters, in black ink, had absorbed the heat. Pintas snapped a photo of the bag, which he shared with the newspaper.

After Pintas' experience, a Review-Journal reporter went to the Vdara pool twice. Employees did not know they were talking to a reporter.

The "hot spot" was visible during one of the visits, but no guests were in its reach. An employee pointed out the zone and said it was "like a magnifying glass that shines down" over a space about 10 feet by 15 feet, which moves as the Earth rotates. At this time of year, the bright reflection is present for about an hour and a half, both before noon and after, according to the young man.

The Review-Journal's other visit was well past noon, so the phenomenon was gone. But several employees recognized the "Vdara death ray" nickname, and readily spoke about the effect.

"It's basically a glare," said one.

"It's like 20 degrees hotter" wherever the reflection is hitting, another one said.

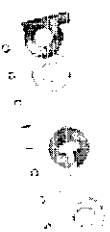
Pintas disagrees strongly with the "glare" terminology. Does glare "painfully heat your hair (and scalp)?" he asked in an e-mail after he returned to Chicago. "Glare sounds like what a politician or insurance attorney would call it. ...

"This is a real risk to pool guests and pool employees," Pintas concludes. Plastic shopping bags are often made of polyethylene, which melts at between 120 and 130 degrees. Many disposable plastic cups are made of polypropylene, which melts at about 160 degrees.

Pintas' theory is that Vdara's curved southern wall acts as a parabola to collect and intensify the afternoon rays, which it then reflects.

Viewed from above, the Vdara tower resembles a crescent. The crescent's southern-facing side is concave. There is no tall building farther south to block the sun's hot afternoon rays, so Vdara receives the full brunt. Its pool lies at the center of this southern-facing wall, on top of a low-rise building that is three stories tall.

A concave reflective surface can act "as a lens," according to Kerry Haglund at the Center for Sustainable Building Research, which is at the University of Minnesota. But she declined to speculate on whether the Vdara's wall is acting as one. Sophisticated computer modeling can determine whether its "facade configuration" and "reflective surface" interact in a way that creates a hazard for pool users, Haglund said via e-mail.



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The Vdara -- and five other CityCenter buildings -- are LEED-certified, a prestigious designation that means the buildings are designed, built and operated to conserve resources and to reduce impacts on the environment. Rafael Vinoly Architects designed Vdara.

Pintas said he doesn't intend to sue Vdara over the reflection issue. But as a condo owner, he worries about the health consequences and expects the hotel to fix the problem.

A new building's first season of operation always uncovers glitches, Absher also said. Vdara solutions under review include adding more foliage to the pool deck, offering larger sun umbrellas and building a shade structure. But the challenge of constructing shade is that the sun, and the reflection, are moving targets.

CityCenter's Vdara isn't the first high-profile structure to reflect brightly. In Las Vegas, both the AdventureDome at Circus Circus and the Mandalay Bay have reflection issues, Absher noted. In early spring, he added, some pool guests at Mandalay Bay even seek out the hot spots, because they are more comfortable for sunning.

In Los Angeles, the Disney Concert Hall -- by noted architect Frank Gehry -- had to tone down its reflectivity by sanding some of its curving exterior metal surfaces.

Initially, its reflections were raising temperatures in nearby buildings and impairing the vision of passers-by. In 2004, the Los Angeles Times ran a story about the hall, below the headline, "Disney venue reflects badly on downtown."

Reporter Alan Maimon contributed to this article. Contact reporter Joan Whitely at jwhitely@reviewjournal.com or 702-383-0268. Contact Alan Maimon at amaimon@reviewjournal.com or 702-383-0404.

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EXHIBIT 2

EXHIBIT 2

When Architects Try for a Luxury Hotel, and Build a Death Ray

By David Karger, author of *Project Manhattan*

FILED UNDER: HEALTH CARE, LAST SEVERAL MONTHS, LITIGATION

In news today, a first in building construction! quite by accident MGM resorts has created the worlds first functioning death ray!

Employees call it the "Vdara death ray," although a spokesman for MGM Resorts preferred to call it a "solar convergence".

Essentially what happens is similar to a solar camp stove, for those of you that remember your boy scout training, that these architects clearly did not, the sun beams bounce off of the concave facade of the Vdara Hotel at CityCenter and travel in a focused beam across the hotel's pool area. On a clear day this beam can singe hair and melt drinking cups as it travels poolside. Apparently designers predicted this problem and put a high-tech film on the building glass but it appears to be ineffective.

The Las Vegas Review Journal printed a personal account:

Chicago visitor Bill Pintas experienced Vdara's "death ray" recently. A lawyer, he was here on business for Preferred Capital Lending, which he co-owns. He also co-owns a Vdara condo.

Pintas told the Review-Journal that at midday Sept. 16, after a brief dip in the hotel pool, he was sunning on a recliner. He was on his stomach, relaxed, eyes closed.

But suddenly, the lawyer became so uncomfortably hot that he leaped up to move. He tried to put on his flip-flop sandals but, inexplicably, they were too hot to touch. So he ran barefoot to the shade.

"I was effectively being cooked," Pintas said. "I started running as fast as I could without looking like a lunatic."

Then he smelled an odor, and realized it was coming from his head, where a bit of hair had been scorched. It was about 12:20 p.m., as best Pintas can recall.

By David Karger, author of *Project Manhattan*



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Photo by Frank Meyer/Journal

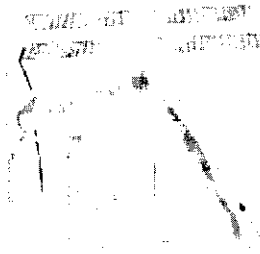
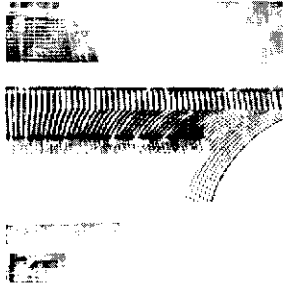
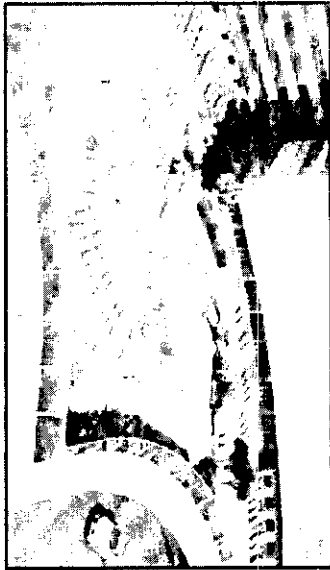


Photo by Frank Meyer/Journal

DISCUSSION

3 Responses to "When Architects Try for a Luxury Hotel, and build a Death Ray,"

luxury hotels are always expensive, but they offer some very attractive features and packages."

EXHIBIT 3

EXHIBIT 3

-APPLICATION-

Title _____

Title of Work: Vdara death-ray

Completion/Publication _____

Year of Completion: 2010

Date of 1st Publication: September 25, 2010

Nation of 1st Publication: United States

Author _____

▪ Author: Stephens Media LLC

Author Created: text

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant _____

Copyright Claimant: Righthaven LLC

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Transfer Statement: By written agreement

Rights and Permissions _____

Organization Name: Righthaven LLC

Name: Chief Executive Officer

Email: sgibson@righthaven.com

Telephone: 702-527-5900

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Certification _____

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Name: Steven A. Gibson

Date: November 24, 2010

Applicant's Tracking Number: 0002160

Case 2:10-cv-02150 Document 1-1 Filed 12/10/10 Page 10 of 10

Registration #:

Service Request #: 1-524088592

Application Date: 11-24-2010 12:55:02

Correspondent _____

Organization Name: Righthaven LLC
Name: Steven A. Gibson
Address: 9960 West Cheyenne Avenue
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Las Vegas, NV 89129-7701 United States

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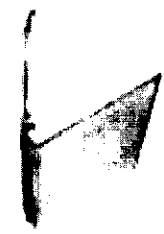
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EXHIBIT 4

EXHIBIT 4



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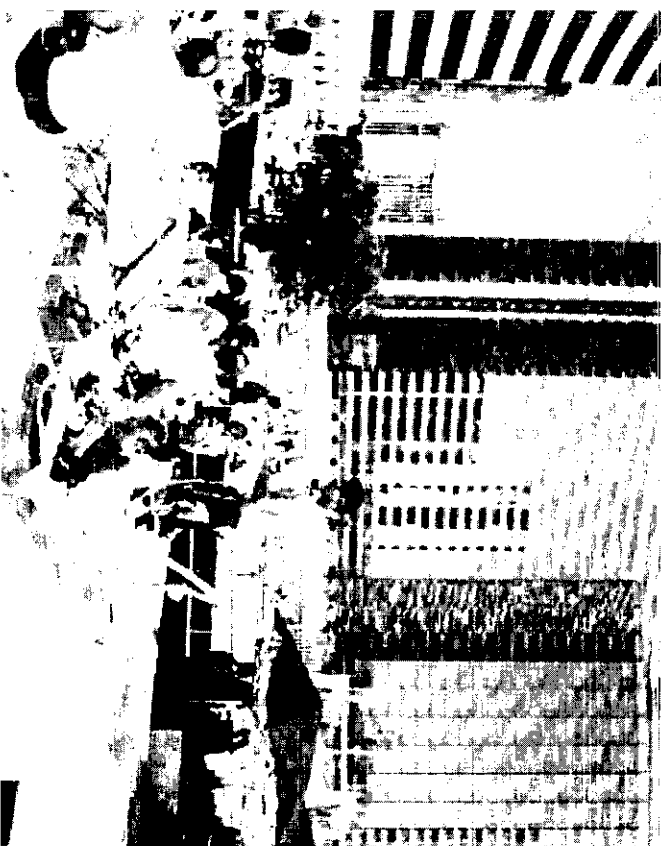


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Vdara visitor: 'Death ray' scorched hair



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By JOHN WITTEL
LAS VEGAS REVIEW-JOURNAL

The tall sleek curving Vdara Hotel at CityCenter on the Strip is a thing of beauty
But the south-facing tower is also a collector and bouncer of sun rays which --

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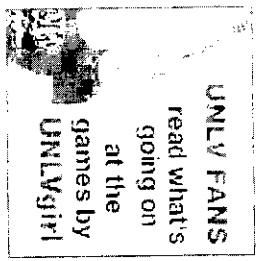
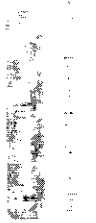
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By JOEL WHITELL LAS VEGAS REVIEW JOURNAL

The tall sleek curving Ydara Hotel at CityCenter on the Strip is a thing of beauty

But the south-facing tower is also a collector and bouncer of sun rays which -- if you're at the hotel's swimming pool at the wrong time of day and season -- can singe your hair and melt your plastic drink cups and shopping bags

Hotel pool employees call the phenomenon the "Ydara death ray."

A spokesman for MGM Resorts International which owns Ydara said he prefers the term "hot spot" or "solar convergence" to describe it. He went on to say that designers are already working with resort staff to come up with solutions

Designers foresaw the issue and thought they had solved it by installing a high-tech film on the south-facing glass panes according to Gordon Absher the MGM spokesman. The film scatters more than 70 percent of reflected rays. But that's not enough. Absher acknowledged as some pool guests are still uncomfortable.

Chicago visitor Bill Pintas experienced Ydara's "death ray" recently. A lawyer he was here on business for Preferred Capital Lending which he co-owns. He

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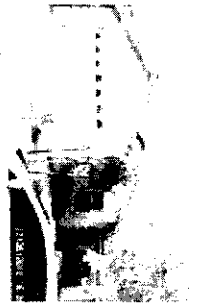
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Las Vegas, NV



Las Vegas, NV

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Chicago visitor Bill Pintas experienced Vdaras' "death ray" recently. A lawyer, he was here on business for Preferred Capital Lending, which he co-owns. He also co-owns a Vdara condo.

Pintas told the Review-Journal that at midday Sept. 16, after a brief dip in the hotel pool, he was sunning on a recliner. He was on his stomach, relaxed, eyes closed.

But suddenly, the lawyer became so uncomfortable that he leaped up to move. He tried to put on his flip-flop sandals but inexplicably, they were too hot to touch. So he ran barefoot to the shade.

"I was effectively being cooked," Pintas said. "I started running as fast as I could without looking like a lunatic."

Then he smelled an odor and realized it was coming from his head, where a bit of hair had been scorched. It was about 12:20 p.m., as best Pintas can recall.

Taking brief refuge at the pool's bar area, Pintas chatted with employees. He said they chuckled when he described what had happened. "Yes, we call it the death ray," he says. They told him sometimes it causes disposable drink glasses to melt, a cocktail waitress added.

After the intense reflection had passed, Pintas returned to his lounge chair. He remembered that a patron nearby laughed and said something like, "It got you, too?"

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Media swims up to man's encounter with Vdaras' death ray.

RUH, REHEBERKUS, TONY CURTIS and V-DAR = DEATH RAY UPD-TE

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OPERING IS LIGHT AT V-DAR = DEATH RAY

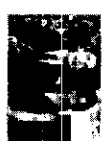
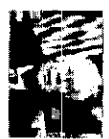
Vdara hotel is first to open, holding off City Center

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remembered that a patron nearby laughed and said something like "it got you too?"

Then he noticed something more -- a flimsy plastic bag holding his newspaper had partially melted. The portion of bag bearing the name Vdara had entirely melted away. Holes marked where the letters, in black ink, had absorbed the heat. Pintas snapped a photo of the bag, which he shared with the newspaper.

After Pintas' experience, a Review-Journal reporter went to the Vdara pool twice. Employees did not know they were talking to a reporter.

The "hot spot" was visible during one of the visits, but no guests were in its reach. An employee pointed out the zone and said it was "like a magnifying glass that shines down" over a space about 10 feet by 15 feet, which moves as the Earth rotates. At this time of year, the bright reflection is present for about an hour and a half, both before noon and after, according to the young man.

The Review-Journal's other visit was well past noon, so the phenomenon was gone. But several employees recognized the "Vdara death ray" nickname and readily spoke about the effect.

"It's basically a glare," said one

"It's like 20 degrees hotter" wherever the reflection is hitting, another one said.

Pintas disagrees strongly with the "glare" terminology. Does glare "painfully heat your hair (and scalp)?" he asked in an e-mail after he returned to Chicago. "Glare sounds like what a politician or insurance attorney would call it."

"This is a real risk to pool guests and pool employees," Pintas concludes. Plastic shopping bags are often made of polyethylene, which melts at between 120 and 130 degrees. Many disposable plastic cups are made of polypropylene, which melts at about 150 degrees.

Pintas' theory is that Vdara's curved southern wall acts as a parabola to collect and intensify the afternoon rays, which it then reflects.

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parabola to collect and intensify the afternoon rays which it then reflects

Viewed from above the Vdara tower resembles a crescent. The crescent's southern-facing side is concave. There is no tall building farther south to block the sun's hot afternoon rays so Vdara receives the full brunt. Its pool lies at the center of this southern-facing wall on top of a low-rise building that is three stories tall.

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CityCenter's Vdara isn't the first high-profile structure to reflect brightly. In Las Vegas, both the AdventureDome at Circus Circus and the Mandalay Bay have reflection issues. Absher noted. In early spring, he added, some pool guests at Mandalay Bay even seek out the hot spots because they are more comfortable for sunning.

In Los Angeles, the Disney Concert Hall -- by noted architect Frank Gehry -- had to tone down its reflectivity by sanding some of its curving exterior metal surfaces.

Summary

In Los Angeles the Disney Concert Hall -- by noted architect Frank Gehry -- had to tone down its reflectivity by sanding some of its curving exterior metal surfaces

Initially its reflections were raising temperatures in nearby buildings and impairing the vision of passers-by In 2004 the Los Angeles Times ran a story about the hall below the headline "Disney venue reflects badly on downtown"

Reporter Alan Maimon contributed to this article Contact reporter Joan Whiteley at jwhiteley@reviewjournal.com or 702-383-0288 Contact Alan Maimon at amaimon@reviewjournal.com or 702-383-0404

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