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

10 RIGHTHAVEN LLC, a Nevada limited-
liability company,

12 Plaintiff,

13 v.

14 RICK ALLEC, an individual; and RX
ADVERTISING, INC. LLC, a limited-
15 liability company of unknown origin,

16 Defendants.

Case No.: 2:11-cv-00532- KJD-PAL

**PLAINTIFF RIGHTHAVEN LLC'S
RESPONSE TO DEFENDANT RICK
ALLEC'S MOTION TO DISMISS
AMENDED COMPLAINT UNDER
RULES 12(b)(1) AND (6)**

18 Plaintiff Righthaven LLC ("Righthaven") hereby responds to Defendant Rick Allec's
19 ("Defendant") Motion to Dismiss Amended Complaint (the "Motion", Doc. # 14.) Defendant's
20 Motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") and
21 Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)").

22 Righthaven's response is based on the below memorandum of points and authorities, the
23 pleadings and papers on file in this action, any oral argument allowed, and any other matter upon
24 which this Court takes notice.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Righthaven's Amended Complaint seeks to hold the Defendant liable for 25 claims of
4 copyright infringement involving the unauthorized, wholesale replication of paid content
5 originally owned by Stevo Design, Inc. ("Stevo Design"). (Doc. # 13 ¶ 22.) As alleged in the
6 Amended Complaint, Stevo Design assigned all rights, title and interest in and to the 25
7 copyrighted works in this case (the "Works"), along with the right to sue for past, present and
8 future infringements. (*Id.* ¶¶ 21-23.) Righthaven wholeheartedly contends this case is nothing
9 short of the theft of paid content, which has been displayed on the Internet domain
10 <therxforum.com> (the "Domain" and the content accessible on the Domain referred to herein as
11 the "Website"), and made accessible to users of the Website free of charge. Frankly, if proven
12 true, this case involves multiples claims of egregious, willful copyright infringement.

13 Understandably, the Defendant has sought to distance himself from the conduct alleged
14 in this case. In fact, the Defendant immediately sought to distance himself from this case by first
15 contending that he was not the "Rick Allec" named in the original Complaint. (*Id.* ¶ 4.) The
16 Defendant did not maintain this ruse for long, but instead shifted his defense to that claimed in
17 the Motion – that he had no control over the Website content, that he has not been affiliated with
18 the Website since 2007, that he was merely a web developer performing services on a contract
19 basis for the owners of the Website, and that he surrendered all login in information to the
20 Website owners long ago. (Doc. # 14 at 2.) As alleged in Righthaven's Amended Complaint,
21 however, the Defendant was listed as the Domain registrant at least as of the filing of the original
22 Complaint and that he has been listed as the "owner" of the Domain in publicly available
23 materials. (Doc. # 13 ¶¶ 5-7, Doc. # 1-1.) Not surprisingly given the nature of his defense, the
24 Domain registrant's identity was changed shortly after the Defendant was served with the
25 original Complaint. (*Id.* ¶ 7.)

26 Despite the foregoing, and despite the other allegations of Righthaven's Amended
27 Complaint, Defendant urges this Court to dismiss him from this action. As argued below,
28 Righthaven has alleged more than sufficient facts to demonstrate the viability of it claims in this

1 case. Righthaven's allegations in this regard clearly vest this Court with subject matter
2 jurisdiction over this dispute. Defendant's claims to the contrary amount to nothing more than
3 speculative innuendo devoid of any substantively legal basis. Accordingly, Defendant's Motion
4 should be denied in its entirety.

5 **II. APPLICABLE STANDARDS**

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

7 Rule 12(b)(1) allows for the dismissal of an action for lack of subject matter jurisdiction.
8 FED.R.CIV.P. 12(b)(1). District courts have original subject matter jurisdiction over claims
9 "arising under" federal law relating to patents, copyrights, trademarks and . . . related claims of
10 unfair competition." 28 U.S.C. § 1338(a), (b); *see also Scholastic Ent., Inc. v. Fox Ent. Group,*
11 *Inc.*, 336 F.3d 982, 986 (9th Cir. 2003). A copyright infringement plaintiff is required to allege:
12 (1) ownership of a valid copyright; and (2) the defendant's violation of one or more of the
13 copyright owner's exclusive rights set forth under the Copyright Act. *Ellison v. Robertson*, 357
14 F.3d 1072, 1077 (9th Cir. 2004); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.
15 340, 361 (1991).

16 Under Rule 12(b)(1), the plaintiff bears the burden of establishing the existence of subject
17 matter jurisdiction since it is the party who invoked the court's jurisdiction. *See Kokkonen v.*
18 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-78 (1994). Subject matter jurisdiction must be
19 demonstrated at the outset of the case and must be found to exist at successive stages of the
20 litigation. *See Lujan*, 504 U.S. at 561.

21 A Rule 12(b)(1) motion that does not consider extrinsic evidence is commonly referred to
22 as a facial attack.¹ *Warren v. Fox Family Worldwide, Inc.* 328 F.3d 1136, 1139 (9th Cir. 2003);
23 *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir. 2003); *Li v. Chertoff*, 482 F. Supp.
24 2d 1172, 1175 (S.D. Cal. 2007). A facial attack challenges the sufficiency of the complaint's
25 allegations that federal subject matter has been invoked. *Montez v. Department of Navy*, 392 F.3d
26 147, 149-50 (5th Cir. 2004); *Warren*, 328 F.3d at 1139; *Morrison*, 323 F.3d at 924 n. 5; *Li*, 482

27
28 ¹ The party challenging subject matter jurisdiction under Rule 12(b)(1) may also proffer

1 F. Supp. 2d at 1175. Under a facial attack, the Court must accept as true all well-pleaded facts
2 and draw all reasonable inferences in favor of the non-moving party. *See Association of Am.*
3 *Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000).

4 Application of the foregoing standards clearly demonstrates that Defendant's Rule
5 12(b)(1) challenge should be rejected because Righthaven's Amended Complaint alleges all
6 jurisdictional facts necessary to invoke subject matter over its copyright infringement claims.

7 **B. Rule 12(b)(6) Standards.**

8 A request for dismissal pursuant to Rule 12(b)(6) "is viewed with disfavor and is rarely
9 granted." *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 256, 249 (9th Cir. 1997) (internal
10 quotations marks omitted). Dismissal pursuant to Rule 12(b)(6) is only appropriate in
11 extraordinary cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981); *Cauchi*
12 *v. Brown*, 51 F.Supp.2d 1014, 1016 (E.D. Cal. 1999); *United States v. White*, 893 F.Supp. 1423,
13 1428 (C.D. Cal. 1995). The "court's role at the 12(b)(6) stage is not to decide winners and losers
14 or evaluate the strength or weakness of claims . . ." *Jacobson v. Hughes Aircraft Co.*, 105 F.3d
15 1288, 1292 (9th Cir. 1997). Thus, courts do not consider whether the plaintiff will ultimately
16 prevail under Rule 12(b)(6), but only whether the plaintiff is entitled to offer evidence in support
17 of the claims alleged. *Allison v. California Adult Auth.*, 419 F.2d 822, 823 (9th Cir. 1969). In
18 fact, dismissal is only "appropriate when it is clear that no relief could be granted under any set
19 of facts that could be proven consistent with the allegations set forth in the complaint." *See*
20 *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 966 (C.D. Cal. 2007). All
21 allegations asserted in the complaint must be construed in favor of the non-moving party and all
22 material allegations – including any reasonable inferences drawn from same – must be accepted
23 as true by the Court under a Rule 12(b)(6) analysis. *See id.* Where dismissal is granted, leave to
24 amend should be granted unless doing so is futile. *In re Silicon Graphics, Inc. Sec. Litig.*, 183
25 F.3d 970, 991 (9th Cir. 1999).

26 The Court is prohibited from considering material outside the complaint under Rule
27 12(b)(6) unless it converts the motion into one seeking summary judgment. *See Arpin v. Santa*
28 *Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001); *Beliveau v. Caras*, 873 F.Supp.

1 1393, 1395 (C.D. Cal. 1995). Such a conversion is generally disfavored if “(1) the motion
2 comes quickly after the complaint was filed, (2) discovery is in its infancy and the nonmovant is
3 limited in obtaining and submitting evidence to counter the motion, or (3) the nonmovant does
4 not have reasonable notice that a conversion might occur.” *Rubert-Torres v. Hospital San Pablo,*
5 *Inc.*, 205 F.3d 472, 475 (1st Cir. 2000). Notice in this regard has been interpreted to require at
6 least ten (10) days notice. *See In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998); *see also Mack v.*
7 *South Bay Beer Distrib., Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986).

8 As argued below, Defendant’s Rule 12(b)(6) attack is really a premature motion for
9 summary judgment based upon facts and evidence exclusively within his control. While the
10 Court could potentially convert Defendant’s Motion into a request for summary judgment, the
11 fact remains that absolutely no discovery has taken place in this matter and the evidence upon
12 which the Defendant asks the Court to rely is not matters that Righthaven can contest absent
13 formal discovery. Accordingly, Defendant’s Motion must be denied under Rule 12(b)(6).

14 **III. ARGUMENT**

15 **A. Defendant’s Rule 12(b)(1) Challenge Must be Denied in View of The** 16 **Allegations Contained in Righthaven’s Amended Complaint.**

17 Defendant’s Rule 12(b)(1) challenge is simply bald speculation and innuendo predicted
18 in part on the results of a different contract and completely inapplicable decisions from this
19 District. (Doc. # 14 at 13-15.) At best, Defendant’s request for dismissal for lack of subject
20 matter jurisdiction constitutes a Rule 12(b)(1) facial attack. The allegations of Righthaven’s
21 Amended Complaint unquestionably set forth sufficient facts to invoke the subject matter
22 jurisdiction of this Court. Accordingly, Defendant’s Rule 12(b)(1) dismissal request must be
23 denied.

24 As noted earlier in this response, a Rule 12(b)(1) facial attack challenges the sufficiency
25 of the complaint’s allegations that federal subject matter has been invoked. *Montez*, 392 F.3d at
26 149-50; *Warren*, 328 F.3d at 1139; *Morrison*, 323 F.3d at 924 n. 5; *Li*, 482 F. Supp. 2d at 1175.
27 Under a facial attack, the Court must accept as true all well-pleaded facts and draw all reasonable
28 inferences in favor of the non-moving party. *See Association of Am. Med. Coll.*, 217 F.3d at

1 778-79. A copyright infringement plaintiff is required to allege: (1) ownership of a valid
2 copyright; and (2) the defendant's violation of one or more of the copyright owner's exclusive
3 rights set forth under the Copyright Act. *Ellison*, 357 F.3d at 1077; *see also Feist Publ'ns, Inc.*,
4 499 U.S. at 361.

5 Pursuant to Section 501(b) of the Copyright Act, only "the legal or beneficial owner of an
6 exclusive right under a copyright" is entitled to sue for infringement. *Silvers*, 402 F.3d at 884.
7 Section 106 of the Act, in turn, defines the exclusive rights that can be held in a copyright (*e.g.*,
8 the right to reproduce, to prepare derivative works, and to distribute copies). Exclusive rights in
9 a copyright may be transferred and owned separately—for example, through assignment or an
10 exclusive license - but no exclusive rights exist other than those listed in Section 106. *Silvers*,
11 402 F.3d at 885. While the right to assert an accrued cause of action for copyright infringement
12 cannot be transferred alone, such a right can be transferred along with one or more of the
13 exclusive rights in a copyright. *See id.* at 890.

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

22 While these principles in mind, it is clear that Righthaven's Amended Complaint more
23 than adequately invokes the Court's subject matter jurisdiction under the Copyright Act. First,
24 Righthaven's Amended Complaint establishes ownership as follows:

25 Stevo Design, the original publisher and owner of the works placed at
26 issue through the original Complaint and through this First Amended
27 Complaint, assigned all rights, title and interest in and to the works to
28 Righthaven, which is the current copyright owner of said works, as well as
 expressly conveying to Righthaven authority to seek redress for any and

1 all past, present and future infringements of the works (the
2 “Assignments”).

3 (Doc. # 13 ¶ 22.) The foregoing allegations not only satisfy Righthaven’s obligation to plead
4 ownership of the Work, but the allegations also establishes the company’s right to sue for past,
5 present and future infringements as required by *Silvers*. (*Id.*) While the Amended Complaint
6 discusses the existence of a Copyright Alliance Agreement and amendments to this contract,
7 these allegations only solidify Righthaven’s ownership of the Works at issue and its standing to
8 maintain this action. (*Id.* ¶¶ 21, 23.) All of these allegations must be accepted as true. *See*
9 *Association of Am. Med. Coll.*, 217 F.3d at 778-79. Defendant offers absolutely no evidentiary
10 basis to conclude otherwise.

11 Defendant attempts to traverse the Amended Complaint’s allegations, which he appears
12 to concede properly invokes the subject matter jurisdiction of this Court, by arguing that the
13 jurisdictional facts must be limited to those in existence at the time the original Complaint was
14 filed. (Doc. # 14 at 14:7-16.) In doing so, Defendant hopes to persuade the Court to ignore the
15 more detailed standing allegations and the fact that Righthaven has properly placed the amended
16 CAA at issue. Defendant, however, is wrong. Righthaven amended its complaint as a matter of
17 rights pursuant to Federal Rule of Civil Procedure 15(a)(1). (Doc. # 13.) As such, Righthaven’s
18 Amended Complaint supersedes and replaces the jurisdictional facts in existence at the time of
19 the original complaint. *See ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 93 (1st Cir. 2008).
20 Accordingly, Defendant’s reliance on case law that limits the jurisdictional facts to those at issue
21 at the time of the filing of the original complaint is completely inapplicable.

22 Defendant’s reliance on inapplicable case law aside, the Amended Complaint
23 additionally sets forth Defendant’s acts constituting the Infringement. (*Id.* at ¶¶ 4-14.) The Court
24 must also accept these allegations as true. *See Association of Am. Med. Coll.*, 217 F.3d at 778-79.
25 Righthaven’s Amended Complaint contains more than adequate facts to invoke subject matter
26 jurisdiction. *See Ellison*, 357 F.3d at 1077; *see also Feist Publ’ns, Inc.*, 499 U.S. at 361.
27 Accordingly, Defendant’s request for dismissal under Rule 12(b)(1) must be denied.
28

B. Defendant's Request for Dismissal of Righthaven's Direct Infringement Claims Must be Denied.

Defendant asserts that Righthaven has failed to state a cognizable direct copyright infringement claim and that dismissal pursuant to Rule 12(b)(6) is required. (Doc. # 14 at 6-10.) Defendant's Rule 12(b)(6) argument must be rejected.

Distilled to its core, Defendant apparently contends that an owner and registrant of an Internet domain cannot be liable for direct infringement. (*Id.*) In this regard, Defendant maintains that even if a person or entity is listed as a domain registrant, that status does not equate to ownership or control over content appearing on the associated website. (*Id.*) Defendant supports this argument by providing a declaration that claims he did not have control over the content displayed on the website at issue and that he has had no affiliation with the website since June 1, 2007. (*Id.* at 11.) The Court cannot accept Defendant's arguments and evidence as true under a Rule 12(b)(6) analysis given the allegations of the Amended Complaint.

In order to state a valid claim for direct copyright infringement, Righthaven must allege: (1) ownership of a valid copyright; and (2) the Defendant's violation of one or more of the copyright owner's exclusive rights set forth under the Copyright Act. *See Ellison*, 357 F.3d at 1077; *see also Feist Publ'ns, Inc.*, 499 U.S. at 361. Righthaven has alleged that the Defendant was the registrar of the Domain in this case as of the filing of the original Complaint. (Doc. # 13 ¶ 5.) Righthaven has also specifically alleged that the Defendant was in control of the content accessible through the Domain. (*Id.* ¶ 6.) Righthaven has additionally alleged that Defendant's name was removed as registrar for the Domain and replaced with another entity shortly after being served with the original Complaint. (*Id.* ¶ 7.) The Defendant is further alleged to have been the owner of the Domain based on publicly available information. (*Id.*; Doc. # 1-1.) While these allegations are certainly sufficient to establish potential liability for direct infringement, Righthaven has also set forth detailed allegations sufficient to establish potential liability based on a willful blindness theory whereby a culture of infringement has been permitted to exist despite Defendant's control over the content appearing on the Website. (*Id.* ¶¶ 128-132.) The Court must accept these allegations as true under a Rule 12(b)(6) analysis. *See Association of Am. Med. Coll.*, 217 F.3d at 778-79. Accordingly, Righthaven's allegations under the Amended

1 Complaint unquestionably establish a more than plausible inference that Defendant is directly
2 responsible for the unauthorized versions of the Works in this case being displayed on the
3 Website.

4 Defendant attempts to overcome the presumptions afforded to a non-moving party under
5 Rule 12(b)(6) by submitting material outside of the Amended Complaint, including Defendant's
6 own Declaration. (Doc. # 14 at 6-12.) Whether or not Defendant's sworn statements excuse him
7 from liability in this case is not at issue under a Rule 12(b)(6) analysis. *See Allison*, 419 F.2d at
8 823. Rather, what is at issue is whether the allegations contained in the Amended Complaint,
9 when all facts and reasonable inferences are deemed to be true, potentially subject the Defendant
10 to liability. *See Burnett*, 491 F.Supp.2d at 966. To the extent the Court wishes to consider the
11 extrinsic materials submitted by the Defendant, it must convert the Motion into a request for
12 summary judgment. *See Arpin*, 261 F.3d at 925. Doing so, however, is clearly inappropriate
13 given that Defendant's Motion is his initial response to the Amended Complaint, no discovery
14 has been conducted in this case given it is at its inception, and virtually all of the facts asserted
15 by the Defendant are exclusively within his own knowledge or within his control. *See Rubert-*
16 *Torres*, 205 F.3d at 475.

17 In sum, the Motion must be denied under Rule 12(b)(6) given the allegations contained in
18 the Amended Complaint, which clearly assert viable claims for direct copyright infringement
19 liability against the Defendant. The Motion must also be denied because it relies on materials
20 outside the Amended Complaint and it is procedurally improper to convert Defendant's Rule
21 12(b)(6) dismissal request into one for summary judgment.

22
23 **C. Defendant's Requested Dismissal of Righthaven's Vicarious Infringement**
24 **Claims is Misplaced Because it Has Asserted no Such Claims Against**
25 **Defendant.**

26 Defendant has moved for dismissal of Righthaven's vicarious copyright infringement
27 claims. (Doc. # 14 at 12-13.) Righthaven, however, has asserted no claims for vicarious
28 copyright infringement against the Defendant. (Doc. # 13 at 45-62.) All such allegations are
asserted against Defendant RX Advertising, Inc. LLC. (*Id.*) Accordingly, Defendant's request

1 for dismissal pursuant to Rule 12(b)(6) on the grounds that Righthaven has failed to assert
2 vicarious infringement claims against him for which relief can be granted must be denied as no
3 such claims have been asserted.

4 **IV. CONCLUSION**

5 For the reasons set forth above, Righthaven respectfully requests that the Court deny
6 Defendant's Motion in its entirety and grant such other relief as it deems proper.

7 Dated this 11th day of August, 2011.

8
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Attorney for Plaintiff Righthaven LLC

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on the 11th day of August, 2011, I attempted to serve the foregoing document via the Court's CM/ECF system, but due to a disruption in Internet service I could not do so under the morning of April 12, 2011.

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