THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Citizens Against Litigation Abuse, Inc. and
the Lowcountry 9/12 Project,.. Petitioners,

v.

Righthaven LLC,..Respondent.

PETITION FOR ORIGINAL JURISDICTION

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S.C. SUPREME COURT

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PETITION FOR ORIGINAL JURISDICTION

I.

INTRODUCTION

In In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992), this Court urged any interested individual who becomes aware of potential unauthorized practice of law to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct. Id. at 307, 422 S.E.2d at 125. Petitioners submit Respondent Righthaven is engaged in the unauthorized practice of law in South Carolina.

Righthaven LLC is a Nevada company. It is not a law firm, yet its exclusive business is prosecuting contingency-fee lawsuits for the benefit of its clients. After finding clients who have claims against third parties, Righthaven obtains "assignments" of those claims and agrees to divide any proceeds 50/50 with the client. Righthaven then files lawsuits in its own name—275 suits against approximately 500 defendants so far. After scaring the living daylights out of its targets with no-warning lawsuits seeking inordinate amounts of money, Righthaven approaches the target and tries to leverage a cost-of-defense settlement, which it splits with its client.

There are many problems with the Righthaven operation. But the most fundamental problem is that the Righthaven business model is blatantly the unauthorized practice of law, in South Carolina and everywhere else. Less than four years ago, this Court prohibited an identical scheme—though on a much smaller scale—in Roberts v. LaConey, 375 S.C. 97, 650 S.E.2d 474 (2007). Roberts and the authorities it cites reflect black letter law: an entity in the business of seeking assignments, pursuing litigation in its

own name, and splitting the proceeds with the assignor commits a fraud on the court and the unauthorized practice of law.

Having filed almost 300 lawsuits in Nevada and Colorado, Righthaven has now brought this illegal business model to South Carolina. Petitioners respectfully request the Court issue a declaratory judgment that Righthaven's business model is the unauthorized practice of law and enjoin Righthaven from operating in South Carolina.

II.

THE HISTORY AND PRACTICES OF RIGHTHAVEN, LLC

A. The Righthaven "Business Model": filing lawsuits for the benefit of clients and charging a fee for doing it.

Righthaven LLC is a Nevada company, not a law firm, whose only business is prosecuting lawsuits. With 275 lawsuits filed so far, and promises of many more to come, Righthaven's sole litigation strategy is the extraction of cost-of-defense settlements. Righthaven uses the courts as "mere[] tools for encouraging and exacting settlements from defendants cowed by the potential costs of litigation and liability" as U.S. District Judge John Kane put it. Order at 2, Doc. #16, Righthaven v. Hill, 1:11-cv-211-JLK (D.Colo 2011). Righthaven has not tried or won a single case[1] and has not given any indication it ever intends to.

All Righthaven lawsuits have thus far been for copyright infringement. In fact, Righthaven holds itself out as "The Nation's Pre-Eminent Copyright Enforcer."[2] Righthaven's business model involves locating allegedly infringing material on the

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[1] Righthaven may have been granted default judgments in some cases, but those hardly constitute "winning."

[2] This representation can be found on Righthaven's website, http://www.righthaven.com.

Internet, obtaining what purports to be an assignment from the original copyright holder, and filing suit against the alleged infringer. Righthaven's suits are filed in its own name and seek $150,000 in statutory damages, attorney's fees, and—bizarrely—a transfer of the target's website to Righthaven.

Righthaven is not a publisher or creator of copyrightable works, nor is it a content licensing clearinghouse. Righthaven produces nothing but lawsuits. And yet Righthaven's complaints all assert that it has been "irreparably harmed" by the alleged infringements. These claims would be comical if they were not embodied in documents seeking judgments that would send most Americans into bankruptcy.

After service, Righthaven approaches its targets about settling for a few thousand dollars, a substantially lower sum than Righthaven demands in its complaint. Rattled by the no-warning nature of the lawsuit, faced with defense costs far in excess of the demand, and with a rapidly approaching answer deadline, many targets settle. Righthaven then deducts its expenses from the recovery and splits it, 50/50, with the original copyright holder.

B. Righthaven's "Key Relationships"; or, in common language, its clients.

Righthaven calls the assignors of claims its "key relationships." These are merely clients on whose behalf Righthaven files lawsuits. All but one of Righthaven's suits have been filed for two clients: Stephens Media LLC, owner of the *Las Vegas Review-Journal*, and MediaNews Group, Inc., owner of *The Denver Post*. Righthaven's lawsuits are filed over the reposting of material appearing in the *Las Vegas Review-Journal* or *The Denver Post*.

Righthaven has a "strategic alliance agreement," or "SAA," with its clients. Though Righthaven claims in its lawsuits it is the assignee of all right, title, and interest in the copyrights, the SAA tells the real story. The SAA only gives Righthaven the right to file a lawsuit and none of the other rights in the copyright. That flaw dooms the SAA from the perspective of copyright law, but there is another, much more fundamental problem with the SAA: it contains a contingency fee provision, requiring Righthaven to split, 50/50, the net litigation proceeds with its clients.

Righthaven tried to keep this a secret. Righthaven and its clients managed to keep the SAA under wraps until April 14, 2011, when—over Righthaven's strenuous objection—the U.S. District Court in Nevada unsealed the SAA. Righthaven fought so desperately to avoid this outcome that it tried to have opposing counsel held in contempt for daring to even ask that the SAA be unsealed. Order at 1, Doc. # 93, Righthaven v. Democratic Underground, 2:10-cv-1356-RLH-GWF (D.Nev. 2010).

C. A fraud on the court is revealed.

Scrutiny of the unsealed SAA revealed the true nature of Righthaven's relationships with its clients, and it revealed something else: Righthaven's financial disclosures, required in Nevada and Colorado, were blatantly fraudulent. The disclosure rules in those courts required Righthaven to identify every entity with a financial interest in its cases. Righthaven filed hundreds, one for each case, and all of them identified only Righthaven LLC and its members, two more LLCs.

But even though the SAA indicated that Righthaven's clients had a 50% interest in each case, not one of the financial disclosures listed Stephens Media or MediaNews Group. The judge who unsealed the SAA was less than pleased:

> As shown in the preceding pages, the Court believes that Righthaven has made multiple inaccurate and likely dishonest statements to the Court. Here, however, the Court will only focus on the most factually brazen: Righthaven's failure to disclose Stephens Media as an interested party in Righthaven's Certificate of Interested Parties. Rule 7.1-1 of the Local Rules of Practice for the District of Nevada requires parties to disclose "all persons, associations of persons, firms, partnerships or corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case." This Local Rule requires greater disclosure than Federal Rule 7.1, which only requires non-governmental corporate parties to disclose parent corporations or corporations owning more than 10% of the party's stock. Frankly, if receiving 50% of litigation proceeds minus costs does not create a pecuniary interest under Local Rule 7.1-1, the Court isn't sure what would.
>
> Making this failure more egregious, not only did Righthaven fail to identify Stephens Media as an interested party in this suit, the Court believes that Righthaven failed to disclose Stephens Media as an interested party in any of its approximately 200 cases filed in this District. Accordingly, the Court orders Righthaven to show cause, in writing, no later than two weeks from the date of this order, why it should not be sanctioned for this flagrant misrepresentation to the Court.

Order at 15 (and Exhibit 1 to the attached Complaint), Doc. #116, Righthaven v. Democratic Underground, 2:10-cv-1356-RLH-GWF (D.Nev. 2010) (docket references omitted).

Righthaven's subterfuge was a calculated attempt to conceal the true nature of its relationship with its clients. The revelation of a 50% kickback indicates the sham nature of the assignment. The true nature of the transaction is a contingency fee representation agreement for legal services. But Righthaven could not legally enter such a contract, because it is not a law firm. Not only was Righthaven engaged in the unauthorized practice of law, it committed fraud on an enormous scale to conceal its illegal conduct.

III.

RIGHTHAVEN IS AN UNAUTHORIZED LAW FIRM COMMITTING THE UNAUTHORIZED PRACTICE OF LAW

A. A look at form over substance.

Petitioners invite the Court to ignore the entire Righthaven enterprise for a moment and consider the following general proposition: A company has an actionable claim against someone. The company wants to hire someone to pursue a lawsuit over the claim. It makes a deal with a firm that employs lawyers and handles lawsuits to do just that. In fact, prosecuting lawsuits is all the firm does.

The company and the firm strike the following deal: the firm will prosecute the company's actionable claim, and the firm and the company will split any recovery, after expenses, 50/50. In the real world, that arrangement is called a "contingency fee representation agreement," the "company" is the client, and the "firm" is a law firm.

But Righthaven does not appear to operate in the real world. Righthaven claims this exact arrangement is actually an "assignment," that it is not a law firm but a "copyright enforcer," and that its clients are not clients but are "key relationships." This is nothing but corporate doublespeak, deployed in an attempt to camouflage an arrangement that is totally impermissible outside the context of a lawyer-client relationship.

Moreover, Righthaven claims to be engaged in a novel pursuit presenting new and undecided issues in copyright enforcement. Those claims are accurate only so long as one doesn't look up precedents relating to the unauthorized practice of law. What Righthaven tries to present as some inventive new way of enforcing copyrights is just a copyright-

specific form of a scheme that has been rejected, so far as Petitioners can determine, by every court that has ever examined it, including this Court in Roberts v. LaConey. In fact, Roberts and the cases it cites provide an excellent basis for analyzing the Righthaven scheme.

B. Righthaven's scheme has been tried before.

Righthaven is by no means the first entity to obtain an assignment of a claim, file a lawsuit in its own name, and kick back a portion of any recovery to the assignor. American courts have consistently refused to allow such a scheme and have found assignments of this nature to be plainly illegal.

i. ILLEGAL IN UTAH.

An early leading opinion is Nelson v. Smith, 154 P.2d 634 (Utah 1944), where the Utah Supreme Court found such assignments to be shams designed to enable the unauthorized practice of law:

> When the defendants solicit the placement of claims with them for collection, they are asking third parties to allow them to render the service of collecting the claim. At that time the collection agency has absolutely no interest, either legal or beneficial, in the claim. The only interest they ever get comes by virtue of a promise to prosecute the claim. Courts cannot remain blind to the fact that the assignment of the claim to the defendants for collection is not made as a gratuity. The percentage of the amount collected which is allowed to the defendants is given to them for one purpose only; to compensate them for services rendered in the collection thereof. Where the collection practice involves the preparing of legal papers, furnishing legal advice and other legal services, the compensation allowed must be assumed to be in part allowed to pay for the legal services so rendered. No matter how one looks at it, this constitutes the rendering of legal services for others as a regular part of a business carried on for financial gain. This essential fact cannot be hidden by the subterfuge of an assignment. The assignment itself, if used to permit this practice, is for an illegal purpose. . . . The taking of an assignment under circumstances such as those detailed above cannot possibly change the essential fact that the defendants are rendering legal services for another for gain.

Id. at 639-640.

This is *exactly* what Righthaven is doing. Righthaven's assignments are absolutely for the purpose of permitting it, a non-law firm, to practice law and to earn a fee for the provision of legal services. As the Utah Supreme Court said nearly seventy years ago, this essential fact cannot be hidden by the subterfuge of an assignment. Such an "assignment" is not an assignment; it is a contingency fee representation agreement.

ii. ILLEGAL IN NEW YORK, EVEN WHEN LAWYERS FILE THE LAWSUITS.

The assignment-lawsuit-kickback scheme did not end in Utah. Two years later, the City of New York had a run-in with a would-be Righthaven, dressed up as a charitable organization. The Hospital Credit Exchange was a collection agency that solicited causes of action from New York's charitable hospitals. Hospital Credit Exchange v. Shapiro, 59 N.Y.S.2d 812, 813-14 (N.Y. Mun. Ct. 1946). The Credit Exchange took "assignments of these claims for the sole and express purpose of instituting suit thereon in its own name although in behalf of such hospitals." Id. at 814. The Credit Exchange used its own lawyers to handle the claims. Id. The Credit Exchange would then take whatever recoveries it obtained and divide them between itself and the assignor. Id.

The New York court found the Credit Exchange "engaged in the practice of law contrary to public policy and in violation of the Penal Law." Id. at 814. The court refused to allow the sham, stating: "Not so easily is the law circumvented which prevents collection agencies from carrying on a legal practice." Id. at 816. Foreshadowing Righthaven, the court went on:

This might be very good business for the officials of a closely managed

> collection agency, who could thus grant themselves very satisfactory compensation for conducting what is tantamount to a law practice. It is not necessary that such compensation take the form of dividends or a distribution of profits; it may be paid in salaries or commissions.

Id. at 816-17.

iii. MICHIGAN FOLLOWS NEW YORK.

A decade after New York's rejection of the assignment-lawsuit-kickback scheme, the Michigan Supreme Court found itself faced with yet another proto-Righthaven, a collection agency taking assignments of claims and bringing suits in its own name in which the assignors retained an interest. Bay County Bar Ass'n v. Fin. Sys., Inc., 76 N.W.2d 23 (Mich. 1956). The Michigan Supreme Court found the assignment-lawsuit-kickback scheme to be the unauthorized practice of law. Id.

The Michigan Supreme court could not "escape the conclusion" that the taking of assignments and filing suits in the assignee's name in which assignors retain an interest was the practice of law. Id. at 29. And just as in New York, it did not matter that the assignee used licensed attorneys to file the suits. Id. The assignee itself had to be authorized to practice law, i.e. a lawyer or a law firm. Id.

"When this is done by one not licensed as an attorney it constitutes the unauthorized practice of law whether done by him in person or through his agent, regardless of whether the latter be a laymen or a licensed attorney." Id. "The corporate defendant has engaged in the unlawful practice [of law]." Id. Righthaven's use of lawyers is therefore no insulation to these arguments.

iv. WISCONSIN REJECTS THE RIGHTHAVEN SCHEME TOO.

Another decade passed and someone tried the assignment-lawsuit-kickback scheme in Wisconsin. The Wisconsin Supreme Court flatly rejected it, stating:

> It is sheer hypocrisy to conclude that the percentage retained by the collection agency represents its equity or ownership share of the claim. It is its fee or charge for professional services rendered. Under these circumstances the property right of the creditor is directly affected and his recovery is dependent upon the litigation undertaken. There is no doubt that the client whose interests must be served and represented in the suit for collection under a normal and lawful lawyer-client relationship is the creditor.

State ex rel. State Bar of Wis. v. Bonded Collections, Inc., 154 N.W.2d 250, 256 (Wis. 1967). The Wisconsin Supreme Court went on to say, in no uncertain terms: "The collection agency by going into court representing itself as the client perpetrates a fraud on the court." Id.

And the Wisconsin Supreme Court, as had its counterparts in New York and Michigan, found that the collection agency in that case was practicing law even though it hired a lawyer to go to court:

> The fact that the defendants in some instances employ a regularly licensed attorney to prepare necessary legal papers and conduct the trial of a suit does not make their conduct legal. One cannot do through an employee or an agent that which he cannot do by himself. If the attorney is in fact the agent or employee of the lay agency, his acts are the acts of his principal or master. When an attorney represents an individual or corporation, he acts as a servant or agent. Since he acts for others in a representative capacity, doing those things which are customarily done by an attorney, he practices law[.]

Id. Again, Righthaven's use of lawyers to prosecute its claims is no defense to these arguments.

v. NEW MEXICO FOLLOWS SUIT.

Just four years later in New Mexico, the Credit Bureau of Albuquerque decided to try the Righthaven path to prosperity. In State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 514 P.2d 40 (N.M. 1973), the Credit Bureau took claims for enforcement under a contingency fee agreement with the creditor. Id. The agreement also

"require[d] the creditor to assign his claim to the Credit Bureau when requested to do so." Id.

If pre-suit collection failed, the Credit Bureau then obtained an "assignment of the claim for the purpose of allowing the Credit Bureau to file suit in its own name." Id. The Credit Bureau did not pay for the assignment, it just assumed the claim in its own name with the contingency fee agreement still in place. Id. The Credit Bureau then filed lawsuits, and if a judgment was collected in such a suit, the creditor-assignor would receive the agreed percentage. Id. at 44.

After apparently employing these tactics for some time, the Credit Bureau finally crossed the wrong person. One David Norvelle was targeted by the Credit Bureau, and his lawyer realized the scheme was not debt collection but the unauthorized practice of law. After this revelation, it appears victims of the Credit Bureau came out of the woodwork and tried to intervene, and so did the New Mexico Attorney General. Id. at 42.

The New Mexico Supreme Court held that the Credit Bureau was engaged in the unauthorized practice of law: "[C]ollection agencies as a part of their business of serving others, clearly should not be permitted to prepare legal papers, commence suits, appear in court, prepare judgments and generally manage law suits for its various customers." Id. at 45. "It does not matter what particular form or name they give their procedure the practice of furnishing or performing legal services for another is essentially the same." Id.

The Credit Bureau court then quoted extensively from Nelson v. Smith before concluding:

> Such a business conducted for the purpose of bringing legal actions on claims owned by third parties and consisting of the payment of all costs and the furnishing of all legal services incident to the bringing of the actions is the practice of law. Where, as here, the agency rendering the

> service is a lay agency, it is the illegal practice of law. Such is the almost uniform holding of the authorities as applied to collection agencies operating along similar lines.

Id. at 45-46 (citations and quotations omitted).

The New Mexico Supreme Court went on:

> And so with the right of a plaintiff to try his own lawsuit in any court. If it is really his own litigation the right is unquestioned and unquestionable. But if it is another's lawsuit or action, placed in plaintiff's name so as to enable him to render service to that other under the pretext of trying his own case, it does not come under the protection of the rule. And if it is done by one who engages in it as a business and holds himself out as peculiarly qualified or equipped, it comes under the ban of illegal practice of law.

Id. at 47 (quotations omitted).

Righthaven, as noted above, holds itself out as "The Nation's Pre-Eminent Copyright Enforcer." This would seem to satisfy the "peculiarly qualified or equipped" requirements. And just as in the Righthaven cases, "The assignments procured by the Credit Bureau were not in truth taken for the purpose of acquiring title and ownership, but rather to facilitate the furnishing of legal services for a consideration." Id. at 49. The unending theme of these cases is that an entity pursuing the Righthaven assignment-lawsuit-kickback scheme is entering into sham documents and committing a fraud on the court.

vi. WEST VIRGINIA COMES TO THE SAME CONCLUSION.

It would appear based on studying the precedents that every few years, in some state or another, someone cooks up the assignment-lawsuit-kickback scheme anew, and it never meets with success. In State ex rel. Frieson v. Isner, 285 S.E.2d 641 (W.Va. 1981), yet another collection agency gave the Righthaven scheme a try. The West Virginia Supreme Court was not pleased:

> The operation of a collection agency, in and of itself, does not constitute the unauthorized practice of law. . . . Where, however, a person, association or corporation which collects debts as a regular business attempts to enforce the claims of others by resort to legal proceedings, the debt collector is extending his or its business to include legal representation of creditors. The collection agency is holding itself out not only as an entity which will collect amounts owed to creditors but also as an agent which will render legal services in order to recover debts. It sells its services as a representative in legal actions as part and parcel of its debt collection business. Such activity can be viewed in no other light than as the unauthorized practice of law.
>
> * * *
>
> The Associated Collection Agencies of West Virginia suggest in their *amicus curiae* brief, however, that South Charleston Adjustment Bureau was not rendering legal services to the petitioner's creditors as a part of its debt collection business, but rather had obtained an assignment of the claims from the creditors and was asserting its own claim. . . . The association argues that because the collection agency is asserting its own claim as assignee rather than acting as a representative of the creditor-assignor, it does not violate the prohibition against laymen engaging in the unauthorized practice of law.
>
> Generally an unsettled account or debt due is a chose in action which is assignable, and by virtue of statute the assignee may sue in his own name to recover the debt. . . . Where, however, a collection agency takes an assignment of a creditor's claim solely for the purpose of enabling the agency to maintain suit thereon, numerous jurisdictions have held that the fact that the collection agency, as assignee, is the real party in interest by virtue of the assignment and entitled to maintain suit in its own name is not determinative of the question of whether in so doing the collection agency is engaging in the practice of law.

Id. at 650-51.

Delivering the final nail in the coffin of the Righthaven scheme in West Virginia, the Supreme Court held: "In such instances the assignment has been held to be a sham or fraud perpetrated upon the court to allow the collection agency to avoid the prohibition on the unauthorized practice of law." Id. at 651.

vii. IOWA SAYS NO TO THE RIGHTHAVEN SCHEME.

The Iowa Supreme Court had a run in with the Righthaven scheme just ten years ago. In Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Associates Ltd., 623 N.W.2d 803 (Iowa 2001), the Iowa Supreme Court found that an entity (other than a law firm) "engages in the unauthorized practice of law when, as a regular part of its business, it procures or takes assignments for collection where the creditor still retains an interest in the underlying debt and the collection agency institutes and maintains legal action to recover the unpaid debt." Id. at 805.

The Iowa Supreme Court rejected the idea that such a legal relationship between a creditor and a debt collector is an "assignment." Id. at 807. "[W]e are convinced that A-1's practices are not consistent with the ordinary meaning of assignment recognized at common law and by statute. Id. The court went on:

> The assignment form executed by A-1's clients purports to transfer absolutely all right, title, and interest in described accounts receivable owned by A-1's clients. If such instrument actually meant what it said, it would come within the ordinary meaning of assignment—a transfer of the assignor's entire interest or rights in the property. And it would plainly give A-1 the right to maintain an action on the debt in its own name and represent itself in court on a pro se basis if it chose to do so.

Id. at 808 (citations omitted).

But the Iowa Supreme Court rejected the assignment as a sham. "A-1's claimed status as a bona fide assignee is defeated under this record, however, because the assignment—though absolute in form—is, in fact, a transfer intended primarily to secure payment for services rendered." Id. Righthaven does not dispute that its right of recovery from its cases is primarily intended to secure payment for services rendered, i.e. "copyright enforcement." Righthaven's clients do not enter into assignments. They enter

into contingency fee representation agreements for legal services.

viii. SOUTH CAROLINA REJECTS THE SCHEME AS WELL.

Finally, just four years ago, this Court encountered the assignment-lawsuit-kickback scheme. In Roberts v. LaConey, 375 S.C. 97, 650 S.E.2d 474 (2007), a debt collector approached a creditor to sign an assignment of a judgment to him. Id. at 101, 650 S.E.2d at 476. He would attempt to collect the debt for a fee of one-third of the recovery. Id. The debt collector used various legal mechanisms to try to compel payment, including asserting that the claim was now his to pursue pro se and accordingly appearing in court. See generally id.

This Court was as unimpressed with the assignment-lawsuit-kickback scheme as the rest of the courts cited above, and in fact held the assignment to be a contingency fee representation agreement for legal services with an individual who was not a lawyer. Id. at 104-06, 650 S.E.2d at 478-79. In fact, in Roberts this Court approvingly cited many of the precedents above which describe the scheme as a "sheer hypocrisy," a "fraud on the court," and a "sham perpetrated on the court to enable unauthorized practice of law." Id. (citing Bonded Collections, supra; Frieson v. Isner, supra). Finally, this Court indicated that in such a situation, the assignee had no genuine title, equity, or ownership in the claim. Id. at 106, 650 S.E.2d at 478 (citing Bonded Collections, supra; Credit Bureau, supra).

C. A pattern of assignment-lawsuit-kickback is per se unauthorized practice.

In many of the cases rejecting the assignment-lawsuit-kickback scheme, the key was the habitual nature of the conduct—that it was a pattern and practice. In Credit Bureau, 514 P.2d 40 (N.M. 1973), the New Mexico Supreme Court said:

> [I]f it is another's lawsuit or action, placed in plaintiff's name so as to enable him to render service to that other under the pretext of trying his own case, it does not come under the protection of the rule [that a plaintiff can sue in his own name]. And if it is done by one who engages in it as a business and holds himself out as peculiarly qualified or equipped, it comes under the ban of illegal practice of law.

Id. at 47 (quotations omitted).

The New Mexico Supreme Court clearly intended to exempt bona fide business transactions from the reach of its prohibition, just as this Court did in Roberts. Id. at 103, 650 S.E.2d at 477. And it can be said with certainty that not one of the other courts prohibiting assignment-lawsuit-kickback *schemes* would have looked askew at *isolated*, bona fide business transactions in that form. There are countless hypothetical scenarios where an isolated transaction in the prohibited form would be upheld.

For example, suppose a young couple is looking at purchasing a nice house on very cheap land, but before any papers are signed, the house burns down due to a neighbor's negligence. The owner has long since moved, and has little interest or ability to pursue litigation. The couple still likes the lot and would rebuild, but can't get financing now that the house is gone.

So the couple and the owner make a deal. The owner assigns all right, title, and interest in the property to the couple who hire a lawyer and pursue the litigation in their own name. The couple agrees to give the litigation proceeds back to the owner, keeping the lot for their time and trouble, where they now intend to build a house.

No court would condemn such a transaction, even though it involves an assignment, a lawsuit by the assignee, and a return of proceeds to the assignor. The couple are clearly not in the business of pursuing these sorts of transactions, taking a fee for their work, and remitting the remainder to the assignor.

What permanently tips the scales against Righthaven is nothing that any documentation or amended assignments can ever fix. Righthaven is in the business of seeking out claims held by others, suing people over them, and returning litigation proceeds—minus costs and a fee—to the original claimant. That is fundamentally the practice of law, and a business entity that is not a law firm simply cannot do it. Righthaven's scheme is irredeemable.

It is worth considering the nature of Righthaven's earnings. Righthaven keeps 50% of a recovery and transfers the other 50% to its client. But why does Righthaven get to keep 50%? What does that money represent? Not compensation for damages, because Righthaven is not a publisher or a creator, its sole enterprise is to file lawsuits. No, Righthaven's cut of the recovery represents a fee for services. And the only service Righthaven renders is the initiation and prosecution of lawsuits. If that is not the unauthorized practice of law, it is difficult to imagine what could be.

D. Righthaven is the worst offender yet.

Righthaven is far worse than the debt collectors referenced in the cases cited above. In every single one of those cases, the debt collector at least tried to collect the debt prior to litigation. At least some percentage of the work done by the debt collectors was not the unauthorized practice of law. But with Righthaven, its first and only act in the collection of alleged debts is to prosecute a lawsuit. That is all Righthaven does and all it ever did. Righthaven is not a debt collector who unintentionally ran afoul of the law of unauthorized practice, Righthaven is an entity set up ab initio for the express purpose of committing the unauthorized practice of law.

The Court may wonder—as have many Righthaven observers—why Righthaven

could not simply operate as law firm and file suits for its clients. After all, Righthaven's cases are not filed pro se, so why take the risk of the whole scheme being declared illegal? The answer is as simple as it is green: money. Righthaven is a for-profit business that needed investors to float venture capital to get it started. No American jurisdiction authorizes this arrangement with law firms—non-lawyers cannot invest in law firms, nor can lawyers split fees with non-lawyers.

While these rules are sometimes criticized with free market arguments, Righthaven demonstrates the wisdom of those restrictions. Righthaven is a lawsuit mill, and the demands of its investors have clearly created an environment where its attorneys have dispatched with the quaint notions of properly investigating lawsuits prior to filing, avoiding misrepresentations to courts, acting with due regard for the rights of unrepresented opponents, etc.

Consider a world where Righthaven's scheme is legitimate. Every law school in the country should close its doors and every state bar should begin winding up its affairs. Anyone who is not a licensed practitioner can strike a deal with anyone holding an actionable claim: "Has someone injured you? Damaged your property? Call the Abe Jackson Assignment Firm at 1-800-GET-CASH! Assign Abe your claims. We handle the lawsuit, and we give you two-thirds of the recovery. Over 20 years practicing assignment in state and federal court. We don't get paid unless you get paid!" It is not an exaggeration to say that this imaginary ad is *precisely* what Righthaven does.

Righthaven has filed 275 lawsuits against approximately 500 defendants and promises to file many more, holding itself out as "The Nation's Pre-Eminent Copyright Enforcer." Copyright is a legal right, and a business whose sole occupation is the

enforcement of legal rights in court is necessarily either a law firm or a business engaged in the unauthorized practice of law. Righthaven is the latter.

IV.

THIS COURT SHOULD PUT A STOP TO THE RIGHTHAVEN SCHEME IN SOUTH CAROLINA

A. Righthaven vows to continue.

Despite the revelation that Righthaven's assignments are shams, instead of trying to find a graceful exit, Righthaven has vowed to continue its campaign of lawsuit terror. In court documents and statements to media, Righthaven has signaled an intention to endlessly tinker with its assignments until discovering the magic words that keep them from getting dismissed.

For example, in Righthaven v. Democratic Underground, Righthaven's complaint was dismissed for lack of standing. The court found the assignment was illusory, transferring to Righthaven only the right to sue, a transaction forbidden by the Copyright Act. So Righthaven and Stephens Media retooled the SAA to try to give Righthaven just enough of a peppercorn of rights so that it could sue under the Copyright Act. In fact, Righthaven has now petitioned for intervention in the very case where its own complaint was dismissed.

And Righthaven's quest for the magic words won't stop there. If the newest version of the SAA fails to satisfy the dictates of copyright law, Righthaven will keep trying again and again until it finds some amalgamation of insincere recitations that will give it standing under the Copyright Act. It's a wonder Righthaven's pleadings don't end with "abracadabra."

Given Righthaven's plans to subject its targets to endless litigation over injuries it did not suffer for claims it does not own, Petitioners respectfully submit this matter is exactly the sort of case where this Court should exercise its original jurisdiction to consider whether Righthaven is engaged in the unauthorized practice of law.

B. Righthaven's predatory litigation conduct justifies the attention of this Court.

i. RIGHTHAVEN'S ABUSE THREATENS THE PUBLIC.

In Roberts v. LaConey, 375 S.C. 97, 650 S.E.2d 474 (2007), the report of the Special Referee briefly discusses the abusive nature of the debt collector's unauthorized practice of law, before concluding that those aspects of the debt collector's conduct were not before the Court. Id. at 102, 650 S.E.2d at 476 n.3 ("Many of these threats are entirely inappropriate, and would violate the Rules of Professional Conduct if made by a lawyer. However, this aspect of Respondent's conduct is not before me.")

Certainly, in this case, Petitioners believe that the Righthaven assignment-lawsuit-kickback scheme is per se unauthorized practice of law regardless of Righthaven's behavior in the ensuing litigation. See generally id. However, the purpose of prohibiting unauthorized practice of law is to protect the public from its harms. In re Unauthorized Practice of Law Rules, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992).

While Righthaven's improper litigation conduct may not be relevant to the ultimate issue of unauthorized practice of law, it is most certainly relevant to whether this Court should exercise its discretion in granting this Petition for Original Jurisdiction. Righthaven's illegal conduct is substantial, and it poses a serious threat to the citizens of South Carolina. Further, the abuses committed by Righthaven are exactly the sort of

abuses one would expect from law firm in disguise, subverting the court system with the sole intent of making a profit.

ii. RIGHTHAVEN AND THE TRUTH ARE NOT WELL ACQUAINTED.

Righthaven has no qualms whatsoever about outright dishonesty before the courts. In Righthaven v. Democratic Underground, the court found Righthaven to have breached its duty of candor to the federal district judges in the District of Nevada, and in doing so induced them to make procedural rulings in Righthaven's favor. In rejecting Righthaven's citation to prior favorable rulings, U.S. District Judge Roger Hunt wrote "As the undersigned issued one of the orders Righthaven cites [to support its standing arguments], the undersigned is well aware that Righthaven led the district judges of this district to believe that it was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the true nature of the transaction[.]" Order at 10 (and Exhibit 1 to the attached Complaint), Doc. #116, Righthaven v. Democratic Underground, 2:10-cv-1356-RLH-GWF.

Righthaven's dishonesty in that case was not an isolated event. In fact, as mentioned above, Righthaven submitted fraudulently inaccurate financial disclosures in every single Nevada and Colorado case, and would have done the same in South Carolina if our local federal rules had the same requirements. Judge Hunt found this to be a pattern of conduct and issued a rule to show cause, stating his belief that "Righthaven has made multiple inaccurate and likely dishonest statements to the Court." Id. at 15. Righthaven's tactics are not welcome in South Carolina.

iii. RIGHTHAVEN VICIOUSLY ATTACKED A DISABLED, AUTISTIC GENTLEMAN.

Dishonesty before tribunals is only the tip of the Righthaven iceberg. In Righthaven v. Hill, 1:11-cv-211-JLK (D.Colo 2011), Righthaven tried to leverage a twenty-year-old autistic gentleman with no assets out of his social security disability benefits directly in violation of federal law. Ignoring the prohibitions of 42 U.S.C. § 407, Righthaven threatened to garnish Mr. Hill's social security disability, $50 a month for ten years. Further, Righthaven conditioned settlement on Mr. Hill's attorney publicly endorsing Righthaven's business model and claiming, falsely, that Righthaven had exhibited professional behavior during settlement negotiations. Specifically, the settlement demand required Mr. Hill's attorney to do the following:

1. State, falsely, that Righthaven had been cooperative and diligent and had exhibited professional behavior during settlement negotiations.

2. State, falsely, that his past accusations about Righthaven's business practices were not well founded. (Mr. Hill's counsel had made these statements in pleadings, Righthaven's demand was that he admit to making arguments in court with no good faith basis.)

3. Be quoted as saying, falsely, "Righthaven was well within their rights to pursue the copyright infringement claim asserted and, as alleged, it would constitute a violation of federal law."

4. Perhaps worst of all, publicly embarrass his client and be quoted as saying: "Hill apparently has a mental disorder[.]"

The Righthaven v. Hill settlement negotiations provide a window into Righthaven's practices, a level of predatory abuse that is absolutely intolerable in ethical

settlement negotiations. Righthaven's conduct is so atrocious that multiple websites have sprung up to try to help its victims, including the Righthaven Victims site[3] and the Righthaven Lawsuits site.[4]

These and other sites post pleadings from various Righthaven cases so that Righthaven's victims who cannot afford representation can have a resource to file pro se answers. In fact, before undersigned counsel became involved, the sole Righthaven defendant in South Carolina, Dana Eiser, was forced to file a pro se answer and counterclaim because she could not find representation in time.

iv. RIGHTHAVEN DEMANDS RELIEF IN ITS PLEADINGS IT CANNOT LEGALLY OBTAIN, FOR THE SOLE PURPOSE OF BULLYING VICTIMS.

Righthaven frequently preys on people who cannot adequately defend themselves and makes ridiculous demands in its pleadings. For example, every Righthaven lawsuit filed thus far has sought a court order forcing the defendant to turn over his or her website to Righthaven. After facing objections that the Copyright Act did not allow for such relief, Righthaven made a rare admission: "Righthaven concedes that such relief is not authorized under the Copyright Act." Opposition to Motion to Dismiss at 5, Doc. # 29, Righthaven v. DiBiase, 2:10-cv-1343-RLH-PAL (D.Nev. 2010).

Unbelievably, Righthaven *continued* to make the website transfer demand and argue that it should be able to. The trouble with Righthaven's position is that, since at least 1889, it has been black letter law in the United States that copyright infringement remedies are only those authorized by the Copyright Act. No less an authority than the United States Supreme Court stated: "The remedies for infringement 'are only those

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[3] http://righthavenvictims.blogspot.com
[4] http://www.righthavenlawsuits.com

prescribed by Congress,'" Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (quoting Thompson v. Hubbard, 131 U.S. 123, 151 (1889)).

The website transfer demand, like Righthaven's other abusive conduct, is aimed at only one thing: intimidating defendants into paying up. And it is interesting to note that the very same day Righthaven admitted in Nevada that the Copyright Act did not authorize website seizure as a penalty, Righthaven filed its South Carolina action—and demanded website seizure in its prayer for relief.

v. RIGHTHAVEN'S SUITS ARE OFTEN FRIVOLOUS ON THE MERITS.

Many of Righthaven's cases would be frivolous even if brought by a legitimate plaintiff in that the defendants obviously qualify for fair use. For example, in Righthaven v. Democratic Underground, Righthaven sued over the posting of four paragraphs of a 34 paragraph story from the *Las Vegas Review-Journal*. The defendant put up a fight, arguing obvious fair use and filing a declaratory judgment counterclaim to that effect. Righthaven moved to dismiss its complaint and argued that should also deprive the defendants of their counterclaim for a fair use declaratory judgment.

This echoed an early Righthaven tactic. Whenever a defendant appeared willing and able to actually play defense, Righthaven would dismiss its complaint and move on. But that tactic didn't work in Democratic Underground, whose attorneys had the foresight to file a counterclaim for fair use. Righthaven strenuously objected to the counterclaim,[5] and in doing so drew the ire of Judge Hunt in Nevada:

Righthaven and Stephens Media have attempted to create a cottage

[5] Righthaven had the audacity to claim it would be unfair to make it an "unwilling plaintiff/counterdefendant." Motion for Voluntary Dismissal at 4, Doc. #36, Righthaven v. Democratic Underground. The irony of this statement appears lost on the Righthaven employee who drafted that motion.

> industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar, with defendants who do not want to incur the costs of defending the lawsuits, are now offended when someone has turned the tables on them and insisting on a judgment in their favor rather than a simple dismissal of the lawsuit.

Order at 2, Doc. #94, Righthaven v. Democratic Underground, 2:10-cv-1356-RLH-GWF (D.Nev. 2010).

After desperately trying to dismiss its case against the Democratic Underground with prejudice, Righthaven was dismissed—but without prejudice—for lack of standing. Yet after claiming to be an "unwilling plaintiff" seeking to end its case permanently, Righthaven did something that only Righthaven would do: it filed a motion to intervene *in the very same case*.

C. Righthaven's overreaching chills freedom of speech and expression.

Were Righthaven solely filing suit against real content pirates instead of innocent people and people who unintentionally commit de minimis infringement, its activities would still violate the law of unauthorized practice, but Righthaven would not pose a broader threat to free speech. Such a course of action would require Righthaven to exercise some level of restraint and judgment, something that is apparently impossible within the confines of its offices. A direct result of Righthaven's sue-first-ask-questions-later strategy has been the severe chilling of legitimate, constitutionally protected speech.

As U.S. District Judge James Mahan noted, "Plaintiff's litigation strategy has a chilling effect on potential fair uses of Righthaven-owned articles, diminishes public access to the facts contained therein and does nothing to advance the Copyright Act's purpose of promoting artistic creation." Order at 7, Doc. #38, Righthaven v. Jama, 2:10-cv-1322-JCM-LRL (D.Nev. 2010). A variety of Righthaven victims and observers have

expressed similar thoughts, too many to include here.

D. The perils of cut-and-paste lawsuits as a volume business.

Righthaven does have one redeeming quality. Righthaven's victims do not fear responsible lawyers and law firms. Attorneys from across the country have effectively battled Righthaven in Nevada and Colorado, many working pro bono.

The reaction of ethical members of the bar has largely been one of disgust. Even attorneys who are in strong sympathy with the idea of increased copyright enforcement have condemned Righthaven's tactics. Many copyright lawyers have commented that Righthaven's campaign of viciousness is likely to result in adverse precedent on the theory that bad facts make bad law.

The idea of professional responsibility is entirely lacking in the Righthaven enterprise, and understandably so, because it is not a professional company. Instead of being a respectable law firm, Righthaven calls itself an "enforcer." And that is certainly what Righthaven is, in the most pejorative sense of the term. Righthaven's complaints are not requests for a court to remediate injustice, they are clubs used by thugs in the service of a protection racket.

Responsible law firms don't initiate suit over the reposting of four out of 34 paragraphs of a newspaper article. Responsible law firm don't sue disabled people with autism and try to leverage them out of their social security benefits. Responsible law firms don't mandate that opposing counsel lie in a press release as a condition of settlement. Responsible law firms don't try to dismiss with prejudice while claiming to be uninterested the case, then seek to intervene after being dismissed without prejudice.

But Righthaven is neither responsible nor a law firm. It does not comply with the

ethical standards of the profession because it doesn't have to. Righthaven is a case study in why non-lawyers should not be permitted to hold ownership stakes in law firms, and why fee-splitting with non-lawyers is, and should be, banned. For Righthaven, the need to bring in settlement dollars has entirely supplanted any notions of ethics or professional responsibility.

What is perhaps most troubling about Righthaven—even moreso than its unauthorized practice of law—is the complete lack of judgment and reasonable conduct. The undersigned cannot say that it is categorically improper to file suit against an autistic defendant. Nor is suing the wrong defendant ipso facto proof of a failure to properly investigate a lawsuit before filing. But Righthaven's problems are not isolated mistakes of the kind that reasonable, ethical practitioners make. Righthaven's problems result from a clear dedication to what is profitable over what is right.

E. The collection agent enjoined in Roberts v. LaConey posed far less of a threat than Righthaven.

The collection agent in Roberts v. LaConey, Glen LaConey, appears to have limited his operation to collecting judgments. 375 S.C. at 101, 650 S.E.2d at 476. LaConey's efforts in pursuit of supplemental proceedings were certainly improper, and his abusive conduct towards his targets did not go unnoticed by the Court. This Court held LaConey's conduct to be the unauthorized practice of law and was absolutely right to do so.

But the harm posed to the public by Glen LaConey pales in comparison to that posed by Righthaven. LaConey tried to collect judgments untainted by the unauthorized practice of law. While the distinction makes little difference to a judgment debtor whose

car is sold at a sheriff's sale, far more danger is posed by the use of unauthorized practice to obtain judgments than to collect them. Prosecution of a lawsuit poses far more jeopardy to the substantive rights of a defendant than collection of a judgment.

Unless there is more to the story than is disclosed in Roberts, it is highly unlikely that LaConey would ever have obtained anything for his client that a court had not already decided his client should have, in a proceeding untainted by unauthorized practice. This is no defense of LaConey's operation, but by comparison, Righthaven's scheme is far, far worse. Righthaven's unauthorized practice of law goes not just to collection of debts but to intimidating targets into believing they have far more exposure to liability than they actually do.

While the cases cited herein are not crystal clear on this point, it seems extremely likely most if not all of the assignors in those cases were debt collectors collecting real debts of a sum certain that were truly due and owing. If the assignment-lawsuit-kickback method is barred as to judgment enforcement and sum-certain debts, it most certainly must reach Righthaven's conduct. A debt collector assignee's leverage is almost certainly limited to the true upper limit of the debt. Even an unrepresented, unsophisticated defendant is unlikely to be suckered into paying *more* than he actually owes on a judgment or a sum-certain debt.

There is a far greater need to protect the public from the harm caused by Righthaven. Righthaven isn't using improper means to collect true, legal debts. Righthaven uses improper means to convince targets they have far more exposure than they actually do, tricking them into paying out far more than the claims are worth even if brought by the true copyright holders. Again, consider Glen LaConey. He may have been

an abusive jerk who used improper leverage to collect debts, but there is no evidence he was a thief.

But where Glen LaConey used improper means to collect genuine debts, Righthaven uses improper means to convince its targets they owe a debt far in excess of their real exposure, then collect an amount still substantially in excess of their true exposure. Righthaven and its associates aren't just committing the unauthorized practice of law, they are committing outright fraud.

This Court found good cause to exercise original jurisdiction over Glen LaConey's unauthorized practice in the pursuit of legitimate debts. Righthaven's scheme is not even limited to legitimate debts, but to whatever it can scare its targets into paying. Petitioners submit that the conduct of Righthaven LLC is far more extensive, far more abusive, and far more likely to cause harm to South Carolinians. Accordingly, Petitioners respectfully request this Honorable Court choose to entertain this matter in its original jurisdiction and explicitly prohibit the Righthaven scheme.

V.

INTEREST OF PETITIONERS

A. Citizens Against Litigation Abuse

Citizens Against Litigation Abuse, Inc. ("CALA") is a South Carolina nonprofit corporation. As its name implies, CALA is a public interest entity interested in preventing and opposing truly abusive litigation. CALA's focus is on abusive litigation in areas relating to political speech and strategic lawsuits against public participation, known as SLAPP lawsuits.

The Righthaven cases directly implicate freedom of speech and have an obvious

chilling effect on core political speech on the Internet. A large proportion of Righthaven cases involve core political speech, as one would expect with lawsuits filed over material appearing in newspapers. Righthaven has sued political speakers from all over the political spectrum. From left to right, from radical to moderate, no group has escaped Righthaven's litigation campaign. The following politically-oriented defendants jump out from just a quick scan of a list of Righthaven cases:

- Former Republican Senate nominee Sharron Angle
- The Democratic Party of Nevada
- The Democratic Underground website
- Free Republic LLC, a conservative website
- The Drudge Report, a major political news website
- The Center for Intercultural Organizing
- Thoughts From A Conservative Mom
- Pajamas Media, a major political blogging association
- The Second Amendment Foundation
- Virginia Citizens Defense League, Inc.
- Climate Change Fraud
- The United States Marijuana Party
- Americans Against Food Taxes
- America's Independent Party of Iowa
- Americans for Legal Immigration Political Action Committee
- American Political Action Committee
- Second Amendment Sisters, Inc.

- Americans for Immigration Reform
- Americans for Democratic Action, Inc.
- Independent Political Report
- No Quarter, a national security and terrorism blog
- Progressive Leadership Alliance of Nevada
- Citizens for Responsibility and Ethics in Washington, Inc.
- National Organization for the Reform of Marijuana Laws
- Clayton Cramer, Second Amendment scholar and activist
- The Armed Citizen
- Free Speech Systems, LLC
- Alex Jones, a libertarian talk radio host

Righthaven does not sue people who have downloaded pirated movies or music. Righthaven sues people who are communicating their views about issues of the day and discussing important matters of public interest. Righthaven's litigation strategy is so brutal and abusive that the words "chilling effect" simply do not do it justice. The free and open exchange of ideas is fundamental to American democracy. Righthaven jeopardizes that, and for that reason Citizens Against Litigation Abuse respectfully petitions this Honorable Court for declaratory and injunctive relief.

B. The Lowcountry 9/12 Project

The Lowcountry 9/12 Project is a South Carolina nonprofit corporation that is very likely to be the next victim of a Righthaven lawsuit. Righthaven has already sued its president, Dana Eiser, over material posted on the Lowcountry 9/12 Project Blog. As a result of litigation with Eiser, Righthaven is now aware that Eiser did not post the

material. Given that the material was posted on its blog, the Lowcountry 9/12 Project is certain Righthaven will pursue an action against it in the near future.

Accordingly, the Lowcountry 9/12 Project respectfully petitions this Honorable Court for declaratory and injunctive relief.

C. Disclosures

Counsel for Petitioners represent the Lowcountry 9/12 Project and Dana Eiser regarding the pending cases of Righthaven v. Eiser, 2:10-CV-3075-RMG-JDA (D.S.C. 2010) (copyright infringement) and Eiser v. Righthaven, 2011-CP-10-4146 (Charleston Co., S.C. Com. Pleas 2011) (Eiser and the Lowcountry 9/12 Project suit against Righthaven and others for unfair trade practices, fraud, and related claims).

Petitioners' Counsel, Petitioner Lowcountry 9/12 Project, and Respondent have a financial interest in those cases that may be affected by this Court's decision. Further, Petitioners' counsel J. Todd Kincannon represents CALA with regard to *amicus curiae* briefing in Righthaven litigation outside of South Carolina.

Finally, Petitioners advise the Court that Righthaven's current South Carolina attorney, Mr. Edward A. Bertele of Charleston, was very recently retained by Righthaven after Righthaven's previous attorney withdrew. Mr. Bertele had nothing to do with filing of the South Carolina lawsuit and has done nothing unprofessional or inappropriate whatsoever.

VI.

CONCLUSION

Ensuring "the public's protection from the harms caused by the unauthorized practice of law" is within the exclusive province of this Court. In re Unauthorized

Practice of Law Rules, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992). Petitioners respectfully request this Court entertain this matter in its original jurisdiction, declare the Righthaven scheme to be the unauthorized practice of law, and enjoin Righthaven from further operations in South Carolina.

Respectfully submitted,

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June 27, 2011

Attorneys for Petitioners

Attachment to the Petition for Original Jurisdiction

Proposed Complaint

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Citizens Against Litigation Abuse, Inc. and
the Lowcountry 9/12 Project,..Plaintiffs,

v.

Righthaven LLC,...Defendant.

COMPLAINT

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Attorneys for Plaintiffs

June 27, 2011

COMPLAINT

The Plaintiffs appear before this Court seeking a declaratory judgment and injunction against Defendant, who is engaged in the unauthorized practice of law in South Carolina as follows:

1. Plaintiff Citizens Against Litigation Abuse, Inc. is a South Carolina nonprofit corporation dedicated to fighting abusive litigation relating to political speech and public participation.

2. Plaintiff Lowcountry 9/12 Project is a South Carolina nonprofit corporation expected to be a future target of the Righthaven lawsuit campaign.

3. Defendant Righthaven LLC ("Righthaven") is a for-profit Nevada company.

4. Righthaven is not a law firm and is not authorized to engage in the practice of law in South Carolina or anywhere else.

5. Righthaven's only business is prosecuting lawsuits in its own name.

6. Righthaven has filed 275 lawsuits against approximately 500 defendants in Nevada, Colorado, and South Carolina, all of which allege copyright infringement.

7. In its lawsuits and elsewhere, Righthaven claims to have obtained ownership of the copyright by assignment from the original owner.

8. Righthaven has an agreement in place with the original copyright owners that it will accept the assignment, prosecute lawsuits in its own name, and split any recovery 50/50 with the original copyright owner. See Exhibit 1, Order of June 14, 2011 at 15, Doc. #116, Righthaven v. Democratic Underground, 2:10-cv-1356-RLH-GWF (D.Nev. 2010). Exhibit 1 is incorporated herein by reference.

9. Righthaven's agreements are therefore not assignments, they are contingency fee

representation agreements for legal services.

10. Righthaven cannot legally perform legal services, because it is not a law firm and is not authorized to practice law.

11. Righthaven's assignments are shams constituting a fraud on the court to enable the unauthorized practice of law.

12. Righthaven has no genuine title, equity, or ownership in the claims it sues over.

13. This conduct constitutes the unauthorized practice of law in South Carolina.

14. Righthaven has engaged in this conduct in South Carolina, filing and prosecuting Righthaven v. Eiser, No. 2:10-CV-3075-RMG-JDA in U.S. District Court for the District of South Carolina.

15. Righthaven intends to continue its operations in South Carolina and elsewhere.

FOR A FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

16. Based on the foregoing facts, Plaintiffs seek a declaration that Righthaven's "business model" constitutes the unauthorized practice of law in South Carolina.

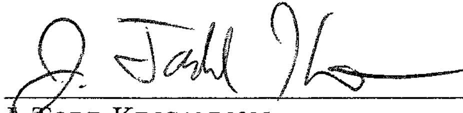
FOR A SECOND CAUSE OF ACTION
INJUNCTIVE RELIEF

17. In the event of a declaration that Righthaven is engaged in the unauthorized practice of law, Plaintiffs seek permanent injunctive relief barring Righthaven from continued operations in South Carolina.

PRAYER FOR RELIEF

18. Wherefore, having fully pled, the Plaintiffs pray for a judgment against the Defendants granting declaratory and injunctive relief and such other relief as the Court deems to be just, equitable, and proper under the circumstances.

Respectfully submitted,



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June 27, 2011

Attorneys for Plaintiffs

Exhibit 1 to the Complaint

Order of June 14, 2011
Docket #116

Righthaven v. Democratic Underground
2:10-cv-1356-RLH-GWF

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RIGHTHAVEN LLC, a Nevada limited-liability company, Plaintiff, vs. DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, an individual, Defendants. __________________________________ DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company, Counterclaimant, vs. RIGHTHAVEN, LLC, a Nevada limited-liability company; and STEPHENS MEDIA LLC, a Nevada limited-liability company, Counterdefendants. __________________________________	Case No.: 2:10-cv-01356-RLH-GWF **O R D E R** (Motion for Voluntary Dismissal with Prejudice–#36; Motion to Dismiss or Strike–#38; Motion for Summary Judgment–#45)

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AO 72
(Rev. 8/82)

Before the Court is Plaintiff/Counterdefendant Righthaven LLC's **Motion for Voluntary Dismissal with Prejudice** (#36, filed Aug. 10, 2010). The Court has also considered Defendant/Counterclaimant Democratic Underground, LLC and David Allen's (collectively "Democratic Underground") Opposition (#44, filed Dec. 7, 2010), and Righthaven's Reply (#57, filed Jan. 7, 2011).

Also before the Court is Counterdefendant Stephens Media LLC's **Motion to Dismiss or Strike** (#38, filed Nov. 17, 2010). The Court has also considered the Democratic Underground's Opposition (#46, filed Dec. 7, 2010), and Stephens Media's Reply (#56, filed Jan. 7, 2011).

Also before the Court is Democratic Underground's **Motion for Summary Judgment** (#45, filed Dec. 7, 2010). The Court has also considered Righthaven's Opposition (#58, filed Jan. 8, 2011), and Democratic Underground's Reply (#62, filed Jan. 28, 2011).

Finally, the Court allowed and ordered supplemental briefing relevant to the three motions under consideration because of important evidence that only came to light after these motions were fully briefed. Accordingly, the Court has considered Democratic Underground's Supplemental Memorandum Addressing Recently Produced Evidence (#79, filed Mar. 9, 2011), Stephens Media's Response (#99, filed May 9, 2011), Righthaven's Response (#100, filed May 9, 2011), and Democratic Underground's Replies (##107 and 108, filed May 20, 2011).

BACKGROUND

This dispute arises out of Democratic Underground's allegedly copyright infringing conduct. About May 13, 2010, a Democratic Underground user posted a comment on Democratic Underground's website which included a portion of a Las Vegas Review-Journal ("LVRJ") article about Nevada politics, particularly about the Tea Party effect on Sharon Angle's senatorial campaign (the "Work"). The posting included a link to the full article and the LVRJ's website. As such, Democratic Underground displayed this selection from the article on its website and Righthaven claims that this infringed on the copyright.

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Righthaven claims that after the Work was posted on Democratic Underground's website, it purchased the copyright to the Work from Stephens Media, the owner of the LVRJ, along with the right to sue for past infringement. (Dkt. #102, Decl. of Steve Gibson, Ex. 1, Copyright Assignment (hereinafter referred to as the "Assignment").) Righthaven then registered the copyright with the United States Copyright office. Thereafter, Righthaven sued Democratic Underground alleging copyright infringement. Democratic Underground, in turn, filed a counterclaim for a declaratory judgment of non-infringement against both Righthaven and Stephens Media, which was not originally a party to this case. Righthaven has since filed a motion for voluntary dismissal with prejudice due to an adverse fair use ruling by the Honorable Larry R. Hicks, United States District Judge for this district (Righthaven is appealing that decision), Stephens Media has filed a motion to dismiss or strike the counterclaim and a partial joinder to Righthaven's motion, and Democratic Underground has filed a motion for summary judgment on Righthaven's claim.

After these motions were fully briefed, Stephens Media disclosed to Democratic Underground the Strategic Alliance Agreement ("SAA") between Stephens Media and Righthaven. The SAA defines their relationship and governs all future copyright assignments between them (including the assignment at issue here). (Dkt. #79, Supplemental Mem. Ex. 1, SAA, dated Jan. 18, 2010.) After learning the details of this agreement, Democratic Underground sought leave to file a supplemental memorandum addressing this newly discovered evidence and its effect on the outstanding motions. The Court allowed the supplemental briefing as it too considered the SAA highly relevant to Righthaven's standing in this and a multitude of other pending Righthaven cases. After considering the supplemental brief and for the reasons discussed below, the Court dismisses Righthaven for lack of standing and, therefore, denies both Righthaven's motion and Democratic Underground's motion as moot. The Court also denies Stephens Media's motion.

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DISCUSSION

I. Righthaven's Standing to Assert Copyright Claims

As stated above, before the Court are two motions to dismiss and a motion for summary judgment. However, the Court must first address the supplemental briefing addressing the SAA and the question of Righthaven's standing to pursue this copyright infringement claim. The Court will then address the outstanding motions.

A. Background - The Strategic Alliance Agreement

Months prior to purportedly assigning the Work to Righthaven, Stephens Media and Righthaven signed a Strategic Alliance Agreement governing future copyright assignments between them. (Dkt. #79, Ex. 1, SAA, dated Jan. 18, 2010.) The SAA details the relationship between Righthaven and Stephens Media, explains the rights and responsibilities of each party, and limits and defines future copyright assignments between them. (*See generally, id.*) As such, it limits and explains the intent behind the Assignment, which was executed in July 2010.

Critically, the SAA expressly denies Righthaven any rights from future assignments (including the Assignment of the Work) other than the bare right to bring and profit from copyright infringement actions. This conclusion is clearly expressed in Section 7.2 of the SAA:

> 7.2 **Despite** any such Copyright Assignment, Stephens Media shall **retain** (and is hereby granted by Right*haven*) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and **Right*haven* shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.** To the extent that Righthaven's maintenance of rights to pursue infringers of the Stephens Media Assigned Copyrights in any manner would be deemed to diminish Stephens Media's right to Exploit the Stephens Media Assigned Copyrights, Right*haven* hereby grants an exclusive license to Stephens Media to the greatest extent permitted by law so that Stephens Media shall have unfettered and exclusive ability to Exploit the Stephens Media Assigned Copyrights. . . .

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1 (*Id*., Section 7.2 (bold emphasis added, italicization in original)). The plain and simple effect of
2 this section was to prevent Righthaven from obtaining, having, or otherwise exercising any right
3 other than the mere right to sue as Stephens Media *retained* all other rights. Even Righthaven's
4 right to sue is not absolute. The SAA gives Stephens Media the right to prevent Righthaven from
5 suing an alleged copyright infringer for various specific reasons, including that the lawsuit might
6 "result in an adverse result to Stephens Media." (*Id*., Section 3.3.) Other sections also give
7 Stephens Media a right to reversion and other rights which, collectively, destroy Righthaven's
8 supposed rights in the Work. (*See generally, id*.) Now that the SAA has shed light upon
9 Righthaven's true interest in the copyright to the Work, Democratic Underground asserts that
10 Righthaven lacks standing to maintain this lawsuit.

11 **B. Legal Standard**

12 Pursuant to Section 501(b) of the 1976 Copyright Act, 17 U.S.C. § 101, *et. seq*.,
13 (the "Act") only the legal or beneficial owner of an exclusive right under copyright law is entitled,
14 or has standing, to sue for infringement. *Silvers v. Sony Pictures Entm't Inc*., 402 F.3d 881, 884
15 (9th Cir. 2005) (*en banc*). In so holding, the Ninth Circuit followed the Second Circuit's decision
16 in *Eden Toys, Inc. v. Florelee Undergarment Co*., 697 F.2d 27 (2d Cir. 1982), *superseded by rule*
17 *and statute on other grounds*. *See also*, *ABKCO Music, Inc. v. Harrisongs Music, Ltd*., 944 F.2d
18 971, 980 (2d Cir. 1991) (citing *Eden Toys*, "the Copyright Act does not permit copyright holders to
19 choose third parties to bring suits on their behalf.") Section 106 of the Act defines and limits the
20 exclusive rights under copyright law. *Id*. at 884–85. While these exclusive rights may be
21 transferred and owned separately, the assignment of a bare right to sue is ineffectual because it is
22 not one of the exclusive rights. *Id*. Since the right to sue is not one of the exclusive rights,
23 transfer solely of the right to sue does not confer standing on the assignee. *Id*. at 890. One can
24 only obtain a right to sue on a copyright if the party also obtains one of the exclusive rights in the
25 copyright. *See id*. Further, to obtain a right to sue for past infringement, that right must be
26 expressly stated in the assignment. *See generally, id*.

C. Analysis

1. Contract Construction

Righthaven argues that the SAA's provisions, which necessarily include Section 7.2, do not alter the unambiguous language of the Assignment or limit the rights it obtained from Stephens Media in the Assignment. This conclusion is flagrantly false—to the point that the claim is disingenuous, if not outright deceitful. The entirety of the SAA was designed to prevent Righthaven from becoming "an *owner* of *any exclusive right* in the copyright. . . .," *Silvers*, 402 F.3d at 886 (emphasis in original), regardless of Righthaven and Stephens Media's *post hoc*, explanations of the SAA's intent or later assignments, (*see generally* Dkt. #101, Decl. of Mark A. Hineuber; Dkt. #102, Decl. of Steven A. Gibson). Prior to the Assignment, Stephens Media possessed all of the exclusive rights to the Work and, therefore, the right to sue. Because the SAA limited the language of the Assignment, the Assignment changed nothing save for Righthaven's claim to have the right to sue. The companies' current attempt to reinterpret the plain language of their agreement changes nothing. In reality, Righthaven actually left the transaction with nothing more than a fabrication since a copyright owner cannot assign a bare right to sue after *Silvers*. To approve of such a transaction would require the Court to disregard the clear intent of the transaction and the clear precedent set forth by the *en banc* Ninth Circuit in *Silvers*.

2. Stephens Media and Righthaven's Intent

Righthaven contends that the Court should construe the SAA to grant Righthaven whatever rights are necessary for it to have standing in a copyright infringement action. First, Righthaven argues that the Court should construe the contract in this manner because in situations where a contract is ambiguous, the Court should look to the parties' intent. *Sheehan & Sheehan v. Nelson Malley and Co.*, 117 P.3d 219, 223–24 (Nev. 2005). Accordingly, Righthaven argues that the plain intent of the SAA is to give Righthaven all rights necessary to bring a copyright infringement action. The Court, however, disagrees with Righthaven's premise because the SAA is not ambiguous. Righthaven and Stephens Media went to great lengths in the SAA to be sure

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1 that Righthaven did not obtain any rights other than the bare right to sue. Thus, the Court finds
2 that the plain language of the SAA conveys the intent to deprive Righthaven of any right, save for
3 the right to sue alleged infringers and profit from such lawsuits. As such, the SAA is not
4 ambiguous and the Court shall not read any ambiguity into it.

5 Second, Righthaven argues that Section 15.1 of the SAA gives the Court authority
6 to correct any provision of the SAA that is deemed void or unenforceable to approximate the
7 manifest intent of the parties. The problem is that this argument requires a provision of the SAA
8 to be void or unenforceable. However, Righthaven's problem is not that any provision of the SAA
9 is void or unenforceable but that the SAA simply does not grant Righthaven any of the exclusive
10 rights defined in Section 106 of the Act required for standing. Therefore, the SAA is not void or
11 unenforceable, it merely prevents Righthaven from obtaining standing to sue from the Assignment.
12 Accordingly, the Court need not and shall not amend or reinterpret the SAA to suit Righthaven's
13 current desires.

14 **3. Righthaven and Stephens Media's Amendment to the SAA**

15 Notwithstanding the actual transaction that occurred, Righthaven argues that the
16 amendment it executed with Stephens Media on May 9, 2011, the day that they filed their response
17 to the supplemental memorandum validates or fixes any possible errors in the original SAA that
18 would prevent Righthaven from having standing in this matter. (Dkt. #102, Gibson Decl. Ex. 3,
19 Clarification and Amendment to SAA.) However, this amendment cannot create standing because
20 "'[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the*
21 *complaint is filed*.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (quoting
22 *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)) (emphasis in *Lujan*).
23 Although a court may allow parties to amend defective allegations of jurisdiction, it may not allow
24 the parties to amend the facts themselves. *Newman-Green*, 490 U.S. at 830. As an example, a
25 party who misstates his domicile may amend to correctly state it. This is an amendment of the
26 allegation. However, that party is not permitted to subsequently move in order to change his

domicile and amend accordingly. This would be an amendment of the jurisdictional facts, which is not allowed. *See id*. Here, Righthaven and Stephens Media attempt to impermissibly amend the facts to manufacture standing. Therefore, the Court shall not consider the amended language of the SAA, but the actual transaction that took place as of the time the complaint was filed.[1]

Regardless of this legal principle, Righthaven argues that courts routinely allow parties to a copyright transfer to subsequently clarify or amend their agreements in order to express their original intent to grant the assignee the right to sue for infringement. Righthaven's assertion is not entirely wrong, but the cases Righthaven cites in support of its proposition are all distinguishable as they deal with matters significantly different than those presently before the Court. For instance, Righthaven cites multiple cases where courts allowed an oral assignment made prior to initiation of a lawsuit to be confirmed in writing after the initiation of the lawsuit. *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003) (allowing an oral assignment to be confirmed in a later writing).[2] These cases are all distinguishable in that the assignor and assignee in these cases had agreements to transfer the necessary, exclusive rights prior to the initiation of a lawsuit. The only thing lacking was the written document necessary for a court to recognize the transfer. In each of these cases, the courts merely gave effect to what the parties had actually done, i.e. recognized rights already actually transferred. Here, Righthaven does not ask the Court to recognize an oral transfer with a late made written memorandum of the deal, but to fundamentally rewrite the agreement between Righthaven and Stephens Media to grant Righthaven rights that it never actually received.

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[1] The Court does not determine whether or not the amended SAA would transfer sufficient rights to Righthaven for it to have standing in suits filed after amendment as the Court need not make that determination to rule on these motions. Nonetheless, the Court expresses doubt that these seemingly cosmetic adjustments change the nature and practical effect of the SAA.

[2] *See also*, *Imperial Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995) ("[A] copyright owner's later execution of a writing which confirms an earlier oral agreement validates the transfer ab initio."); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.,* 29 F.3d 1529, 1532 (11th Cir. 1994); *Sabroso Publ'g, Inc. v. Caiman Records Am., Inc.*, 141 F. Supp. 2d 224, 228 (D.P.R. 2001).

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Righthaven cites three other district court cases from other circuits which deal with matters other than oral assignments later ratified by written agreements. First is a district court case, *Intimo Inc. v. Briefly Stated, Inc.*, 948 F. Supp. 315 (S.D.N.Y. 1996), wherein the court allowed the parties to the assignment agreement to amend the agreement to include the right to sue for pre-assignment copyright violations. Notably, the plaintiff in that case would have maintained standing as not all claims were based on pre-assignment copyright violations. *Id*. at 318–19. Nonetheless, the *Intimo* court allowed amendment to correct what it found was merely an oversight on the part of the parties because the agreement was silent on pre-assignment copyright violations despite the parties intent to transfer the right to sue on those violations. Here, Righthaven and Stephens Media may have wanted Righthaven to be able to sue, but the SAA was anything but silent in making sure that Stephens Media *retained* complete control over the Work rather than actually effectuate the necessary transfer of rights. The entirety of the SAA is concerned with making sure that Righthaven did not obtain any rights other than the right to sue. This careful exclusion of rights made even that transfer ineffectual under *Silvers*.

The other two cases are also distinguishable. The second case, *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614 (N.D. Ga. 1993), is based on facts largely similar to *Intimo* and the same analysis distinguishes it from the present case. The third is an unreported district court case, *Gondinger Silver Art Co., Ltd. v. Int'l Silver Co.*, No. 95 CIV. 9199, 1995 WL 702357 (S.D.N.Y. Nov. 28, 1995), that dealt with a later assignment because there was a dispute as to whether the relevant work was a work made for hire or whether the plaintiff was a co-author of the work. The *Gondinger* court did not expressly determine the issue, finding that it was irrelevant as there was another basis for standing. *Id*. at *4–5. In sum, not one of the cases cited by Righthaven persuade, much less require, the Court to find standing based on Righthaven and Stephens Media's Amended SAA.

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1 **4. Democratic Underground's Standing to Challenge the SAA**

2 Righthaven also contends that Democratic Underground lacks standing to challenge
3 the validity of the SAA. However, Democratic Underground does not actually attack the SAA's
4 validity, Democratic Underground only contends that the SAA prevented the Assignment from
5 transferring the rights Righthaven and Stephens Media currently argue the Assignment transferred.
6 In essence, Democratic Underground simply argues that, under the SAA, the Assignment only
7 transferred one particular right, which failed to have the effect Righthaven wishes it had.
8 Democratic Underground does not contest the SAA's validity or argue that it should be undone in
9 any way. Further, the *Sylvers* court necessarily allowed the defendant to challenge whether the
10 necessary rights were transferred from the rights holder to the plaintiff in that action. Otherwise
11 the Ninth Circuit would not have been able address the plaintiff's lack of standing in *Silvers* and
12 hold that a mere right to sue is insufficient to bring a copyright infringement action.

13 **5. Prior Rulings within this District**

14 Finally, Righthaven contends that multiple courts within this district have already
15 determined that Righthaven has standing to bring claims for past infringement under the *Silver*
16 standard based on the plain language of the copyright assignment. At best, this argument is
17 disingenuous. As the undersigned issued one of the orders Righthaven cites for this argument, the
18 undersigned is well aware that Righthaven led the district judges of this district to believe that it
19 was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the
20 true nature of the transaction by disclosing the SAA or Stephens Media's pecuniary interests. As
21 the SAA makes abundantly clear, Stephens Media *retained* the exclusive rights, never actually
22 transferring them to Righthaven regardless of Righthaven's and Stephens Media's current
23 contentions. Further, Righthaven also failed to disclose Stephens Media in its certificates of
24 interested parties, despite Stephens Media's right to proceeds from these lawsuits. (Dkt. #79, Ex.
25 1, SAA Section 5 (granting Stephens Media a fifty percent interest in any recovery, minus costs).)
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Since those orders were tainted by Righthaven's failure to disclose the SAA and Stephens Media's true interest, those decisions are not persuasive and do not support standing here.

D. Righthaven Lacks Standing to Bring this Action

Because the SAA prevents Righthaven from obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement action, the Court finds that Righthaven lacks standing in this case. Accordingly, the Court dismisses Righthaven from this case. However, Righthaven requests that upon such a finding, the Court grant it leave to join Stephens Media as a plaintiff to cure the jurisdictional defect. Adding Stephens Media, however, would not cure the jurisdictional defect as to Righthaven. *Eden Toys*, 697 F.2d at 32 n.3 ("While [Federal Rule of Civil Procedure] 17(a) ordinarily permits the real party in interest to ratify a suit brought by another party, the Copyright Law is quite specific in stating that only the owner of an exclusive right under a copyright may bring suit." (internal citations and quotations omitted).) Also, as Stephens Media has already been brought into this suit as a counter-defendant to a declaratory judgment claim, the Court finds it unnecessary to join Stephens Media as a plaintiff. If Stephens Media wishes to assert claims against Democratic Underground, it may do so separately.

II. Righthaven's Motion and Democratic Underground's Motion are Both Moot

Because the Court has dismissed Righthaven for lack of standing, the Court denies both Righthaven's motion for voluntary dismissal with prejudice and Democratic Underground's motion for summary judgment on Righthaven's claim as moot. Since Righthaven has been dismissed, its complaint is also dismissed. This, of course, does not affect Democratic Underground's right to bring a motion for attorney fees under the Act. Also, the counterclaim against Stephens Media remains and so the Court now turns its attention to Stephens Media's motion.

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1 **III. Stephens Media's Motion to Dismiss or Strike**

2 **A. Legal Standard**

3 **1. Motion to Dismiss Standard**

4 "In this action, as in all actions before a federal court, the necessary and
5 constitutional predicate for any decision is a determination that the court has jurisdiction—that is
6 the power—to adjudicate the dispute." *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998).
7 The purpose of a complaint is two-fold: to give the defendant fair notice of the basis for the court's
8 jurisdiction and of the factual basis of the claim. *See* Fed. R. Civ. P. 8; *Skaff v. Meridien North*
9 *Am. Beverly Hills, LLC*., 506 F.3d 832, 843 (9th Cir. 2007). Rule 12(b)(1) of the Federal Rules of
10 Civil Procedure allows defendants to seek dismissal of a claim or action for a lack of subject
11 matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in
12 its entirety, fails to allege facts on its face that are sufficient to establish subject matter jurisdiction.
13 *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th
14 Cir. 2008). Although the defendant is the moving party in a motion to dismiss brought under Rule
15 12(b)(1), the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears
16 the burden of proving that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264
17 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178,
18 189 (1936)).

19 Attacks on jurisdiction pursuant to Rule 12(b)(1) can be either facial, confining the
20 inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the
21 complaint. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). "In
22 a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient
23 on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes
24 the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe*
25 *Air for Everyone v. Myer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A "factual" attack made pursuant
26 to Rule 12(b)(1) may be accompanied by extrinsic evidence. *Whitethorn v. F.C.C.*, 235 F. Supp.

1 2d 1092, 1095–96 (D. Nev. 2002) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.
2 1989). Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered
3 in its entirety, fails to allege facts that are sufficient to establish subject matter jurisdiction. *In re*
4 *Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir.
5 2008).

6 **2. Motion to Strike Standard**

7 Under Rule 12(f) a "court may strike from a pleading … any redundant, immaterial,
8 impertinent, or scandalous matter." Matter is "immaterial" if it has no bearing on the controversy
9 before the court. *In re 2TheMart.com, Inc Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).
10 Allegations are "impertinent" if they are not responsive to the issues that arise in the action and
11 that are admissible as evidence. *Id.* "Scandalous" matter is that which casts a cruelly derogatory
12 light on a party or other person. *Id.* A court need not wait for a motion from the parties; it may act
13 on its own to strike matter from a pleading. Fed. R. Civ. P. 12(f)(1).

14 **B. Analysis**

15 Stephens Media's motion essentially relies on two separate arguments for its
16 position that there is no justiciable case or controversy: (1) that Stephens Media assigned all of the
17 rights in and to the Work to Righthaven, thus negating the possibility of any case or controversy
18 between Stephens Media and Democratic Underground, and (2) that Democratic Underground's
19 counterclaim will necessarily be adjudicated by a decision on the original complaint and, therefore,
20 should be stricken. The Court dispelled Stephens Media's first argument in the analysis above.
21 Stephens Media expressly avoided transferring the exclusive rights to the Work to Righthaven by
22 neutering future assignments in the SAA. As to Stephens Media's second argument, setting aside
23 the fact that Stephens Media was never a party to Righthaven's complaint, that argument is now
24 moot as the Court has dismissed Righthaven's complaint. Since the complaint has been dismissed,
25 the issues raised by the counterclaim can only be adjudicated by litigating the counterclaim, not the
26 now defunct complaint.

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1 **1. Justiciable Case or Controversy**

2 Stephens Media's principle contention for why there is no justiciable case or
3 controversy between Stephens Media and Democratic Underground relied on the Assignment of
4 rights to Righthaven. Though the Court has refuted this particular argument, the Court will,
5 nonetheless, quickly address the case or controversy requirement for a declaratory judgment action
6 as it still pertains to this case.

7 The Supreme Court has held that declaratory judgment claims must arise from
8 disputes that are "'definite and concrete, touching the legal relations of parties having adverse
9 legal interests,' . . . 'real and substantial,'" and beget "specific relief through a decree of a
10 conclusive character, as distinguished from an opinion advising what the law would be upon a
11 hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.* 549 U.S. 118, 127 (2007).
12 Nonetheless, a party need not "bet the farm" and always actually engage in planned conduct that
13 would result in threatened legal action before bringing a declaratory judgment suit. *Id.* at 133–34.

14 Contrary to its assertions in its moving papers, Stephens Media has threatened
15 Democratic Underground with litigation because, according to the SAA, Stephens Media approved
16 or consented to suit against Democratic Underground. (Dkt. #79, Ex. 1, SAA Section 3.3.)
17 Additionally, Stephens Media's then CEO, Sherman Frederick, generally threatened potential
18 defendants that he would send his "little friend called Righthaven" after them. (Dkt. #13, Answer
19 and Countercl. ¶ 33.) Here, Stephens Media actually did send Righthaven after Democratic
20 Underground. Further, Democratic Underground desires to re-post the allegedly infringing
21 material to maintain a full archive of prior posts on its website. This could result in new copyright
22 infringement litigation against Democratic Underground if the Court does not declare that the post
23 did not infringe the copyright in the first instance. This threat of suit is sufficiently real and
24 substantial that an actual case and controversy exists between these parties and warrants a
25 declaratory judgment suit. Accordingly, and because the Court dismissed Righthaven and its
26 complaint, the Court denies Stephens Media's motion.

1 **IV. Order to Show Cause**

2 As shown in the preceding pages, the Court believes that Righthaven has made
3 multiple inaccurate and likely dishonest statements to the Court. Here, however, the Court will
4 only focus on the most factually brazen: Righthaven's failure to disclose Stephens Media as an
5 interested party in Righthaven's Certificate of Interested Parties. (Dkt. #5.) Rule 7.1-1 of the
6 Local Rules of Practice for the District of Nevada requires parties to disclose "all persons,
7 associations of persons, firms, partnerships or corporations (including parent corporations) which
8 have a direct, pecuniary interest in the outcome of the case." This Local Rule requires greater
9 disclosure than Federal Rule 7.1, which only requires non-governmental corporate parties to
10 disclose parent corporations or corporations owning more than 10% of the party's stock. Frankly,
11 if receiving 50% of litigation proceeds minus costs (Dkt. #79, SAA Section 5) does not create a
12 pecuniary interest under Local Rule 7.1-1, the Court isn't sure what would.

13 Making this failure more egregious, not only did Righthaven fail to identify
14 Stephens Media as an interested party in this suit, the Court believes that Righthaven failed to
15 disclose Stephens Media as an interested party in any of its approximately 200 cases filed in this
16 District. Accordingly, the Court orders Righthaven to show cause, in writing, no later than two (2)
17 weeks from the date of this order, why it should not be sanctioned for this flagrant
18 misrepresentation to the Court.

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CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Righthaven is dismissed from this case for lack of standing. As such, Righthaven's complaint is dismissed in its entirety.

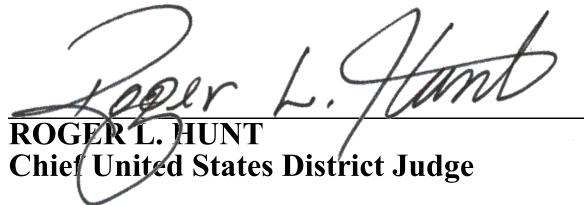
IT IS FURTHER ORDERED that Righthaven's Motion for Voluntary Dismissal with Prejudice (#36) is DENIED as moot.

IT IS FURTHER ORDERED that Stephens Media's Motion to Dismiss or Strike (#38) is DENIED.

IT IS FURTHER ORDERED that the Democratic Underground's Motion for Summary Judgment (#45) is DENIED as moot.

IT IS FURTHER ORDERED that Righthaven show cause, in writing, no later than two (2) weeks from the date of this order, why it should not be sanctioned.

Dated: June 14, 2011.



ROGER L. HUNT
Chief United States District Judge

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Citizens Against Litigation Abuse, Inc. and
the Lowcountry 9/12 Project,.. Petitioners,

v.

Righthaven LLC,..Respondent.

NOTICE OF PETITION FOR ORIGINAL JURISDICTION

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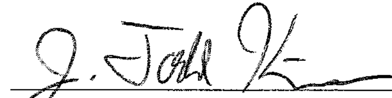
June 27, 2011

Attorneys for Petitioners

NOTICE OF PETITION FOR ORIGINAL JURISDICTION

TO RESPONDENT RIGHTHAVEN LLC:

Plaintiffs hereby notify you that they have filed the attached Petition for Original Jurisdiction and proposed Complaint with the Supreme Court of South Carolina. Pursuant to Rule 245, SCACR, you are further notified that you have twenty days from the date of service to serve and file a return to the Petition.



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June 27, 2011

Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Citizens Against Litigation Abuse, Inc. and the Lowcountry 9/12 Project,.. Petitioners,

v.

Righthaven LLC,..Respondent.

VERIFICATION OF PETITION AND COMPLAINT

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June 27, 2011

Attorneys for Petitioner

VERIFICATION OF PETITION AND COMPLAINT

The undersigned J. Todd Kincannon, first being duly sworn, deposes and says:

1. All facts appearing in the Petition for Original Jurisdiction and the proposed Complaint in this action are true and accurate to the best of my knowledge.

2. I have personal knowledge of most of the facts in the Petition for Original Jurisdiction and the proposed Complaint, and as to the rest, I am informed and believe them to be true.

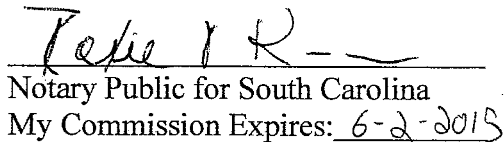
3. The subject matter of this action cannot be determined in a lower court, as matters relating to the practice of law are within the exclusive original jurisdiction of this Court.

4. This matter significantly impacts the public interest as described in the Petition for Original Jurisdiction.

Further affiant sayeth not.

J. TODD KINCANNON

Subscribed and sworn to before me
on this 27th day of June, 2011



Notary Public for South Carolina
My Commission Expires: 6-2-2015