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PAK.ORG.

11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13  
14 RIGHTHAVEN LLC, a Nevada limited liability  
company,

15 Plaintiff,

16 v.

17 AZKAR CHOUDHRY, an individual; and  
18 PAK.ORG, a corporation of unknown origin  
and nature,

19 Defendants.  
20

21  
22 AZKAR CHOUDHRY, an individual,

23 Counterclaimant,

24 v.

25 RIGHTHAVEN LLC, a Nevada limited  
liability company,

26 Counter-defendant.  
27  
28

Case No. 2:10-cv-02155-JCM-PAL

**DEFENDANT AND  
COUNTERCLAIMANT AZKAR  
CHOUDHRY'S REPLY IN SUPPORT  
OF MOTION FOR  
RECONSIDERATION OF MAY 3,  
2011, ORDER DENYING IN PART  
DEFENDANTS' AND  
COUNTERCLAIMANT'S MOTION  
TO DISMISS THE COMPLAINT FOR  
FAILURE TO STATE A CLAIM UPON  
WHICH RELIEF CAN BE GRANTED  
OR, IN THE ALTERNATIVE, FOR  
JUDGMENT ON THE PLEADINGS  
OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT**

1 Defendant and Counterclaimant Azkar Choudhry (“Mr. Choudhry”) hereby replies in  
2 support of his Motion for Reconsideration of the Court’s May 3, 2011, Order denying in part  
3 Defendants’ motion to dismiss the Complaint, or in the alternative for summary judgment  
4 (respectively, the “Motion for Reconsideration,” and the “Order”). This Reply is supported by  
5 the following Memorandum of Points and Authorities, the pleadings and papers on file in this  
6 action, the Request for Judicial Notice (the “RJN”) filed concurrently herewith, and any oral  
7 argument the Court may allow.

### 8 9 MEMORANDUM OF POINTS AND AUTHORITIES

#### 10 **I. INTRODUCTION**

11 For the reasons discussed in Mr. Choudhry’s Motion for Reconsideration, the inline  
12 linking and volitional conduct defenses are separate and independent, as are the facts relating to  
13 each. Inline linking describes the circumstance where a party (whether volitionally or not)  
14 merely links to a copyrighted work such that the work is displayed in an end-user’s web browser,  
15 rather than hosting that work on its own server. Inline linking is noninfringing because the  
16 linking party does not, as a matter of law, copy, modify, distribute or publicly display the work  
17 when it does not host the work on its server. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,  
18 1160-1161 (9th Cir. 2007). Volition is different; it is an element of the plaintiff’s claim in all  
19 copyright cases. *See Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (a  
20 “plaintiff must . . . show volitional conduct on the part of the defendant in order to support a  
21 finding of direct copyright infringement.”). Courts have routinely held that there is no volition  
22 where content arrives at a defendant’s website by virtue of an automated process. *See, e.g.,*  
23 *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 907 F. Supp. 1361, 1370 (N.D. Cal.  
24 1995) (an “element of volition or causation . . . is lacking where a defendant’s system is merely  
25 used to create a copy by a third party.”). In this case, Mr. Choudhry has submitted ample  
26 evidence – distinct from the evidence he submitted in support of his inline linking defense – that  
27 because the Make Magazine content arrived at his server by means of an automated process, he  
28 engaged in no volitional conduct sufficient to give rise to a finding of direct copyright

1 infringement. This is true regardless of whether there was an inline link or not. Because the  
2 Court erred in holding that the volitional conduct analysis was dependent upon an evaluation of  
3 inline linking, and because there is no genuine dispute as to any material fact relevant to Mr.  
4 Choudhry's volitional conduct defense, the Court should reconsider its denial of Mr. Choudhry's  
5 summary judgment motion as to that issue.

## 6 **II. ARGUMENT**

### 7 **A. The Defense Of Inline Linking Is Separate From And Unrelated To The** 8 **Nonvolitional Conduct Defense.**

9 In its Opposition, Righthaven attempts to muddy the waters regarding the issue presented  
10 in Mr. Choudhry's Motion for Reconsideration. The fact that Mr. Choudhry's conduct is  
11 noninfringing pursuant to more than one defense is irrelevant to the instant motion; Mr.  
12 Choudhry seeks reconsideration only as to the volitional conduct defense. In its Order of May 3,  
13 2011, the Court ruled with respect to inline linking that the Court is not an expert in source code  
14 authorship, and that Righthaven had contested the authenticity of the HTML code submitted by  
15 Mr. Choudhry for the Court's consideration. [Order at 4.] Yet the HTML code and the other facts  
16 related to inline linking are irrelevant to the question of whether Mr. Choudhry's conduct was  
17 volitional. [Mot. for Recons. at 2-4.] Indeed, in analyzing volitional conduct, the Court should  
18 assume that the allegedly infringed work was actually copied to Mr. Choudhry's website, i.e.,  
19 that inline linking did not occur. [Mot. for Recons. at 2.]

20 The defenses of inline linking (on the one hand) and the volitional conduct doctrine (on  
21 the other hand) are separate, unrelated, and independent grounds for concluding that Mr.  
22 Choudhry had no legal liability with regard to the allegedly infringing post that underlies this  
23 action. [Choudhry's Mot. to Dismiss at 8-15; Mot. for Recons. at 2-4.] Mr. Choudhry  
24 respectfully submits that the Court erred by failing to consider each defense, and the different  
25 evidence relevant to each defense, separately.

1           **B.     Mr. Choudhry Has Submitted Substantial Evidence Showing That He**  
2           **Engaged In No Volitional Conduct Related To The Allegedly Infringing Post.**

3           Mr. Choudhry has submitted substantial and uncontroverted evidence that he engaged in  
4 no volitional conduct sufficient to give rise to liability for direct copyright infringement. For  
5 example, Mr. Choudhry has submitted a sworn declaration stating, among other pertinent facts,  
6 that:

- 7           • The software that runs the GupShup forums, vBulletin, checks for new  
8 content published through the RSS feeds to which GupShup subscribes on  
9 a regular and fully automated basis. If it finds new RSS content on a feed  
10 to which GupShup subscribes, it automatically posts that content to  
GupShup without any modification to the underlying content, and without  
any human intervention. [Choudhry Decl. ¶ 15].
- 11           • On or about October 8, 2010, in response to Make Magazine's update to  
12 its RSS feed, GupShup's vBulletin software automatically posted the text  
13 of the Make Magazine blog post entitled *Can a Building Be a Sun-Death*  
*Ray? Yes!*, and hyperlinks to the two images referenced therein, to  
14 GupShup's "RSS:Gadgets" sub-forum. This post occurred without [Mr.  
Choudhry's] knowledge or intervention . . . [Choudhry Decl. ¶ 29].
- 15           • Due to the automated operation of the RSS feed, the Make Magazine post  
16 appeared in GupShup's "RSS:Gadgets" sub-forum without [Mr.  
17 Choudhry's] knowledge, prior review, or prior approval. [Choudhry Decl.  
¶ 29].
- 18           • Due to the automated nature of the RSS feed, [Mr. Choudhry does] not  
19 know the content of any RSS-generated posts that appear on [his] server,  
20 at least until after they have been automatically posted to a GupShup sub-  
forum. [Choudhry Decl. ¶ 38].

21           In addition, Righthaven's own exhibit [Complaint, Ex. 2], shows that the title of the sub-  
22 forum to which the content was posted is "RSS:Gadgets," indicating that the content that appears  
23 therein is as a result of automated third-party RSS feeds. *See also*, Choudhry Decl. ¶ 16 (" . . . of  
24 82 separate forum categories, only 8 include sub-forums linked to RSS feeds.").

25           Finally, the fact that the allegedly infringing post, [Complaint, Ex. 2], is identical to the  
26 original Make Magazine blog post that generated the RSS feed in question, [Exhibit I to the  
27 Declaration of Benjamin A. Costa in support of Mr. Choudhry's Motion to Dismiss], further  
28

1 supports the conclusion that Make, not Mr. Choudhry, was the source of the alleged infringement  
2 in this case.

3 Mr. Choudhry has come forward with substantial evidence that demonstrates a lack of  
4 volitional conduct on his part. Accordingly, even if there were no inline linking defense available  
5 in this case, he is not liable for direct copyright infringement.

6 **C. Righthaven Has Not Raised Any Dispute As To Any Material Fact Relevant**  
7 **To The Volitional Acts Doctrine, Nor Has It Demonstrated A Need For Discovery.**

8 As Righthaven points out, the Court denied Mr. Choudhry's summary judgment motion  
9 not only on the erroneous ground that "Defendants' argument as to volition depends on the court  
10 concluding that, as a matter of law, the alleged infringement here was actually 'inline linking,'" but  
11 also because the Court found "the genuine issues of material fact cited by plaintiff  
12 Righthaven at pages eleven to twelve of the response brief (doc. #23) apropos." [Order at 4.]  
13 However, as to the latter ground, the Court did not specify whether some of all of the genuine  
14 issues it identified were related to inline linking, or alternatively to volitional conduct. Because  
15 the Court erred in holding that the volitional conduct defense depends upon an inline linking  
16 analysis, it appears that some or all of the genuine issues identified by the Court (such as those  
17 relating to the HTML code) were likely irrelevant to the volitional conduct analysis (and  
18 therefore immaterial with respect to that defense). Because the Court should analyze volitional  
19 conduct without regard to inline linking, only those facts relevant to volitional conduct need be  
20 undisputed in order for the Court to grant summary judgment in Defendants' favor.

21 Righthaven has offered nothing to dispute the facts that relate to Mr. Choudhry's lack of  
22 volition, beyond a list of generalized questions that in effect accuse (with no basis) Mr.  
23 Choudhry of lying to the Court in his declaration. Such questions are insufficient to defeat  
24 summary judgment. Vague doubts and suppositions that merely express an "unspecified hope of  
25 undermining [Mr. Choudhry's] credibility" are insufficient to defeat a motion for summary  
26 judgment. *Nat'l Union Fire Ins. Co v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). Rather,  
27 Righthaven "must come forward with 'specific facts showing that there is a genuine issue for  
28

1 trial.” *Matsushita Elec Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation  
2 omitted). It has failed to do so.

3 Similarly, Righthaven’s argument that there has not yet been any discovery in this case is  
4 unavailing. A party seeking to prevent the grant of a motion for summary judgment and seeking  
5 a continuance for discovery must show “(1) that they have set forth in affidavit form the specific  
6 facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that  
7 these sought-after facts are ‘essential’ to resist the summary judgment motion.” *State of Cal., on*  
8 *Behalf of the California Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th  
9 Cir. 1998) (“*Dept. of Toxic Substances*”); *see also, VISA Int’l Serv. Ass’n v. Bankcard Holders of*  
10 *America*, 784 F.2d 1472, 1475 (9th Cir. 1986). Righthaven has made none of these showings.

11 Rule 56(d) provides a mechanism for nonmoving parties to request an opportunity to  
12 pursue discovery, yet Righthaven failed to submit a declaration or affidavit pursuant to this Rule.  
13 “Rule [56(d)] requires affidavits setting forth the particular facts expected from the movant’s  
14 discovery. *Failure to comply with the requirements of Rule [56(d)] is a proper ground for*  
15 *denying discovery and proceeding to summary judgment.*” *Brae Transp., Inc. v. Coopers &*  
16 *Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) (emphasis added) (addressing Rule 56(d) at its  
17 former location as Rule 56(f)).

18 Righthaven has failed to set forth any specific facts it might hope to elicit from further  
19 discovery with respect to volitional conduct, has failed to show that any such facts exist, and has  
20 failed to show that any such facts would be essential to resisting Choudhry’s summary judgment  
21 motion. Righthaven is obligated to do more than posit questions that appear generically relevant;  
22 it must set forth specific facts that exist and/or that would preclude summary judgment pursuant  
23 to the volitional acts doctrine if discovered. *See Family Home and Finance Ctr., Inc. v. Federal*  
24 *Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). It has not done so.

25 Righthaven knows what an RSS feed is, and it knows that nonvolitional conduct is a valid  
26 defense to a claim for direct copyright infringement. In a case currently pending in the District of  
27 Colorado, in response to a defendant’s motion to dismiss, filed before the parties had conducted  
28 any discovery, Righthaven argued:

1  
2 Defendants' assertions, however, completely ignore that [defendant]  
3 selected and posted the Work on the Website without any due diligence as  
4 to its source by simply relying on content made available from a third  
5 party's website. Thus, *this is not a case where copyright protected content  
6 appeared on a defendant's website through subscription to an RSS feed or  
7 other service engaged to provide content.*

8 Request for Judicial Notice, Ex. A (Righthaven's Opposition to Defendants' Motion to Dismiss  
9 for Lack of Personal Jurisdiction, *Righthaven LLC v. Tripso et al.*, Case No. 11-cv-00146-JLK,  
10 May 16, 2011 (emphasis added) (internal citations omitted)). Accordingly, Righthaven has  
11 acknowledged that content appearing "on a defendant's website through subscription to an RSS  
12 feed or other service engaged to provide content," precisely the issue in this case, is not a proper  
13 basis for asserting direct copyright liability. Moreover, the above-referenced filing was made by  
14 Righthaven in response to a motion to dismiss, before discovery had been propounded and  
15 before experts had been retained, yet Righthaven was quite capable of accurately assessing the  
16 presence or absence of a subscription-based RSS feed in that case.

17 Righthaven's apparent aim in the instant proceeding is to stave off defeat for long enough  
18 to conduct costly discovery against Defendants, whose only "transgression" is the legally  
19 immunized conduct of subscribing to a third-party's RSS feed, and to send the message to other  
20 Righthaven victims that standing up to even baseless claims of infringement is far more costly  
21 than settlement. Because Righthaven has failed to properly submit any evidence that would tend  
22 to contradict Mr. Choudhry's volitional conduct defense, Mr. Choudhry requests reconsideration  
23 and issuance of summary judgment in his favor.  
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1 **III. CONCLUSION**

2 For the reasons set forth above, and in Mr. Choudhry's underlying Motion for  
3 Reconsideration, Mr. Choudhry respectfully requests that the Court reconsider its Order with  
4 respect to the volitional conduct defense.

5  
6 Dated: June 13, 2011.

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7  
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**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Azkar Choudhry and Pak.org and that on this 13th day of June, 2011, I caused the DEFENDANT AND COUNTERCLAIMANT AZKAR CHOUDHRY'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF MAY 3, 2011, ORDER DENYING IN PART DEFENDANTS' AND COUNTERCLAIMANT'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT to be served by the Court's CM/ECF system.

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