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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

**DEFENDANT’S RESPONSE TO
PLAINTIFF’S MOTION TO QUASH
WRIT OF EXECUTION**

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21 Defendant Wayne Hoehn (“Defendant”), represented by his attorneys, Randazza Legal
22 Group, in the above-captioned matter, replies to Plaintiff/Judgment Debtor Righthaven LLC’s
23 (“Plaintiff[’s]”) Motion to Quash Writ of Execution (Doc. 76) and respectfully requests that this
24 Court deny Plaintiff’s Motion.

I. Introduction

25 The Defendant properly filed a Writ of Execution with this court pursuant to both Fed. R.
26 Civ. P. 69(a)(1) and N.R.S. 21.020. This Motion was immediately returnable at the time it was
27 filed, and the Court had discretion to grant, reject, or reduce the fees Hoehn sought (Decl. of J.
28 DeVoy ¶¶ 4-6) (*see* Doc. 59) (reducing interest rates, accrued interest sought by Hoehn). The
clerk of the court did not object to the addition of these fees, despite his amendments to the

1 accrued interest (*id.*). The clerk then approved the rest of the amounts Hoehn seeks.
2 Accordingly, this Court should deny Plaintiff's Motion to Quash.

3 **II. Argument**

4 Defendant properly filed a Writ of Execution with this Court pursuant to Fed. R. Civ. P.
5 69(a)(1), which states that a money judgment is enforced by a writ of execution in "accord with
6 the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). Therefore, in
7 order to determine the proper procedure for enforcing a writ of execution, the court must turn to
8 N.R.S. 21.020 for guidance as to the proper procedure for issuing a writ of execution. According
9 to the statute, the Defendant properly filed a writ with this Court, and the Deputy Clerk of the
10 Court made amendments to the writ and approved it. (Doc. 59).

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12 **A. This Court should deny Plaintiff's Motion to Quash because Plaintiff failed to
13 respond to the writ within the time allotted.**

14 According to the procedure governing the writ, an execution "shall be returnable to the
15 clerk with whom the judgment roll is filed not less than 10 nor more than 60 days after its receipt
16 by the sheriff." N.R.S. 21.040. Under Fed. R. Civ. P. 69(a)(1), Nevada law controls the
17 operation of Hoehn's writ of execution. In the instant case, the motion for the writ of execution
18 was ripe the day it was filed, October 29, 2011. (DeVoy Decl. ¶¶ 3-6). The Deputy Court Clerk
19 approved the writ on November 1, 2011. (Doc. 59)

20 Righthaven, yet again, did not act in time to obtain the relief it seeks (*see* Docs. 64, 65,
21 73). Righthaven failed to respond to the writ within 60 days of its approval under N.R.S. 21.040,
22 and did not file its Motion to Quash until January 9, 2012 — 70 days after the writ was signed
23 and dated by the Deputy Clerk. (Doc. 76) As such, because the Plaintiff failed to respond to the
24 writ in the allotted time period, and is time-barred from bringing a Motion to Quash in this
25 Court.

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27 **B. The Court and Clerk were justified in the addition of attorneys' fees and costs in
28 this case because the time spent pursuing fees is awardable, and the Deputy Law
Clerk already made the appropriate amendments to the writ of execution.**

1 Time spent in establishing entitlement to an amount of fees is awardable. *Clark v. City of*
2 *Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986). *See also In re Nucorp Energy*, 764 F.2d 655,
3 661 (9th Cir. 1985) (noting that attorneys should be compensated for time spent on the overall
4 rate of compensation). In addition, if the certainty of an award has not yet attached, a fee
5 multiplier is appropriate until certainty is in place. *Id.*

6 In its Motion to Quash, the Righthaven argues that Hoehn's counsel improperly added
7 almost \$30,000 in accrued costs and fees to its writ of execution. Per the Writ of Execution's
8 affidavit, this is a true and correct amount of accrued fees and costs incurred between the time
9 this Court entered judgment against Righthaven (Docs. 43, 44) and it approved the Writ of
10 Execution (Doc. # 59). This practice is accepted under Nevada law, and the amount of fees and
11 costs added to a judgment upon its execution is left to the jurisdiction of the issuing court. *See*
12 *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 832 (Nev. 2008) ("the district
13 court had authority to award to Mt. Rose Heating attorney fees incurred postjudgment"). In
14 *Barney*, the court held that post-judgment fees and costs incurred in enforcing the judgment were
15 properly included in a writ of execution, subject to the issuing court's discretion. *Id.* Indeed, just
16 as with an award of attorneys' fees, awarding post-judgment costs and fees is a matter consigned
17 to the Court's discretion. Here, it was exercised consistent with Nevada law to allow Hoehn to
18 recover his significant costs and fees incurred in post-judgment enforcement litigation.

19 As demonstrated by the clerk's authority to write down the amount Hoehn sought from
20 Righthaven (*id.*), Hoehn's request for additional fees to be included in his writ of execution was
21 precisely that – a request. The clerk and Court were free to exercise their discretion to allow,
22 reduce or refuse the inclusion of these desired sums in Hoehn's writ of execution (*see id.*). The
23 Court and the clerk's exercise of this jurisdiction does not now give Righthaven a basis to quash
24 Hoehn's writ of execution – particularly when it is not even close to satisfying Hoehn's
25 underlying judgment (*see Doc. # 70*).
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1 The addition of accrued fees and costs is appropriate in the instant case because certainty
2 is not yet in place that the Defendant will receive the judgment ordered by the Court. The Court
3 ordered the Plaintiff to “post a bond to secure the judgment on attorneys’ fees entered by this
4 Court in the amount of \$34,045.50.” (Doc. # 56). Thus far, the Plaintiff has refused to secure
5 that bond (Doc. # 58), and has twice been denied emergency or urgent relief from the Ninth
6 Circuit Court of Appeals seeking to stay Hoehn’s enforcement of his judgment without posting a
7 bond (Doc. # 57, 78). Righthaven’s declination has led to Hoehn filing the Motion for the Writ
8 of Execution. (Doc. 58), which the Court granted (Doc. 59).

9 Further, if the additional costs were inappropriate, the Deputy Law Clerk would have
10 made corrections to the Writ, as he already did when changing the amount of accrued interest,
11 costs and fees. (Doc. 59) The Defendant’s original filing contained an interest rate of 5.25,
12 calculated according to information provided by the Nevada Commissioner on Financial
13 Institutions, plus 2 percent, pursuant to NRS 99.040. (Docs. 58, 58-1) Once approved, the Writ
14 of Execution contained a corrected interest rate of 0.11 percent per day, which was the number
15 substituted in by the Deputy Law Clerk. (Doc. 59).

16 Ironically, the one thing that could moot Hoehn’s writ of execution is for Righthaven to
17 post a bond for the value of Hoehn’s judgment. *Covrig v. Powers*, 74 Nev. 348, 353 (Nev. 1958).
18 By posting a bond, Nevada law would place a pause on further levies and executions on
19 Righthaven’s assets. As Righthaven refuses to do so, despite being given approximately two
20 months to do so by this Court (Docs. 43, 56). No bond has yet been posted, Righthaven’s best
21 insulation against Hoehn’s writ of execution has not been asserted – yet it is available, if
22 Righthaven simply posts the required bond. At this point, however, after two trips to the Ninth
23 Circuit Court of Appeals it is safe to assume Righthaven will not do so. Once again, Righthaven
24 seeks exceptional relief without paying the costs associated with obtaining it.

25 Even if the Court finds that the addition of \$29,674,90 at the time of the Writ was
26 inappropriate, as of the filing of this response, Plaintiff still has failed to satisfy the original
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1 judgment issued against it in the amount of \$34,045.50. Righthaven has, however, not obtained
2 a stay from Hoehn's enforcement of this judgment (Docs. 56, 57, 78), and has been
3 uncooperative in attempting to fulfill it (*see* Docs. 68, 70). In fact, Righthaven has not only
4 refused to post a bond, but it refused to show up to a debtors' exam (Doc. 71), and it refused to
5 adhere to this court's order of December 12 (Doc. 66) ordering it to assign its copyrights and
6 other intangible property to the receiver. It still refuses to do so.

7 Now, rather than focus on obeying this court's orders, Righthaven requests unavailable
8 relief more than three months after the Court entered its order (Docs. 43, 44). Stemming from
9 Righthaven's uncooperativeness and untimeliness in acting, both this Court's Writ of Execution
10 (Doc. 59), and its Appointment of Receiver (Doc. 68) are appropriate in order to pursue the
11 judgment award granted by this Court.

12 **III. Conclusion**

13 The Defendant's Writ of Execution was properly filed pursuant to Fed. R. Civ. P.
14 69(a)(1) and Nevada law. The Ninth Circuit allows for the addition of fees in pursuit of fees, as
15 is the case here. Further, if the additional fees were not appropriate, the Deputy Court Clerk, or
16 the Court itself, would have made further changes before approving the Defendant's Writ of
17 Execution (*see* Doc. # 59) (reducing accrued interest and interest rates sought by Hoehn in his
18 writ of execution). For the foregoing reasons, the Plaintiff's Motion to Quash Writ of Execution
19 should be denied. Further, the Court should consider issuing an order to show cause regarding
20 Righthaven's ostensible contempt in refusing to adhere to this Court's lawful order (*see* Docs. #
21 66, 70).

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Marc J. Randazza
J. Malcolm DeVoy IV
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Attorneys for Defendant,
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1 Dated January 26, 2012

Wayne Hoehn
Respectfully Submitted,

RANDAZZA LEGAL GROUP



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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 Randazza Legal Group and that on this 26 day of January, 2012, I caused the document(s) entitled:

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO QUASH WRIT OF EXECUTION

and all attachments to be served by the Court’s CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy