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12 *Wayne Hoehn*

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

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

17 Plaintiff,

18 vs.

19 WAYNE HOEHN, an individual,

20 Defendant.

Case No. 2:11-cv-00050

**MOTION FOR LEAVE TO
SUPPLEMENT RECORD**

MOTION FOR LEAVE TO SUPPLEMENT RECORD

21 Defendant Wayne Hoehn (hereinafter “Hoehn,” or the “Defendant”), by and through his
22 counsel, Randazza Legal Group, brings this Motion to supplement the record in this case with
23 new information made available only after making his Motion for Attorney’s Fees (Doc. # 32)
24 against Plaintiff Righthaven LLC (hereinafter “Righthaven,” or the “Plaintiff”).

25 Hoehn filed a Motion seeking attorney’s fees (Doc. # 32) on July 5, the last day he was
26 allowed to do so under Rule 54, after trying to negotiate a fee award with Righthaven. (*Id.*) On
27 July 14, 2011, a colleague of this Court, Judge Hunt, held a hearing in which Righthaven was
sanctioned in various ways for its “intentional misrepresentations” and “concerted effort to hide
Stephens Media’s role in this litigation,” which “demonstrated Righthaven’s bad faith, wasted
judicial resources, and needlessly increased the costs of litigation.” *Righthaven LLC v.*

1 *Democratic Underground LLC et al.*, Case No. 2:10-cv-01356 (Doc. # 138) (D. Nev. July 19,
2 2011) (minute entry).

3 Righthaven's sanctions are considerable. First, it has been fined \$5,000. *Id.* In addition,
4 Judge Hunt ordered Righthaven to provide copies of its prior Order dismissing Righthaven's
5 case for lack of standing in *Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 116),
6 *2011 WL 2378186* at *1, its Strategic Alliance Agreement ("SAA") with Stephens Media, and a
7 transcript of the July 14, 2011 hearing, in every pending case involving Stephens Media.
8 *Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 138).

9 From July 19 to July 22, Hoehn's counsel engaged Righthaven's counsel regarding filing
10 this documents in the instant case. Righthaven's counsel has thus far declined to do so.
11 Declaration of J. Malcolm DeVoy ¶¶ 2-5.

12 The recent Order in *Democratic Underground* (Doc. # 138) comes after Hoehn has moved
13 for fees in this case (Doc. # 32) and Righthaven has filed a notice of appeal (Doc. # 33). Even if
14 Judge Hunt had not ordered Righthaven to submit these documents to the Court in this case,
15 Hoehn would have done so on his own, as Judge Hunt's Order and characterization of
16 Righthaven's practices have a direct bearing upon both the pending fee motion and at least the
17 first portion of this Court's Order on Summary Judgment (Doc. # 28). Under these
18 circumstances, courts – including those in this District – allow the movant to put the newly
19 revealed evidence on the record. *See Democratic Underground*, Case No. 2:10-cv-01356 (Doc. #
20 76) (granting leave to supplement factual record with late-supplied evidence); *U.S. v. Maris*,
21 *2011 WL 468554* at *5 n.5 (D. Nev. Feb. 4, 2011) (granting leave to file supplemental materials
22 after motions were filed and a hearing held on a motion for summary judgment); *Mitchel v.*
23 *Holder*, *2010 WL 816761* at *1 n.1 (N.D. Cal. Mar. 9, 2010) (granting leave to file supplemental
24 memorandum concerning newly obtained evidence); *Lumsden v. United States*, *2010 WL*
25 *2232946* at *1 (E.D. N.C. June 3, 32010) (granting a party leave to submit additional newly
26 discovered evidence).

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1 A true and correct copy of a partial transcript of this hearing, filed in Righthaven LLC v.
2 Pahrump Life, Case No. 2:10-cv-01575 (Doc. # 58-2) (D. Nev. July 20, 2011), is attached hereto
3 as Exhibit A. The evidence contained therein, regarding the misrepresentations made by
4 Righthaven regarding its standing, go to the heart of this Court's June 20, 2011 Order dismissing
5 the action, and reveal Righthaven's lack of credulity in bringing its claims against Hoehn – an
6 important factor for this Court in assessing an award of attorney's fees under *Fogerty v. Fantasy*
7 *Incorporated*, 510 U.S. 517 (1994).

8 Moreover, the transcript is clear at various points that Judge Hunt's Order – and the
9 transcript – should be considered by all courts with pending Righthaven matters, including
10 appeals. (Exh. A at 18:20-19:2, 21:11-22:12.) Judge Hunt specifically said, concerning what
11 would later become his Order in Document Number 138, that the documents he specified “will
12 not apply to those cases that have been dismissed, *unless there's going to be an appeal in those*
13 *cases.*” (*Id.* at 18:25-19:2.) Judge Hunt's language, and the manifest intent of his Order, could
14 not be any clearer: Righthaven is supposed to file those documents in this case – *especially* now
15 that Righthaven has filed a notice of appeal (Doc. # 33).

16 As Righthaven ostensibly has no intent to comply with Judge Hunt's Order in Democratic
17 Underground and file a transcript from the July 14 hearing in this case (*see* DeVoy Decl. ¶ 6),
18 Hoehn takes it upon himself to show a portion of it to the Court, establishing its probative value,
19 and seeking leave to make it part of the record for considering an award of attorney's fees, as
20 well as for the Ninth Circuit Court of Appeals' proper consideration.

21
22 Dated July 22, 2011

Respectfully Submitted,

RANDAZZA LEGAL GROUP

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Marc J. Randazza
J. Malcolm DeVoy IV

Attorneys for Defendant,
Wayne Hoehn

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a
3 representative of Randazza Legal Group and that on this 22nd day of July, 2011, I caused the
4 document(s) entitled:

- 5 • **MOTION FOR LEAVE TO SUPPLEMENT RECORD**

6 and all attachments to be served as follows:

7
8 by depositing same for mailing in the United States Mail, in a sealed envelope
9 addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne
10 Avenue, Suite 210, Las Vegas, Nevada, 89129-7701, upon which first class
postage was fully prepaid; and/or

11 Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or

12
13 to be hand-delivered;

14
15 by the Court's CM/ECF system.

16
17 /s/ J. Malcolm DeVoy

18 J. Malcolm DeVoy