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THOMAS A. DIBIASE

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RIGHTHAVEN LLC, a Nevada limited-
liability company,

Plaintiff,

v.

THOMAS A. DIBIASE, an individual,

Defendant.

THOMAS A. DIBIASE, an individual,

Counterclaimant,

v.

RIGHTHAVEN LLC, a Nevada limited-
liability company,

Counter-defendant.

CASE NO.: 2:10-cv-01343-RLH-PAL

**DEFENDANT-COUNTERCLAIMANT
THOMAS A. DIBIASE'S REPLY BRIEF IN
SUPPORT OF HIS MOTION TO DISMISS
FOR LACK OF SUBJECT-MATTER
JURISDICTION**

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1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Under the Strategic Alliance Agreement (“SAA”), Righthaven received sham
4 assignments for hundreds of Stephens Media LLC’s (“Stephens”) copyrights. Righthaven then
5 registered those copyrights with the Copyright Office based on the inaccurate representation that
6 it owned them. With those registrations in hand, Righthaven filed hundreds of copyright-
7 infringement lawsuits against individuals and non-profit entities. When some of those
8 defendants challenged Righthaven’s standing on the pleadings, Righthaven provided the relevant
9 assignment agreements to the Court, but repeatedly withheld the highly material SAA. That
10 strategy worked. Courts ruled that Righthaven had standing to sue based solely only on the
11 copyright registration and the assignment agreement. Had Righthaven presented the SAA, the
12 results would have been much different. The SAA makes clear that Stephens has not transferred
13 any rights under Section 106 of the Copyright Act to Righthaven, and therefore Righthaven lacks
14 standing to bring copyright infringement actions over Stephens’ articles.

15 When the SAA was uncovered in litigation, several parties—including Mr. DiBiase—
16 filed motions challenging Righthaven’s standing to sue. Righthaven and Stephens then
17 abandoned any pretense that Stephens’ assignments to Righthaven were legitimate. On May 9,
18 2011, five days after Mr. DiBiase filed this motion to dismiss, Stephens and Righthaven
19 purported to amend the SAA. That gambit does not cure the jurisdictional defects in
20 Righthaven’s case. First, jurisdiction must be present at the outset of an action, it cannot be
21 invented nine months later when fact discovery is about to close. Second, the amended SAA
22 suffers from the same flaw as the original: Stephens still controls all of the relevant rights to
23 exploit the copyright in the work at issue. Accordingly, even if the amendment were considered,
24 Righthaven’s case should still be dismissed for lack of subject-matter jurisdiction.

25 Finally, Righthaven lacks standing to sue because the arrangement between Righthaven
26 and Stephens is champertous. Righthaven does not dispute that: (1) a champertous agreement is
27 void; and (2) the elements of a champerty defense are satisfied if the SAA does not grant
28 Righthaven ownership rights under Section 106 of the Copyright Act. To avoid a finding of

1 champerty, Righthaven raises the defense that it was acting in good faith when filing this case.
2 Righthaven, however, could not have harbored a reasonable belief that it owned an interest in the
3 McMurdo Article when it filed and prosecuted this case. The SAA is clear that Stephens
4 controls the exclusive rights to exploit the article. And that reality is bolstered by the actions of
5 the parties: Stephens continues to act as the owner of this article after this suit was filed, and
6 Righthaven's only connection is as a litigant. On this record, Righthaven's claim that it
7 reasonably believed that it owned the McMurdo Article rings hollow. The Court, therefore,
8 should find lack of subject-matter jurisdiction for the independent reason that Righthaven has
9 engaged in champerty by contracting to sue over an article in which it had no interest, thereby
10 voiding the transaction that purportedly gave it ownership.

11 **II. ARGUMENT**

12 **A. Righthaven Did Not Own The McMurdo Article When It Filed This Suit.**

13 For most of this case, Righthaven withheld the alleged assignment agreement for the
14 McMurdo Article. It did not attach that agreement to its complaint, did not produce the
15 document with its original set of initial disclosures, and did not turn it over in response to
16 document requests that Mr. DiBiase served in January. Finally, Righthaven divulged the
17 assignment for the first time when responding to this motion. That agreement—as properly
18 interpreted with reference to the SAA—demonstrates that Righthaven did not own the copyright
19 in the McMurdo Article when it filed this lawsuit.

20 Righthaven and Stephens entered into the SAA on January 18, 2010. *See* Volkmer Decl.,
21 Ex. A at 1 (Docket No. 48). The agreement sets forth detailed procedures under which
22 Righthaven files lawsuits over Stephens' newspaper articles. *Id.* at §§ 3-4. The SAA requires
23 Stephens to “assign” articles to Righthaven using a standard format. *Id.* at § 7.1, Exhibit 1. The
24 SAA further states that “*despite any Copyright Assignment,*” Stephens retains an exclusive right
25 to exploit the “assigned” articles “for any lawful purpose whatsoever” and that Righthaven “shall
26 have no right” to exploit them. *Id.* at § 7.2 (emphasis added). Stephens also has the right to
27 terminate any alleged assignment “and enjoy a right of complete reversion.” *Id.* at § 8.
28 Righthaven does not dispute that these terms governed the claimed assignment at issue here.

1 On July 19, 2010—six months after the parties signed the SAA and after Righthaven
2 identified Mr. DiBiase’s blog post at issue in this case—Stephens purported to assign the
3 copyright in the McMurdo Article to Righthaven using the format mandated by the SAA.
4 *Compare* Mangano Decl., Ex. 1 (purported assignment agreement for McMurdo Article) (Docket
5 No. 58) *with* Exhibit 1 of the SAA. The alleged assignment took place “subject to” Stephens’
6 reversion rights spelled out in the SAA. Mangano Decl., Ex. 1. The stilted language of the
7 assignment is anything but an unconditional transfer: Stephens purports to assign the copyright
8 in the McMurdo Article “requisite to have Righthaven recognized as the copyright owner . . . for
9 purposes of Righthaven *being able to claim* ownership as well as the right to seek redress for
10 past, present, and future infringement.” *Id.* (emphasis added).

11 This purported assignment did not transfer any rights under Section 106 of the Copyright
12 Act to Righthaven. Both before and after the “assignment,” Stephens had the *exclusive right* to
13 exploit the McMurdo Article. If anything, Stephens tried to assign to Righthaven a heavily
14 qualified right to sue for copyright infringement, which is barred by *Silvers v. Sony Pictures*
15 *Entm’t, Inc.*, 402 F. 3d 881 (9th Cir. 2005). Righthaven’s contrary argument is difficult to
16 follow. It contends that “[n]othing in the SAA’s provisions alter the unambiguous language of
17 the Assignment or the rights that Righthaven acquired.” Opp. at 11. The SAA, however, creates
18 Stephens’ assignment obligations in the first place, dictates the format and terms of future
19 assignments, explains what happens “despite any Copyright Assignment,” and describes the
20 reversion rights that the assignments must expressly incorporate. *See* SAA §§ 3-4, § 7.1, § 7.2,
21 § 8, Exhibit 1. While Righthaven notes that the SAA “does not effectuate the assignment of any
22 work,” Opp. at 11, that does not matter because the SAA *governs* the assignments that Stephens
23 makes to Righthaven.

24 Righthaven apparently contends that the assignment in this case transferred the full
25 panoply of Section 106 rights to Righthaven for a brief instant. That is wrong. Stephens at all
26 times retained the rights to exploit the McMurdo Article *despite any assignment*. SAA § 7.2.
27 And even if the Court were to indulge the fiction that Righthaven had Section 106 rights for
28 some immeasurably small time period, the analysis would not change. By immediately

1 transferring back to Stephens the exclusive rights to exploit the McMurdo Article, Righthaven's
2 claimed ownership interest would have been divested. *See* 17 U.S.C. § 101 (“transfer of
3 copyright ownership” means “an assignment, mortgage, *exclusive license*, or any other
4 conveyance . . . of a copyright.”) (emphasis added). Accordingly, Righthaven never had the
5 necessary statutory authority to sue over the article. *See* 17 U.S.C. § 501(b).¹ Nevertheless,
6 Righthaven asserted ownership of each of the divisible Section 106 rights in the McMurdo
7 Article, and claimed ongoing irreparable harm arising from those rights. *See* Compl. at ¶¶ 25-35.

8 Righthaven also claims that Stephens' reversion rights in the McMurdo Article have “no
9 impact” on the ownership status of the article. Opp. at 11. Not so. The reversion shows that any
10 purported transfer from Stephens to Righthaven is illusory. Indeed, the assignment agreement
11 itself specifically references the reversion and the point of Righthaven's business model is to sue
12 over copyrights owned by third parties and then abandon those copyrights when the lawsuits end.
13 Righthaven's Operating Agreement (“RHOA”) could not be clearer on this point: Righthaven
14 seeks “limited, revocable assignment[s]” from copyright owners so that it can file lawsuits, but
15 the copyright owners will “ultimately enjoy the copyright registration upon revocation of the
16 assignment.” RHOA §§ 3.2(c)-(d) (Docket No. 51 at Ex. B). Righthaven's assertion that there is
17 “nothing in the record to suggest” that Stephens will exercise its reversion rights ignores its own
18 charter. *See* Opp. at 11.

19 Stephens retains other accoutrements of ownership despite the alleged assignment to
20 Righthaven. Stephens can use the “assigned” copyrights as collateral when securing funding.
21 SAA § 9.3. And it can “sell” or “assign” the allegedly “assigned” articles to third parties so long
22 as it receives Righthaven's prior agreement. *Id.* Righthaven does not try to explain how these
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24

25 ¹ If Righthaven's ownership-for-an-instant argument were correct, the *Silvers* prohibition
26 on assigning a naked cause of action for copyright infringement would be meaningless. The
27 assignor could transfer all Section 106 rights along with the right to sue for accrued causes of
28 action, and then have the assignee immediately transfer back the Section 106 rights to the
assignor. The Ninth Circuit did not create a rule that could be circumvented so easily.

1 provisions can coexist with an interpretation of the SAA under which Righthaven is vested with
2 genuine ownership rights upon the execution of an assignment agreement.

3 Given that copyright assignments from Stephens to Righthaven take place under the
4 auspices of the SAA, it is surprising that Righthaven would point to cases where courts,
5 including this one, analyzed Righthaven's standing to sue without the benefit of the SAA. *See*
6 *Righthaven LLC v. Vote For The Worst, LLC, et al.*, Case No. 2:10-cv-01045-KJD-GWF (D.
7 Nev. Mar. 30, 2011), Docket No. 28 at 3 (finding it "plausible to infer" that Righthaven had
8 standing based on the assignment alone, but without considering or being presented with the
9 SAA);² *Righthaven LLC v. Majorwager.com, Inc.*, Case No. 2:10-cv-00484-GMN-LRL, 2010
10 WL 4386499, at *2 n.2 (D. Nev. Oct. 28, 2010) (finding a "plausible inference" of jurisdiction
11 based on the assignment agreement alone, but noting that "regardless of the assignment's
12 assertions, if only a right to sue was transferred; Plaintiff may lack standing"); *Righthaven LLC*
13 *v. Dr. Shezad Malik Law Firm P.C.*, Case No. 2:10-cv-00636-RLH-RJJ, 2010 WL 3522372, at
14 *2 (D. Nev. Sept. 2, 2010) (without the benefit of the SAA, which Righthaven did not present,
15 this Court concluded that "the assignment in question (which Plaintiff has attached to its
16 opposition) clearly assigns both the exclusive copyright ownership, together with accrued causes
17 of action, i.e., infringements past, present and future.")³ Those rulings have no applicability
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21 ² Righthaven's opposition brief in *Vote For The Worst*, supported by cherry-picked
22 evidence (but not the SAA), argued that the assignment agreement's "unambiguous language is
23 not subject to alternative interpretation." Case No. 2:10-cv-01045-KJD-GWF, Docket No. 28 at
24 10. When the SAA finally came to light, however, the defendant filed a renewed motion to
dismiss for lack of subject-matter jurisdiction. *See id.* at Docket No. 33. That motion is under
submission.

25 ³ Righthaven went so far as to file a motion for sanctions in the *Malik Law Firm* case
26 because the defendant in that action filed a motion to dismiss for lack of subject-matter
27 jurisdiction. *See* Case No. 10-cv-00636 at Docket No. 13. Righthaven did not disclose that
28 existence of the SAA in its sanctions motion despite its obvious materiality, and asserted instead
that "there is no division of copyright ownership as was the case in *Silvers*; Righthaven is the
owner of both the exclusive rights in and to the Work and the owner of all accrued causes of
action." *Id.* at 12:24-26. The SAA reveals that this representation was incorrect.

1 here and their provenance raises questions about Righthaven's treatment of the standing issue in
2 prior court submissions.⁴

3 Finally, based on the alleged intent of the parties, Righthaven urges the Court to
4 "construe the contracts in such a way that they convey to Righthaven all rights that are necessary
5 to have standing to maintain this action." Opp. at 13. That would be improper. The intent of the
6 parties is for Righthaven to sue for copyright infringement with Stephens' retaining full
7 ownership rights in the "assigned articles." *Silvers* does not permit such a construction no matter
8 how fervently the parties want that result.⁵

9 * * *

10 The assignment agreement for the McMurdo Article did not transfer any rights under
11 Section 106 of the Copyright Act to Righthaven. Accordingly, Righthaven did not own the
12 article when it purported to register the work with the Copyright Office in July 2010 or when it
13 filed this lawsuit a month later.

14 **B. The SAA's Purported Amendment Does Not Cure The Jurisdictional Defects**
15 **In Righthaven's Case.**

16 Faced for the first time with standing arguments based on the SAA, Righthaven
17 scrambled to amend the agreement to paper over the jurisdictional defects in its case. The
18 purported amendment, however, does not help Righthaven. First, jurisdiction is measured at the
19

20 ⁴ Righthaven's failure to disclose the SAA in prior court submissions concerning the
21 standing question makes ironic its claim that it would be "inequitable" for Mr. DiBiase to be
22 allowed to challenge the "validity" of the alleged transfer agreement. Opp. at 9 n.2. Of course,
23 Mr. DiBiase does not challenge contract validity as a general matter. Instead, he asks the Court
24 to interpret the legal significance of the agreement. If *Silvers* is to be enforced, district courts
25 plainly have that power. The cases Righthaven cites stand for the unremarkable proposition that
26 defendants in some circumstances cannot invoke technical defects in assignment agreements as a
27 defense. Mr. DiBiase's argument does not fit into that category.

28 ⁵ Under Nevada law, "where a contract consists of several agreements, one of which is
illegal, the illegal portion can be severed if it does not destroy the symmetry of the contract."
Vincent v. Santa Cruz, 647 P. 2d 379 (Nev. 1982). However, Righthaven does not seek to have
the illegal portions of the SAA severed; it seeks to have the Court rewrite a failed attempt to get
around *Silvers*.

1 time of the filing of a complaint and must exist throughout the case; a plaintiff may not
2 manufacture jurisdiction retroactively by attempting to alter the facts after filing a lawsuit.
3 Second, the purported amendments to the SAA do not change the underlying standing analysis.
4 Righthaven does not own sufficient rights in the McMurdo Article to file a copyright-
5 infringement lawsuit against Mr. DiBiase even after the amendment.

6 Righthaven's standing to bring this lawsuit depends on the facts as they existed when it
7 filed this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); Moore's
8 Federal Practice § 101.32 (3d ed.) ("Standing is determined as of the time the suit is filed.").
9 "The plaintiff must establish by a preponderance of the evidence that he had standing when the
10 complaint was filed." *Doran v. Del Taco, Inc.*, No. SACV04046CJC(ANX), 2006 WL 2037942,
11 *7 (C.D. Cal. July 5, 2006). Righthaven did not have standing when it filed this case in August
12 2010 because it did not own any Section 106 rights in the McMurdo Article at that time. The
13 Court, therefore, should not consider Righthaven's last-second amendment when deciding the
14 standing question. *See Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1224 (D. Haw. 2001), *aff'd*,
15 342 F.3d 934 (9th Cir. 2003) (refusing, for purposes of a standing analysis, to consider facts that
16 occurred after case was filed); *Gaia Technologies v. Reconversion Tech.*, 93 F. 3d 774, 779-80
17 (Fed. Cir. 1996) (plaintiff lacked standing to file suit where it did not own the intellectual
18 property at issue before filing suit; alleged *nunc pro tunc* assignment signed after the complaint
19 was filed was ineffective to confer standing).⁶

22 ⁶ The non-binding cases cited by Righthaven do not compel a different result. Most involve
23 oral assignments that were later ratified by a written agreement. *See Billy-Bob Teeth, Inc v.*
24 *Novelty, Inc.*, 329 F.3d 586 (7th Cir. 2003); *Imperial Residential Design, Inc. v. The Palms Dev.*
25 *Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995); *Arthur Rutenberg Homes, Inc. v. Drew Homes,*
26 *Inc.*, 29 F.3d 1529, 1532 (11th Cir. 1994). Others concern written assignments that were silent
27 about whether the assignee could sue based on accrued causes of action. *See Intimo, Inc. v.*
28 *Briefly Stated, Inc.*, 948 F. Supp. 315 (S.D.N.Y. 1996); *Infodek, Inc. v. Meredith-Webb Printing*
Co., Inc., 830 F. Supp. 614 (N.D. Ga. 1993). These cases do not address the present situation
where Righthaven entered into an agreement that plainly did not give it any Section 106 rights
and then has attempted to fix that overarching defect by amendment.

1 Considering the SAA's alleged amendment at this late stage would not only conflict with
2 established law, but prejudice Mr. DiBiase. This lawsuit concerns historical facts that took place
3 as of August 9, 2010, and that is the case that Mr. DiBiase has been litigating for months. Some
4 new claim that Righthaven did not own the McMurdo Article at the outset, but did acquire
5 ownership rights nine months later,⁷ would raise a host of new defenses and increase the
6 significance of various discovery topics (*e.g.*, the drafting history of and communications
7 concerning the purported amendment to the SAA). But it is too late to change the focus of this
8 case. The deadline to file amended pleadings has passed, *see* Scheduling Order, Docket No. 36
9 at 3 (deadline to amend pleadings was March 10, 2011), and the fact-discovery period ends on
10 August 12, 2011. Scheduling Order, Docket No. 52 at 2. The more equitable approach is to
11 dismiss Righthaven's complaint and enter judgment in Mr. DiBiase's favor. *See Doran*, 2006
12 WL 2037942, at *10 (entering judgment for defendant in an ADA case where there was no
13 credible evidence the plaintiff visited the defendant's business prior to filing his complaint). If
14 Righthaven then wishes to file a new case against Mr. DiBiase based on alleged ownership of the
15 McMurdo Article stemming from the May 9, 2011 amendment to the SAA, it would be free to
16 do so (subject to Rule 11 and the doctrine of *res judicata*).⁸

17 Even if this Court were to consider the May 9, 2011 amendment to the SAA, however,
18 dismissal is still appropriate. Section 7.2 of the SAA originally made clear that Stephens retains
19 the exclusive right to exploit the "assigned" articles and that Righthaven did not have any of
20 those rights. SAA § 7.2. Recognizing that this structure is fatal to any claim that Righthaven has
21 standing to bring copyright infringement actions, the parties amended the SAA so that

22 ⁷ Righthaven has not asserted that Stephens executed a second assignment of the McMurdo
23 Article pursuant to the amended SAA. Nevertheless, it appears to argue that the SAA's new
24 language retroactively controls the July 19, 2010 assignment.

25 ⁸ Righthaven argues that it "promotes judicial economy and reduces litigation costs" to
26 consider the amended SAA. That is not the case. If this action is dismissed now, the case will
27 be revived only if Righthaven elects to re-file. If it does not, judicial economy and litigation
28 costs will be *saved* by dismissal. If Righthaven re-files, the Court and the parties will benefit
from litigating the effect of the amendment to the SAA in a case that raises the issue from the
outset, instead of one where the issue was interjected at the eleventh hour.

1 Righthaven purportedly grants to Stephens a *non-exclusive* license to exploit the articles in
2 exchange for *one dollar*. 5/9/2011 Amendment to SAA § 7.2 (emphasis added) (Hinueber Decl.,
3 Docket No. 56 at Ex. 3). But the license is non-exclusive in name only. If Righthaven wishes to
4 exploit the articles that it allegedly owns (other than by filing lawsuits and splitting the proceeds
5 with Stephens), it must give Stephens 30-days' notice. *Id.* Failure to provide that notice would
6 be a material breach of the agreement, cause Stephens irreparable injury, and give Stephens the
7 right to obtain unopposed injunctive relief. *Id.* This notice period is critical because if
8 Righthaven ever provides notice, Stephens has the right to purchase the article back for the
9 nominal sum of *ten dollars* well before Righthaven engages in any exploitation of the assigned
10 articles. 5/9/2011 Amendment to SAA § 8.

11 After the alleged amendment, Righthaven has the right to file lawsuits over certain
12 Stephens' articles and has no right to otherwise exploit them unless two improbable events
13 occur: (1) Righthaven gives notice of its intent to exploit the articles (which it has no reason to
14 do given its business purpose and the subject matter of the SAA); and (2) Stephens decides not to
15 purchase the article back for ten dollars upon receiving such notice (which would be
16 economically irrational). Such a hypothetical ownership interest in articles "assigned" under the
17 amended SAA is insufficient to vest Righthaven with standing under the Copyright Act. *See,*
18 *e.g., Nafal v. Carter*, 540 F. Supp. 2d 1128 (C.D. Cal. 2007), *aff'd*, 388 Fed. Appx. 721 (9th Cir.
19 2010). Indeed, Stephens and Righthaven did not change other aspects of the SAA that make
20 clear that Stephens is the true owner of the "assigned" copyrights. *See* SAA § 3.3 (Stephens has
21 veto power over Righthaven's lawsuits); SAA § 8 (Stephens may take back the allegedly
22 assigned articles at any time and for any reason); SAA § 9.3 (Stephens may use the allegedly
23 assigned articles as collateral and may assign them to third parties with Righthaven's approval).
24 The Court should pay no heed to the artificial labels that Stephens and Righthaven have attached,
25 and should instead consider the practical impact of their arrangement: Stephens is a newspaper
26 publisher that retains the right to use "assigned" articles as if no assignment has taken place, and
27 Righthaven's only interest in the articles is to file lawsuits.

28

1 * * *

2 The amendment to the SAA should not be considered because the Court measures
3 jurisdiction at the time Righthaven filed its complaint. Regardless, even if the Court were
4 inclined to consider the effects of the amendment, it would find that the amendment serves no
5 legitimate business purpose and was concocted to try to avoid the *Silvers* rule. Indeed, nothing
6 of substance has changed after the amendment. Stephens still owns all of the exclusive rights to
7 exploit the McMurdo Article, and Righthaven has nothing other than a claimed right to sue for
8 copyright infringement. Righthaven therefore lacks standing under the old SAA or the new one,
9 and its case should be dismissed.

10 **C. The Champertous Assignment Is Void.**

11 The purported assignment of the copyright in the McMurdo Article is void because it was
12 made pursuant to a champertous arrangement. Righthaven does not dispute that a champerty
13 finding would void the purported assignment of the McMurdo Article, or that the purpose of the
14 champerty doctrine is to avoid intermeddlers undertaking suits that others would not file.
15 Further, Righthaven does not deny that it has prosecuted this action at its own expense in
16 exchange for part of the proceeds of a favorable decision. The only question before the Court,
17 therefore, is whether Righthaven has a genuine interest in this litigation. The timeline
18 demonstrates that it has never has possessed such an interest:

19 **January 18, 2010:** Stephens and Righthaven enter into the SAA. Righthaven agrees to
20 search for certain copyrighted works apparently owned by Stephens and to file lawsuits over
21 them. Righthaven undertakes responsibility for litigation costs, and agrees to split litigation
22 proceeds with Stephens 50/50. The parties agree on the form that copyright assignments will
23 take, and that “despite any such Copyright Assignment,” Stephens “shall retain” the exclusive
24 right to exploit allegedly assigned articles. Righthaven, for its part, has no exploitation rights. In
25 addition, Stephens enjoys “a right of complete reversion” in the allegedly assigned articles.

26 **June 11, 2010:** Stephens publishes the McMurdo Article.

27 **June 14, 2010:** Mr. DiBiase posts the blog post at issue.

28

1 **July 9, 2010:** Righthaven writes a letter addressed to Stephens stating that it intends to
2 pursue an infringement action against Mr. DiBiase unless Stephens objects within five days
3 pursuant to Section 3.3 of the SAA. *See* Volkmer Reply Decl., Ex. A.⁹

4 **July 19, 2010:** Stephens signs the alleged assignment agreement for the copyright in the
5 McMurdo Article, subject to the provisions in the SAA.

6 **July 27, 2010:** Righthaven obtains a copyright registration for the McMurdo Article
7 based on an alleged transfer “by written agreement” from Stephens.

8 **August 9, 2010:** Righthaven files this suit against Mr. DiBiase.

9 **May 9, 2011:** Righthaven and Stephens sign a purported amendment to the SAA.

10 Righthaven’s champertous plan was hatched by January 18, 2010. It was implemented
11 with respect to the McMurdo Article by Righthaven’s July 9, 2010 letter offering a champertous
12 arrangement. Not even Righthaven contends it had a legitimate interest in this action at that
13 time. And when Righthaven filed this case on August 9, 2010, it still did not have any lawful
14 interest in a copyright claim that Stephens might have against Mr. DiBiase based on the
15 McMurdo Article. *See* SAA § 7.2. Instead, Righthaven was an interloper seeking to prosecute
16 the case of another in exchange for a cut of the proceeds. For the reasons stated above, the May
17 9, 2011 amendment to the SAA does not change the standing analysis. But even if Stephens had
18 granted Righthaven an unconditional assignment on that date, such an assignment would not
19 undo the champerty that Righthaven already committed. For the doctrine to serve its deterrent
20 purpose, liability must be measured at the time the champertous agreement is entered into.
21 Otherwise, a party could engage in champerty with impunity by obtaining an assignment from
22
23

24 ⁹ Righthaven produced this letter as part of a “Third Supplemental Initial Disclosure” on
25 May 17, 2011. While Righthaven has not authenticated it, the letter fits within the structure
26 dictated by the SAA. Righthaven has not produced this, or any other document, in response to
27 Mr. DiBiase’s discovery requests (such as Request for Production 74, seeking communications
28 with Stephens Media). *See* DiBiase’s Motion to Compel (Docket 53) at 31. We note that the
second page of the letter has a different date than the first page (May 17, 2011). Righthaven has
offered no explanation for this discrepancy.

1 the true owner of the claim in the event that a champerty defense is raised. That would invite
2 mischief and substantially weaken the doctrine.

3 To try to stave off a champerty finding, Righthaven claims that it harbored a “reasonable
4 belief” that it was an interested party in this litigation. Opp. at 18. Even if there were evidence
5 in the record suggesting that Righthaven subjectively believed that it had a legitimate interest in
6 this action, such a belief could not be objectively reasonable. The original SAA and the
7 amended version are clear and unequivocal: Stephens, not Righthaven, maintains exclusive
8 rights to exploit the McMurdo Article. It would be manifestly unreasonable for Righthaven to
9 enter into these agreements and simultaneously conclude that it owns a real interest in the
10 McMurdo Article.

11 Indeed, the parties’ own behavior illustrates that Righthaven is not the true owner:
12 Stephens continues to use the McMurdo Article as if no assignment had ever taken place, *see*
13 [http://www.lvrj.com/news/retired-teacher-gets-death-penalty-for-wife-s-murder-](http://www.lvrj.com/news/retired-teacher-gets-death-penalty-for-wife-s-murder-96191524.html?mobile=y)
14 [96191524.html?mobile=y](http://www.lvrj.com/news/retired-teacher-gets-death-penalty-for-wife-s-murder-96191524.html?mobile=y) (McMurdo Article still available on the *Las Vegas Review-Journal*
15 website with the notation “Jun. 11, 2010 Copyright © Las Vegas Review-Journal”), while
16 Righthaven’s only use of the article has been to file this lawsuit. Moreover, Righthaven’s
17 Operating Agreement states that it only intended to obtain “a limited, revocable assignment . . .
18 in order to enable [it] to recover damages” with the understanding that Stephens “would
19 ultimately enjoy the copyright registration upon revocation of the assignment.” RHOA §§
20 3.2(c)-(d) (Docket No. 51 at Ex. B). These undisputed facts doom any claim that Righthaven
21 harbored a reasonable belief that it held a legitimate interest in this suit.

22 Instead of joining the merits, Righthaven takes issue with the procedure, claiming that the
23 requirements of Rule 56 should control. DiBiase’s motion, however, establishes the lack of any
24 genuine issues of material fact concerning Righthaven’s champertous behavior. Righthaven had
25 an opportunity to present evidence in opposition, and in fact, submitted declarations from
26 Righthaven and Stephens executives. Those are not sufficient, however, to create a genuine
27 issue of material fact concerning Righthaven’s champerty. *See* Fed. R. Civ. P. 56(c)(1)(A) (“A
28 party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to

1 particular parts of materials in the record.”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247
 2 (1986) (“The mere existence of some alleged factual dispute” not enough to forestall summary
 3 judgment).¹⁰ And if there is any other evidence that might bear on the champerty question, it is
 4 evidence exclusively within Righthaven’s possession that Righthaven decided not to present (and
 5 has refused to turn over in discovery). *See Precision Airmotive Corp. v. Rivera*, 288 F. Supp. 2d
 6 1151, 1154 (W.D. Wash. 2003) (“A continuance is not justified when all the information and
 7 knowledge is already in the [non-movant’s] possession.”).¹¹ On this record, Righthaven has been
 8 extended the protections that Rule 56 accords and cannot be heard to complain that a different
 9 process would change the result. *Cf.* Fed. R. Civ. P. 12(d) (the district court may convert a Rule
 10 12(b) or Rule 12(c) motion into a motion for summary judgment if matters outside of the
 11 pleadings are presented).

12 III. CONCLUSION

13 For the foregoing reasons, Mr. DiBiase respectfully requests that the Court dismiss
 14 Righthaven’s Complaint with prejudice for lack of subject-matter jurisdiction.

15 Dated: June 3, 2011

Respectfully submitted,

16 WILSON SONSINI GOODRICH & ROSATI
 17 Professional Corporation

18 By: /s/ Bart E. Volkmer
 19 Colleen Bal (*pro hac vice*)
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22 _____
 23 ¹⁰ The two declarations show that both Stephens and Righthaven intended to find a way
 24 around the *Silvers* rule under which Stephens could retain unfettered ownership rights in the
 25 articles, yet Righthaven could file lawsuits over them. *See* Hinueber Decl. at ¶ 9 (the parties’
 26 intent was “to acknowledge Stephens Media’s ability to continue to use the assigned content as
 licensee in the same general manner it had done prior to entering in the SAA, such as the
 archiving of prior published literary works on the LVRJ Website”).

27 ¹¹ Righthaven has refused to provide discovery concerning champerty. Accordingly, DiBiase
 28 has moved to compel the production of documents related to this topic. *See* Docket No. 53.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3th day of June, 2011 I caused a copy of Defendant-Counterclaimant Thomas A. DiBiase’s Reply Brief in Support of His Motion to Dismiss for Lack of Subject –Matter Jurisdiction to be served using the Court’s CM/ECF system.

/s/ Deborah Grubbs