

1 J. Malcolm DeVoy IV (Nevada Bar No. 11950)
2 jmd@Randazza.com
3 RANDAZZA LEGAL GROUP
4 7001 W. Charleston Boulevard, #1043
5 Las Vegas, Nevada 89117
6 Telephone: (888) 667-1113
7 Facsimile: (305) 437-7662
8 Randazza.com

6 Attorney for Defendants,
7 *NewsBlaze LLC and*
8 *Alan Gray*

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 RIGHTHAVEN, LLC, a Nevada limited-liability
12 company

Case No.: 2:11-cv-00720

12 Plaintiff,

**DEFENDANTS' MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

13 vs.

14 NEWSBLAZE LLC, a California limited
15 liability company; and Alan Gray, an individual,

16 Defendants.

17 **DEFENDANTS' MOTION TO DISMISS**
18 **FOR LACK OF SUBJECT MATTER JURISDICTION**

19 Defendants NewsBlaze LLC, and Alan Gray (collectively, "NewsBlaze," or the
20 "Defendants"), by and through their counsel, move to dismiss Plaintiff Righthaven, LLC's
21 (hereinafter "Righthaven[']s," or the "Plaintiff[']s") Complaint (Doc. # 1) filed on May 5, 2011
22 for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1) and
23 Local Rule 7.2.

24 **I. Introduction**

25 Plaintiff filed this lawsuit against the Defendants on May 5, 2011, which NewsBlaze now
26 responds to with this Motion to Dismiss for lack of subject matter jurisdiction. Pursuant to this
27 Court's April 14, 2011 Order in *Righthaven LLC v. Democratic Underground LLC*, Case No.
28 2:10-cv-01356, Doc. # 93 (D. Nev. Apr. 14, 2011), evidence regarding Righthaven's relationship

1 with Stephens Media LLC (hereinafter “Stephens Media”) has been unsealed and released to the
2 public. On April 15, 2011, an unredacted version of the Defendants’ Supplemental
3 Memorandum Addressing Recently Produced Evidence Relating to Pending Motions in the
4 Democratic Underground case was made available on the Public Access to Court Electronic
5 Records (“PACER”) system, as well as this court’s CM/ECF system. Case No. 2:10-cv-01356
6 Doc. # 79 (D. Nev. Mar. 9, 2011). A true and correct copy of Exhibit A to Doc. # 79 in
7 *Democratic Underground* is attached to this Motion as Exhibit A.

8 This document clearly reveals that Righthaven lacked the rights to bring this suit, and
9 thus this court lacks jurisdiction over this matter. Nevertheless, on May 9, 2011, Righthaven
10 executed a “Clarification” (hereinafter, the “Clarification”) of the Agreement between
11 Righthaven and Stephens Media LLC (hereinafter, “Stephens Media”). This executed document
12 was filed with the court in numerous cases, including *Righthaven LLC v. Hoehn*, 2:11-cv-00050
13 (Doc. # 24 Exh. 3) (D. Nev. May 9, 2011); a true and correct copy of this “Clarification” is
14 attached to this Motion as Exhibit B. This “Clarification” supposedly rectifies the defects in
15 Righthaven’s Agreement, which governs the terms on which Stephens Media assigns its
16 copyrights to Righthaven. The “Clarification”, however, does no such thing, and serves only as
17 a cynical attempt to obfuscate the unlawful nature of Righthaven’s enterprise: The
18 “Clarification,” along with the Agreement, is a mere acquisition of the right to sue for copyright
19 infringement without the true transfer of any other rights under Title 17. Just days ago, this
20 District found that Righthaven lacked standing and therefore subject matter jurisdiction to bring
21 a nearly identical case, *Righthaven LLC v. Democratic Underground LLC*, Case No. 2:10-cv-
22 01356 (Doc. # 116) (D. Nev. June 14, 2011).

23 Under Rule 12(b)(1), subject matter jurisdiction is an essential element to every lawsuit,
24 and must be present for any court to hear a dispute. In this case, Righthaven does not have
25 sufficient rights in the work putatively assigned to it by Stephens Media to bring – or maintain –
26 its case against NewsBlaze. As such, the Court should dismiss Righthaven’s suit.

27 //

28 //

II. Legal Standards

Subject matter jurisdiction is an essential element to every lawsuit and must be demonstrated “at the successive stages of the litigation.” *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The existence of subject matter jurisdiction is an ongoing inquiry that a court must conduct *sua sponte* in order to continue the case. *Chapman*, 631 F.3d at 954; *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). Where subject matter jurisdiction is absent, a court has no discretion and must dismiss the case. *Chapman*, 631 F.3d at 954.

A central component to subject matter jurisdiction is the question of standing, which requires that the party experience actual or imminent harm. *Lujan*, 504 U.S. at 561 (citing *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)). A party’s standing to bring a case is not subject to waiver, and can be used to dismiss the instant action at any time. Fed. R. Civ. P. 12(h)(3); *U.S. v. Hays*, 515 U.S. 737, 742 (1995); *Chapman*, 631 F.3d at 954.

III. Argument

A. Righthaven Has No Standing to Bring This Case.

1. *Righthaven’s Agreement Does Not Confer Sufficient Copyright Rights for Righthaven to Bring this Lawsuit.*

Righthaven is neither the owner nor exclusive holder of any rights in the copyrighted work underlying this lawsuit. Copyright assignments occurring under Righthaven’s Agreement with Stephens Media have been analyzed by this District, and found to transfer nothing more than a bare right to sue – which is impermissible under the Copyright Act – and thus precluded Righthaven from being recognized as the Copyright owner. *Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 116 at 6:3-7:13.) As such, Righthaven has suffered no injury or other cognizable harm required for it to have standing under *Lujan*. *Id.* at 11:3-13. Absent this very basic requirement of standing, there is no subject matter jurisdiction in this case, and it must be dismissed.

For a plaintiff to sue for copyright infringement, it must have an exclusive right in a copyright. *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005); *see*

1 *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144 (holding that only owners and
 2 “exclusive licensees” may enforce a copyright or license). Without such exclusivity, a plaintiff
 3 has no standing to enforce a copyright. *Sybersound*, 517 F.3d at 1144. As status as a copyright
 4 owner or exclusive licensee is prerequisite for enforcing such a right, a plaintiff with neither
 5 lacks standing to pursue an infringement claim on that copyright, as it cannot experience the
 6 injury requisite for Article III standing under *Whitmore* and *Lujan*.

7 Righthaven lacks sufficient rights under *Silvers* and *Sybersound* to bring this lawsuit.
 8 The Strategic Alliance Agreement (hereinafter, the “Agreement”) between Stephens Media and
 9 Righthaven found in Exhibit A obviates the need to examine the copyright assignment for the
 10 work at issue in this case.¹ Indeed, the Agreement makes it abundantly clear that Righthaven
 11 actually has *no* rights in the copyrights it claims. Most importantly, Section 7.2 of the
 12 Agreement, Exhibit A, provides as follows:

13 Despite any such Copyright Assignment, **Stephens Media shall retain (and is**
 14 **hereby granted by Righthaven) an exclusive license to Exploit the Stephens**
 15 **Media Assigned Copyrights** for any lawful purpose whatsoever and **Righthaven**
 16 **shall have no right or license to Exploit or participate in the receipt of**
 17 **royalties from the Exploitation of the Stephens Media Assigned Copyrights**
 18 **other than the right to proceeds in association with a Recovery.** To the extent
 19 that *Righthaven's* maintenance of rights to pursue infringers of the Stephens
 20 Media Assigned Copyrights in any manner would be deemed to diminish
 21 Stephens Media's right to Exploit the Stephens Media Assigned Copyrights,
 22 *Righthaven* hereby grants an exclusive license to Stephens Media to the greatest
 23 extent permitted by law so that Stephens Media shall have unfettered and
 24 exclusive ability to Exploit the Stephens Media Assigned Copyrights. *Righthaven*
 25 shall have no Obligation to protect or enforce any Work of Stephens Media that is
 26 not Stephens Media Assigned Copyrights.

27 Emphasis added; “Exploit” defined in Exhibit A, Schedule 1. Thus, while Stephens Media gives
 28 Righthaven the illusory rights for Righthaven to be *recognized* as the copyright holder of the

¹ Judge Hunt ordered this document to be made public in *Righthaven LLC v. Democratic Underground LLC*, Case 2:10-cv-1356 Order, Doc. # 93 (D. Nev., Apr. 14, 2011). His rationale included the fact that the contents of this document would have an impact on all Righthaven cases. “As I have read these and other motions in this case, and considered the multitude of cases filed by Righthaven, on the claimed basis that Righthaven owns the copyrights to certain Stephens Media copy, it appears to the Court that there is certainly an interest and even a right in all the other defendants sued by [Righthaven] to have access to this material.” *Id.* at 4.

1 works at issue in its lawsuits, it does not provide any transfer any of the rights in 17 U.S.C. § 106
2 that must be transferred to make a valid copyright assignment or license, and thus grant the
3 assignee the right to sue. *See Silvers*, 402 F.3d at 885; *Democratic Underground*, Case No. 2:10-
4 cv-01356 (Doc. # 116 at 6:3-17). The “assignment” is a transparent sham that is designed to
5 make Righthaven *appear* to be a copyright assignee for the purposes of filing suit, meanwhile the
6 actual rights at issue are governed by this Agreement, which renders the assignment
7 meaningless. (Exh. A.) The Agreement even specifically precludes Righthaven from the most
8 basic of assignee rights and prohibits Righthaven from “Exploit[ing]” (Exh. A at Schedule 1) the
9 copyrighted works through distribution, publication or licensing. In the end, Stephens Media is
10 the only party to the Agreement with any exclusive rights in the copyrighted content.

11 But that is not the full extent of the sham and the fraud that has been perpetrated upon
12 this court hundreds of times – as a right of reversion is also included in the Agreement. As seen
13 in Section 8 of the Agreement, Exhibit A:

14
15 Stephens Media shall have the right at any time to terminate, in good faith, any
16 Copyright Assignment (the "Assignment Termination") and enjoy a right of
17 complete reversion to the ownership of any copyright that is the subject of a
18 Copyright Assignment; provided, however, that if Righthaven shall have
19 commenced an action to prosecute an infringer of the Stephens Media Assigned
20 Copyrights, Stephens Media shall be exclusively responsible for effecting
21 termination of such action including, without limitation, all Losses associated
22 with any dismissal with prejudice.

23 In addition to Stephens Media having the exclusive license to use the copyrights for everything
24 but Righthaven’s lawsuits, it also retains the ability to reclaim those rights at any time.
25 Righthaven does not even acquire the exclusive right to sue, as the full text of Section 8, found in
26 Exhibit A, specifically contemplates Stephens Media litigating the infringement of the copyrights
27 it assigns to Righthaven.

28 This is not a true copyright ownership that Righthaven has acquired, nor is it even an
exclusive license – it is simply an attempt to illegally assign a copyright claim. And it is exactly
that narrow, exploitative interest that the Ninth Circuit held flew in the face of the Copyright Act,

1 and clearly stated could not be the basis of a copyright infringement lawsuit, in *Silvers*. 402 F.3d
2 at 890; *see also Sybersound*, 517 F.3d at 1144; *Democratic Underground*, Case No. 2:10-cv-
3 01356 (Doc. # 116 at 3:3-4:13).

4 **2. Righthaven's "Clarification" Also Fails to Give Righthaven Standing.**

5 Righthaven attempted to salvage its beleaguered Agreement by executing the
6 "Clarification," which memorialized the parties' intent in creating the initial Agreement. (Exh.
7 B.) Contrary to Righthaven's hopes, though, this "Clarification" served only to make
8 Righthaven's naked use of its acquired copyrights as the basis of lawsuits – and only as the basis
9 of lawsuits – even clearer.

10 The "Clarification" does not retroactively remedy Righthaven's lack of standing. While
11 a subsequently executed agreement provides clarification regarding the parties' intent to cure
12 standing defects in copyright cases, it does not retroactively confer standing that previously did
13 not exist. *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003); *Imperial*
14 *Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995); *Arthur*
15 *Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir. 1994); *Infodek, Inc.*
16 *v. Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614, 620 (N.D. Ga. 1993). This District has
17 rejected Righthaven's reliance on these cases; Righthaven is not able to create facts that would
18 potentially confer standing once the case has been filed. "The existence of federal jurisdiction
19 ordinarily depends on the facts as they exist when the complaint is filed." *Lujan*, 504 U.S. at
20 571 n.4 (1992) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989))
21 (emphasis in *Lujan*); *Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 116 at 7:20-
22 22).

23 The "Clarification" is not relevant or binding on this case. Righthaven filed its
24 Complaint against the Defendants (Doc. # 1) on May 5, 2011, and purported to obtain the
25 copyrights underlying this lawsuit from Stephens Media, prior to its May 9, 2011 execution of
26 the "Clarification." Thus, the "Clarification" cannot be used to rescue Righthaven's failed claim
27 of standing, or to confer subject matter jurisdiction on the court. *Democratic Underground*, Case
28 No. 2:10-cv-01356 (Doc. # 116 at 7:15-9:24). Nevertheless, the "Clarification" is analyzed to

1 demonstrate that, even if deemed effective by the Court, it undermines Righthaven’s standing to
2 bring suit under the copyrights “obtained” from Stephens Media.

3 *i. The “Clarification” Denies Righthaven of Substantially All Ability to*
4 *Use Its Assigned Copyrighted for Anything – Except Lawsuits.*

5 Despite the May 9, 2011 “Clarification,” Righthaven’s Agreement with Stephens Media
6 provides it with nothing more than the bare right to sue. An important component of
7 Righthaven’s “Clarification” is the revision of Agreement § 7.2 (Exh. A § 7.2) to no longer give
8 Stephens Media an exclusive license to Exploit (defined in *id.* at Schedule 1) the copyrighted
9 works for “any lawful purpose” (*id.* § 7.2). In its place, as the putative owner of the copyright,
10 Righthaven has granted Stephens Media a non-exclusive license to Exploit the copyrighted work
11 “to the greatest extent permitted by law” on condition that 1) Stephens Media pay Righthaven
12 \$1.00 per year for this right, and 2) that Righthaven give Stephens Media 30 days notice if it
13 decides to Exploit the copyrighted work or receive any royalties from the copyright’s use other
14 than in connection with lawsuits, with failure to do so constituting a material breach of the
15 Agreement. (Exh. B § 1.)

16 This aspect of the “Clarification” is problematic for numerous reasons. First,
17 Righthaven’s non-exclusive license to Stephens Media contains no definitions as to duration,
18 geography or media covered, but haphazardly lets Stephens Media use the copyright assigned to
19 Righthaven “to the greatest extent permitted by law.” (*Id.*) This broad language impairs the
20 markets and interests of other licensees to which Righthaven could license its copyrighted works,
21 such as those that better serve markets in which Stephens Market is permitted to compete, and
22 especially in light of Righthaven’s infringement litigation arrangement with Stephens Media
23 evinced in Exhibit A §§ 3-5, and unchanged by the “Clarification.”

24 Moreover, under the “Clarification,” Righthaven’s unilateral use of the assigned
25 copyright would constitute a material breach of the Agreement, allowing Stephens Media to seek
26 injunctive relief against Righthaven for using the copyright that it ostensibly owns. (Exh. B § 1.)
27 Such an extreme limitation by the assignor of a copyright is inimical to ownership of a copyright,
28 yet in a desperate attempt to retain the right to extort money from NewsBlaze (and hundreds of

1 other defendants), Righthaven dishonestly insists that it is the owner of the assigned Stephens
2 Media copyrights. (Exh. B § 3.) This dishonesty must not be rewarded.

3 Stephens Media’s \$1.00-per-year license and royalty fee (Exh. B § 1) is also misleading.
4 While a nominal fee for licensing back the copyright Stephens Media originally assigned to
5 Righthaven, this sum is vastly outweighed by the revenues Stephens Media receives from
6 Righthaven’s litigation on the assigned copyright, as the Agreement – unaltered by the
7 “Clarification” in this respect – entitles Stephens Media to 50% of any recovery Righthaven
8 obtains from litigation. (Exh. A § 5). With all of the components taken together, Stephens Media
9 assigns its copyright to Righthaven and pays \$1.00 in order to receive 50% of Righthaven’s
10 litigation recovery.² Based on what little public information is available about Righthaven’s
11 settlements, Stephens Media’s recovery entitlement per copyright assignment has been orders of
12 magnitude greater than \$1.³ Indeed, without the recovery clause in § 5 of the Agreement (Exh.
13 A. § 5), this entire arrangement would fail to be profitable for Stephens and Righthaven and
14 make no sense for either party, as Stephens assigns only copyrights that have been – or it
15 believes have been – infringed. (*See* Exh. A. § 3.) It makes no sense for Stephens Media to
16 assign only its infringed copyrights to Righthaven, just to license them back and give Righthaven
17 the sole “right” to sue for infringement,⁴ unless Righthaven’s only purpose is to sue on these
18 assigned copyrights.

19 Righthaven and Stephens Media also used the “Clarification” to amend the reversion
20 provisions of its Agreement. Instead of allowing Stephens Media to have a complete reversion
21 of the copyright (Exh. A § 8), the “Clarification” allows Stephens Media to, at any time, give
22 Righthaven 14 days notice that it will repurchase the previously assigned copyright for \$10.
23 (Exh. B § 2.) What’s more, upon exercising this option, Stephens Media must repay Righthaven
24 the costs Righthaven had undertaken to pursue infringement actions on that assigned copyright.

25 _____
26 ² This presumably includes sharing any attorneys’ fees award with Stephens Media, potentially violating Fed. R.
27 Civ. P. 54(d)(2).

28 ³ *See* Righthaven Lawsuits, <http://righthavenlawsuits.com/> (*last accessed* May 10, 2011) (providing Righthaven’s
estimated revenues based on lawsuit settlements).

⁴ The right to sue for copyright infringement is not one of the exclusive copyright rights provided under 17 U.S.C. §
106.

1 (*Id.*) This revised Section 8.2 goes into considerable detail governing how Righthaven will be
2 compensated and disputes settled in the event of Stephens Media exercising its unilateral right to
3 repurchase its assigned copyright from Righthaven, even at the cost of terminating Righthaven’s
4 pending litigation (*id.*) – a profound issue that belies Righthaven’s claim as the true, legal and
5 beneficial owner of the assigned copyrights.

6 Operating together, sections 1 and 2 of the “Clarification” make it clear that Stephens
7 Media retains full ownership of the copyrights that Righthaven claims to own. (Exh. B §§ 1 and
8 2.) If Righthaven wants to exploit or otherwise license the assigned copyright, it must give
9 Stephens Media 30 days’ notice before doing so. (Exh. B § 1.) Yet, once given notice of
10 Righthaven’s intent to use the copyright it supposedly owns, Stephens Media may exercise its
11 rights under new § 8.1 to repurchase the copyright with 14 days’ notice and the payment of \$10.
12 This creates a loop where, if Righthaven were to even try to use Stephens Media’s assigned
13 copyrights for a purpose other than litigation, Stephens Media could (and certainly would) snatch
14 them back before Righthaven could actually use them. Righthaven’s and Stephens Media’s
15 characterization of this arrangement as “ownership” is beyond bizarre, and reveals their intent to
16 call an unlawful assignment of the right to sue “ownership” in an effort to misdirect the Court.

17 Substantively, this is not a non-exclusive license, but an exclusive license to Stephens
18 Media. This mislabeled exclusive license permits Stephens Media to use the assigned copyright
19 “to the greatest extent permitted by law” (*id.*) up to and until the time Righthaven uses or
20 licenses the copyright for a purpose other than infringement litigation. (*Id.*) Should Righthaven
21 provide Stephens Media notice that it intends to use the copyright for non-litigation purposes,
22 though, Stephens Media can buy back its rights before anyone else can use the copyrights
23 supposedly owned by Righthaven. (Exh. B §§ 1 and 2.) *Sybersound*, 517 F.3d at 1150-51
24 (holding that only exclusive licensees may use or enforce the rights they possess); *Davis*, 505
25 F.3d at 101 (observing that “no one other than the exclusive licensee may exercise the right”
26 where there is an exclusive license).

27 //

28 //

1 ***ii. Taken Together, the Terms of Righthaven's Agreement and***
2 ***"Clarification" Show that Righthaven is not the Owner of the Assigned***
3 ***Copyrights, but has Merely been Assigned a Right to Sue.***

4 Righthaven's and Stephens Media's "Clarification" describes Righthaven as the
5 copyright "owner," but it is a word without meaning in this circumstance. (Exh. B § 3.) Just as a
6 child that lacks understanding of the world around her may call a dog a "cat," that does not make
7 it so. Righthaven and Stephens Media have misidentified Righthaven as the owner of Stephens
8 Media's assigned copyrights in § 3 of the "Clarification" (*id.*). This characterization of
9 Righthaven as an owner is inaccurate in light of the excessive restrictions on Righthaven's use of
10 the assigned copyrights contained within the Agreement (Exh. A) and amplified in the
11 "Clarification" (Exh. B).

12 It is not uncommon for courts to encounter restrictive agreements that purport to transfer
13 ownership of a copyright but, in reality, convey no such right. In *Lahiri v. Universal Music &*
14 *Video Distribution Corporation*, 606 F.3d 1216, 1222 (9th Cir. 2010) the appeals court found
15 that a settlement agreement purportedly recognizing a party in the litigation as an "owner" of a
16 copyright was too restrictive to convey such a right, holding that "[t]he record demonstrates [the
17 attorney] misled the district court by use of a settlement agreement that deceptively used
18 ownership language, but did not convey or recognize [the assignee's ownership]." This
19 language should be of great instructive value for this Court, as the record in this case
20 demonstrates the same thing.

21 Similarly, in *Nafal v. Carter*, the court held that the plaintiff's description in the putative
22 assignment as a "co-owner" was not dispositive of the plaintiff's ownership rights. 540 F. Supp.
23 2d 1128, 1141 (C.D. Cal. 2007). Instead, the court held that the relevant test to determine proper
24 ownership of a copyright was "Whether an agreement transfers rights that are exclusive or
25 nonexclusive is governed by the substance of what was given to the licensee and not the label
26 that the parties put on the agreement." *Id.* at 1141-42, citing *Althin v. W. Suburban Kidney Ctr.*,
27 874 F. Supp. 837, 843 (N.D. Ill. 1994).

28

1 In *Nafal*, the document allegedly giving the plaintiff an ownership interest in the
2 copyright prohibited him from “exercising any decision-making authority over almost every
3 portion of the License Agreement.” 540 F. Supp. 2d at 1142. Accordingly, the court found that
4 Nafal was not the owner of the work, lacked Article III standing to pursue a copyright
5 infringement claim, and disposed of the case at summary judgment. *Id.* at 1144. Similarly, in
6 *Althin*, the trial court found that the plaintiff company lacked standing to bring its copyright
7 infringement claims. 874 F. Supp. at 837. Upon review, the court found that the assignment
8 agreement that putatively made the company an exclusive copyright right holder merely
9 conveyed a non-exclusive license to the plaintiff company. *Id.* Specifically, the court found that
10 the rights transferred by the parties’ agreement under the 1976 Copyright Act were “governed by
11 the substance of what was given to the licensee and not the label that the parties put on the
12 agreement.” *Id.* As the licensor gave the licensee no right to transfer or assign the license
13 agreement, with only a very narrow exception, the court held that Althin did not acquire
14 sufficient rights to have standing to enforce them against others’ infringement, and thus
15 dismissed the case on the defendant’s Fed. R. Civ. P. 12(b)(1) Motion to Dismiss. *Id.*

16 As set forth above, Righthaven has extraordinarily limited rights for a copyright “owner.”
17 Righthaven’s fundamental rights to dispose of its copyrights are so limited and crippled that
18 cannot even use them for non-litigation purposes without seeking Stephens Media’s approval,
19 lest it “materially breach” its Agreement. (Exh. B § 1.) Whenever Stephens Media wishes, with
20 minimal notice, it may, without opposition, repurchase its assigned copyrights for \$10 apiece.
21 (Exh. B § 2.) As is apparent from the Agreement, the only thing Righthaven has any authority to
22 do is to pursue infringement litigation. (Exh. A §§ 3-5.)

23 A number of provisions in the Agreement that are not affected by the “Clarification”
24 further deny Righthaven ownership of the copyright, and reserve rights to Stephens Media far
25 beyond those due to a non-exclusive licensee. As part of its copyright assignments to
26 Righthaven, Stephens Media is entitled to:

1 maintain Encumbrances on Stephens Media Assigned Copyrights as part of an
2 overall funding securitization whereby all or substantially all of Stephens Media's
3 assets are Encumbered as part of said funding securitization and Stephens Media
4 Assigned Copyrights are not singled-out as or part of a particularized group of
5 Encumbered assets.

6 (Exh. A § 9.3.) This provision entitles Stephens Media, putatively the non-exclusive licensee of
7 the assigned copyrights under the “Clarification”, to mortgage the copyrights ostensibly owned
8 by Righthaven. Thus, despite Righthaven being the apparent owner of these copyrights,
9 Stephens Media is entitled to use them as security for funding and other financial obligations.
10 This is inconsistent with the tale that Righthaven now weaves before this Court.

11 Stephens Media retains a number of other rights in the copyrights Righthaven claims to
12 own. In Agreement § 3.3 (*id.* § 3.3), Stephens Media retains the right to reassign the copyright,
13 despite Righthaven’s ownership, if Righthaven declines to sue for its infringement. If
14 Righthaven was the sole and true owner of the assigned copyright, Stephens Media would have
15 no such rights, yet this section of the Agreement gives Stephens Media the right to reassign a
16 copyright that it insists is owned by Righthaven. (*Id.*) Righthaven further reveals the flimsiness
17 of its “ownership” in Agreement § 3.4, in which it does not even have the exclusive right to
18 conduct litigation, and grants Stephens Media – a mere non-exclusive licensee under the
19 “Clarification,” which normally would not have standing to sue for infringement – the right to
20 pursue infringement litigation on its own, without Righthaven. (*Id.* § 3.4.)

21 In sum, all of Righthaven’s rights to the copyrights assigned to it by Stephens Media are
22 completely beholden to Stephens Media’s unfettered whims: From Righthaven’s ability to
23 exploit or license the work to a party other than Stephens Media and Stephens Media’s right to
24 re-purchase any assigned copyright for \$10 without Righthaven having any ability to oppose, to
25 Righthaven’s sole pre-authorized use of the assigned copyright being for copyright infringement
26 under Agreement §§ 3.1-3.4 and Stephens Media’s ability to pursue its own copyright
27 infringement lawsuits. Stephens Media’s rights and privileges permeate the Agreement and
28 “Clarification” so completely and thoroughly that Righthaven’s “ownership” of the assigned
copyright is little more than a cruel joke at NewsBlaze’s expense (and the expense of hundreds

1 of other defendants who have been sued under this unlawful arrangement, to say nothing for the
2 poor souls who have paid Righthaven its extortionate demands).

3 To the extent this Court must examine this Agreement, and correct it as Righthaven has
4 encouraged the Court to do in § 15.1 of its Agreement (*id.* § 15.1) in order to effect the parties'
5 manifest intent, it should find that it is nothing more than a vehicle to unlawfully transfer the
6 right to sue, and no other rights, under the guise of copyright ownership. Yet, Righthaven's
7 manifest intent, evidenced in its operating agreement, is to do nothing but register copyrights to
8 create the appearance of ownership and then sue for their infringement. Righthaven's operating
9 agreement, in its complete and redacted form submitted, is contained in the public record as an
10 exhibit to a filing in *Righthaven LLC v. DiBiase*, Case No. 2:10-cv-01343 (D. Nev. Apr. 17,
11 2011) (Doc. # 51). A true and correct copy of excerpts therefrom, containing sections 3.2 and
12 19.4, is attached as Exhibit C.

13 In relevant part, § 3.2(d) and (e) state that Righthaven's purpose will be to register
14 copyrights it "obtains" – flimsily, as seen in the Agreement – and use them as the basis for
15 infringement litigation; Righthaven's intent was never to rightfully own or productively use the
16 obtained copyrights. (Exh. C § 3.2.) Righthaven even foresaw the problems addressed in this
17 Motion and by this District in *Democratic Underground*. Section 19.4(d) of its operating
18 agreement identifies the prevailing unlawfulness of obtaining the bare right to sue for copyright
19 infringements, and, in a roundabout way, disclosed it as a risk that "the willingness of consumers
20 to understand and agree to the assignment and license-back structure that is inherent in the
21 Company's business structure may not be consistent *or even prevalent*" (Exh. C § 19.4(d))
22 (emphasis added).

23 Indeed, the Agreement and its "Clarification" haphazardly consider Righthaven's ability
24 to use and protect its copyright rights in all arenas except its meticulously detailed scheme to
25 pursue infringement litigation on the assigned copyrights in Agreement §§ 3-5. (Exh. A. §§ 3-5.)
26 The very inclusion of § 15.1 (*id.* § 15.1) in the Agreement, and its retention in the
27 "Clarification," demonstrates that Righthaven and Stephens Media knew their arrangement was a
28 sham, yet they couldn't find a way to make the Righthaven model work – predominantly because

1 such operations are prohibited by *Silvers* and other law in this Circuit – and want the Court to
2 change the parties’ agreement to effectuate its unlawful scheme. Not only is the Agreement and
3 “Clarification” between Stephens Media and Righthaven unlawful, so too is the parties’ intent –
4 to transfer the right to sue to Righthaven, with no other rights – and the Court cannot cure what
5 ails Righthaven and its business model.

6 The operation of this Agreement and its “Clarification” is nothing more than the transfer
7 of an accrued right to sue without any exclusive rights. This practice has been held unlawful in
8 every jurisdiction to consider it, including the controlling Court of Appeals for the Ninth Circuit.
9 *Hyperquest, Inc. v. N’Site Solutions, Inc.*, 632 F.3d 377, 383 (7th Cir. 2011); *U.S. v. Chalupnik*,
10 514 F.3d 748, 753 (8th Cir. 2008); *Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007); *Silvers*, 402
11 F.3d at 885; *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991);
12 *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27 (2d Cir. 1982); *see also*
13 *Sybersound*, 517 F.3d at 1144. No matter what Righthaven calls the rights it supposedly obtains,
14 substantive analysis reveals them to be little more than the bare right to sue – something that not
15 only is not provided for in 17 U.S.C. § 106, but has been specifically held to be unlawful in case
16 after case, and runs directly contrary to the Copyright Act’s entire purpose.

17 **B. Righthaven has Willfully Deceived this Court, and its Complaint Should be**
18 **Dismissed on that Basis.**

19 Righthaven fought mightily to keep this evidence from the public and from all defendants
20 in its legion of cases brought in this District. *See generally Democratic Underground*, Case No.
21 2:10-cv-1356. An examination of the document and its implications for Righthaven’s business
22 model make the reason plain – it reveals the unlawful nature of Righthaven’s actions before this
23 court and renders all of its lawsuits null and void. For this reason, the Court has an independent
24 justification for dismissing this case.

25 This Court has the inherent power to dismiss an action when a party has “willfully
26 deceived” the Court and “engaged in conduct utterly inconsistent with the orderly administration
27 of justice.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983); *Phoceene Sous-*
28 *Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982). Such conduct is

1 inimical to the proper and equitable use of not only this Court’s resources, but the justice system
2 as a whole. There is little doubt, though, that this is exactly what Righthaven has done in this
3 case.

4 In the Agreement, Stephens Media retains an “exclusive license” to exploit the copyrights
5 allegedly assigned to Righthaven. (Exh. A § 7.2.) Righthaven has no right to receive royalties
6 for the copyrighted work’s use, other than the recovery it is entitled to from litigation;
7 additionally, Righthaven specifically gives Stephens Media an unspecified – but expansive⁵ –
8 exclusive license to exploit the copyrights. (*Id.*) The extent to which Righthaven putatively owns
9 the copyright is further undermined by Stephens Media’s right to reversion, which allows it to
10 take back the copyright at almost any time (*Id.* § 8.)

11 Meanwhile, in Righthaven’s Complaint, it deceptively claims to be the “owner” of the
12 copyrighted work (Doc. # 1 ¶¶ 11, 23) and avers to have the exclusive rights to reproduce the
13 work, create derivatives of the copyrighted work, distribute copies of the work and publicly
14 display the work under 17 U.S.C. § 106. (Doc. # 1 ¶¶ 30-33.) All of these claims are clearly
15 contradicted by Section 7.2 of the Agreement, which makes it clear that Righthaven has no rights
16 to use the work for any purpose other than litigation, and is assigned the copyright solely to coat
17 its lawsuits with the veneer of legitimacy. (Exh. A §§ 3.1, 3.3, 3.4, 7.1, 7.2.)

18 Moreover, the Agreement is clear that Stephens Media is an interested party in this
19 litigation. Section 5 of the Agreement grants Stephens Media a 50% distribution of
20 Righthaven’s recovery in its lawsuits, including this one. Yet, Righthaven has failed to disclose
21 Stephens Media as an interested party in this case as required by Local Rule 7.1-1. (Doc. # 2.) In
22 *Democratic Underground*, this District stated that if Stephens Media’s recovery of 50% of
23 litigation proceeds minus costs does not create a pecuniary interest under Local Rule 7.1-1, this
24 District “isn’t sure what would.” Case No. 2:10-cv-01356 (Doc. # 116 at 15:2-18). Furthermore,
25 this District issued an Order to Show Cause for Righthaven to explain why it should not be liable
26 for sanctions after failing to disclose Stephens Media’s obvious financial interest in not only that
27 case, but the hundreds of others filed in this District, including this very case. *Id.*

28 _____
⁵ “[T]o the greatest extent permitted by law.” (*Id.*)

1 The Agreement embodied in Exhibit A defines the full scope of Stephens Media's
2 relationship with Righthaven, as its "Clarification" is ineffective in this case, rendering any
3 analysis of an individual copyright assignment superfluous. It is clear from the Agreement that
4 whatever rights Righthaven does have from Stephens Media are insufficient to lawfully bring its
5 lawsuit against these Defendants (and others as well), and that it lacks standing to do so.
6 Righthaven willfully hid this information from the Court, and when one party discovered it,
7 Righthaven fought extensively to keep the information from other Defendants. Now that it has
8 seen the light of day, and this Court has opportunity to gaze upon it, Righthaven's deception
9 stands starkly revealed. This case must be dismissed.

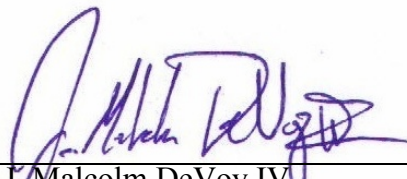
10 **Conclusion**

11 Under the law of this Circuit and this District, Righthaven does not have the legal right to
12 pursue its copyright infringement claim in this case. As seen from Exhibits A and B, it has
13 acquired no rights from Stephens Media, and certainly not enough to claim its copyrights were
14 infringed upon. Evinced by excerpts from Righthaven's operating agreement in Exhibit C, this
15 always was, and is, Righthaven's intent in operating its unlawful lawsuit scheme. As such, it has
16 not suffered an injury cognizable by law, and its case is not properly before this Court.
17 Therefore, consistent with Federal Rule of Civil Procedure 12(h)(3), this Court should dismiss
18 Righthaven's case against the Defendants.

19
20 Dated: June 16, 2011

Respectfully Submitted,

RANDAZZA LEGAL GROUP

21
22
23
24
25 

J. Malcolm DeVoy IV

26 Attorney for Defendants,
27 *NewsBlaze LLC and*
28 *Alan Gray*

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 16th day of June, 2011, I caused documents entitled:

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

to be served as follows:

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

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

to be hand-delivered;

by the Court's CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy