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

11 RIGHTHAVEN LLC, a Nevada limited-
 liability company,

13 Plaintiff,

14 v.

15 VOTE FOR THE WORST, LLC, a Utah
 16 limited-liability company; NATHAN E.
 PALMER, an individual; and DAVID J.
 17 DELLA TERZA, an individual,

18 Defendants.

Case No.: 2:10-cv-01045-KJD-RJJ

**PLAINTIFF’S OPPOSITION TO
 DEFENDANTS’ MOTION TO DISMISS**

21 Righthaven LLC (“Righthaven”) hereby opposes Defendant Vote for the Worst, LLC,
 22 Defendant Nathan E. Palmer, and Defendant David J. Della Terza’s (collectively with Vote for
 23 the Worst, LLC and Nathan E. Palmer known herein as the “Defendants”) Motion to Dismiss.
 24 Righthaven bases this Opposition on the accompanying declaration of Joseph C. Chu (“Chu
 25 Decl.”), the pleadings and papers on file in this action, on any oral argument this Court may
 26 allow, and on any other matter of which this Court takes notice.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 **A. Standing**

5 The Defendants' standing argument is illegitimate for the following five independent
6 reasons:

- 7 (1) The Defendants' standing argument is not ripe for consideration. The Defendants
8 rely upon a hypothetical, erroneous assumption as a basis for their standing argument.
9 Said argument is both inappropriate and a waste of the Court's time. The Defendants
10 have not seen the copyright assignment entered into by Righthaven and assignor
11 Stephens Media LLC (the "Righthaven Assignment"), a true and correct copy of
12 which is attached hereto at Exhibit 1. (Ex. 1.)
- 13 (2) Righthaven has far exceeded the pleading requirements associated with both standing
14 and the copyright claim.
- 15 (3) Righthaven is entitled to a presumption of copyright ownership. The United States
16 Copyright Office (the "USCO") has already examined Righthaven's claim of
17 copyright ownership and has granted Righthaven registrant status. The Defendants'
18 standing argument is merely an attempt to diminish the USCO's evaluation of
19 ownership and the presumption arising therefrom.
- 20 (4) Assuming, *arguendo*, that this Court believes that Righthaven's presumption of
21 ownership does not effectively end the standing analysis, the Righthaven Assignment,
22 presented herewith, unequivocally substantiates Righthaven's standing to sue.
- 23 (5) To the extent that this Court finds the Righthaven Assignment to be in any way
24 unclear as to the transfer of accrued causes of action, this gives rise to a genuine issue
25 of material fact.

26 Therefore, Righthaven contends that if Righthaven is correct on any of the above five
27 arguments, then the Defendants' standing argument must fail.

1 **B. Personal Jurisdiction**

2 The Ninth Circuit has made it abundantly clear: willful copyright infringers who
3 reproduce content from a source known to exist in the forum purposefully avail themselves of
4 said forum’s personal jurisdiction. *Columbia Pictures Television v. Krypton Broadcasting of*
5 *Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997) *rev’d* on other grounds *Feltner v. Columbia*
6 *Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). In the instant matter, the Defendants
7 committed intentional copyright infringement of a literary work which: (1) knowingly emanated
8 from a Nevada-based daily publication, (2) was of specific concern to Nevada residents, and (3)
9 was owned by a Righthaven, a Nevada-based company. Consequently, the Defendants’
10 infringing conduct was expressly aimed at Nevada and Nevada residents, and the Defendants
11 knew that any harm caused by such conduct would likely be suffered in Nevada. Furthermore,
12 the Defendants’ willful blindness to the extensive infringing activity occurring on the
13 Defendants’ website does not somehow shield the Defendants from liability; the facts and
14 circumstances of this case are such that the Defendants knew, or reasonably should have known,
15 that such unlawful activity was taking place. Ultimately, the Defendants’ misguided efforts to
16 escape jurisdiction amount to nothing more than a red-herring discussion: the Defendants’
17 unauthorized reproduction and public display of a Righthaven-owned copyrighted work
18 emanating from Nevada is the fact most pertinent to the jurisdictional analysis. Summarily, as
19 pled in the Complaint and further demonstrated herein, the Defendants’ Nevada-related
20 infringing activities definitively justify the Court’s exercise of personal jurisdiction.

21
22 **II. FACTS**

23 Righthaven is the owner of the copyright in the literary work entitled: “‘Idol’ finalists
24 keep busy in Las Vegas” (the “Work”). (Compl. Ex. 2.) The Work was originally published on
25 April 11, 2010 in the *Las Vegas Review-Journal* (the “LVRJ”). (Compl. ¶ 26.) Accordingly, the
26 Work plainly identifies the LVRJ as the original source publication. (Compl. ¶ 10.) The Work’s
27 content is divided into four, entirely unrelated sections. (Compl. Ex. 2.) As indicated by the
28 Work’s title, the Work’s first – and longest – section concerns a recent trip to Las Vegas taken

1 by the finalists of the popular television show, *American Idol*. (Compl. ¶ 15.) (Compl. Ex. 2.)
2 The Work’s remaining three sections are separated by individual subheadings and concern,
3 respectively: Hugh Hefner’s birthday dinner menu, Las Vegas celebrity sightings, and a quote
4 from actor/comedian Jimmy Fallon. (Compl. Ex. 2.)

5 Righthaven acquired ownership of the Work on or about May 25, 2010, whereupon
6 Righthaven entered into the Righthaven Assignment with Stephens Media LLC. (Ex. 1.) In
7 addition to assigning Righthaven exclusive ownership of the copyright in and to the Work, the
8 Righthaven Assignment also transferred to Righthaven the right to seek redress for all accrued
9 causes of actions, including, without limitation, infringements of the Work occurring prior to the
10 effective date of the Righthaven Assignment. (Ex. 1.) On June 21, 2010, the USCO granted
11 Righthaven the copyright registration to the Work, registration number TX0007159695. (Compl.
12 ¶ 27.) (Compl. Ex. 4.)

13 The Defendants are the owners and operators of the Internet domain found at
14 <votefortheworst.com> (the “Website”). (See Compl. ¶¶ 5-7.) On or about April 12, 2010, an
15 unauthorized reproduction of the Work (the “Infringement”) was publicly displayed on the
16 Website. (Compl. ¶¶ 11-12, 28.) (Compl. Ex. 3.) The Infringement was comprised of a verbatim
17 copy of the Work’s entire first section. (See Compl. Ex. 2-3.) The Defendants did not seek
18 permission, nor were the Defendants granted permission, in any manner, to reproduce, display,
19 or otherwise exploit the Work. (Compl. ¶¶ 29-30.) The Infringement, like the Work, plainly
20 depicts the LVRJ as the original source publication. (Compl. ¶ 13.) (Compl. Ex. 3.)

21 The Defendants filed the Motion to Dismiss in this matter on August 16, 2010 (Docket
22 No. 14). Said motion sets forth a standing argument substantively identical to the standing
23 arguments previously asserted by the Defendants’ counsel, *Lewis and Roca LLP* (“Lewis and
24 Roca”), in recent copyright actions initiated by Righthaven. (Ex. 2.) (Ex. 3.) In said actions,
25 Lewis and Roca subsequently withdrew, or otherwise conceded this same standing argument
26 following the presentment of Righthaven’s opposition and corresponding copyright assignment.
27 (Ex. 4.) (Ex. 5.) Nevertheless, Lewis and Roca apparently insists on continuing to put this same
28 argument before the Court.

1 **III. ARGUMENT**

2 **A. Righthaven's Standing to Sue is Clear and Unequivocal**

3 **1. The Defendants have Ignored Righthaven's Presumption of Ownership**

4 Not only did Righthaven meet the applicable pleading requirement, but standing in this
5 matter has been dispositively resolved by Righthaven's presumption of copyright ownership. As
6 Righthaven is the copyright registrant, (*see* Compl. Ex. 4.) the Copyright Act clearly mandates
7 that Righthaven is afforded an evidentiary presumption as the exclusive owner of the copyright.
8 17 U.S.C. § 410(c). Specifically, section 410(c) provides, in pertinent part, that "[i]n any judicial
9 proceedings the certificate of a registration made before or within five years after first
10 publication of the work shall constitute prima facie evidence of the validity of the copyright and
11 of the facts stated in the certificate." *See also Harper House, Inc. v. Thomas Nelson, Inc.*, 889
12 F.2d 197, 201 (9th Cir. 1989); *Marquis Models, Inc. v. Green Valley Ranch Gaming, LLC*, No.
13 05-01400, 2007 WL 2904172, at *3 (D. Nev. Sept. 30, 2007). Therefore, to challenge
14 Righthaven's status as the rightful litigant in this lawsuit, it is the Defendants' burden to proffer
15 evidence that rebuts Righthaven's presumption of ownership. *See, e.g., May v. Morganelli-*
16 *Heumann & Associates*, 618 F.2d 1363, 1369 (9th Cir. 1980) (presumption of copyright
17 ownership is rebuttable through extrinsic evidence). The Defendants have not provided any
18 persuasive rebuttal evidence. Instead, the Defendants attempt to undermine Righthaven's
19 standing by merely hypothesizing – without any substantiation – as to why Righthaven's
20 copyright registration might somehow be invalid for the purposes of standing. The Defendants
21 futilely note that "it appears that Righthaven was not, in fact, the copyright owner at the time of
22 the alleged infringement." (Mot. to Dismiss 6:9-10) This inconclusive statement is irrelevant to
23 the instant analysis and does nothing to contest Righthaven's presumption of copyright
24 ownership.¹ Absent any showing of evidence to rebut said presumption, the Court need not

25 _____
26 ¹ Further irrelevant is the Defendants' discussion of the Work's authorship. (Mot. to Dismiss 6:14-25) While 17
27 U.S.C. § 201(a) vests copyright ownership in the initial author of a work, and § 201(b) vests ownership of a work
28 made for hire in the person for whom the work was prepared, § 201(d)(1) expressly states that "ownership of a
copyright may be transferred in whole or in part by any means of conveyance." Thus, once proof of registration is
granted by the USCO and said registration is sufficiently alleged in the pleadings, whether the plaintiff is the
original author of the registered work is not a relevant inquiry to the standing analysis. This is particularly true
under the present circumstances, wherein the Work's ownership rights have clearly been transferred since the time

1 entertain the Defendants' unsupported efforts to diminish the USCO's evaluation of
2 Righthaven's copyright claim and the presumption of ownership arising therefrom.

3
4 **2. The Standing Challenge is Not Ripe for Consideration**

5 The Defendants' standing argument (*see* Mot. to Dismiss 5-7) is not ripe for
6 consideration because the Defendants have not yet seen the Righthaven Assignment. Rather than
7 review the Righthaven Assignment prior to presenting the standing argument, the Defendants are
8 instead relying upon the erroneous, hypothetical assumption that Righthaven may not be the
9 assignee of both copyright ownership in the Work and all past, present, and future causes of
10 action arising therefrom. Accordingly, the Defendants' argument is not fit for judicial decision
11 and is effectively wasting the Court's time and resources.

12 The Defendants' failure to review the Righthaven Assignment precludes the Defendants
13 from asserting a ripe, well-founded standing challenge. A determination of ripeness gives rise to
14 a two-prong test: "(1) the fitness of the issues for judicial decision; and (2) the hardship to the
15 parties of withholding court consideration." *Manufactured Home Communities, Inc. v. City of*
16 *San Jose*, 420 F.3d 1022, 1033 (9th Cir. 2005) (internal quotation marks omitted). The
17 Defendants' failure to review the Righthaven Assignment is dispositive to this analysis. The
18 entirety of the Defendants' position on standing is based upon the incorrect assumption that the
19 Righthaven Assignment *may* not have transferred to Righthaven ownership of both the copyright
20 and all accrued causes of action. In other words, the Defendants are presenting the Court with an
21 argument founded exclusively upon sheer speculation as to the nature and dimension of
22 Righthaven's copyright ownership.

23 Rather than waste the Court's time by filing a grossly premature motion, the Defendants
24 should have requested the Righthaven Assignment in the normal course of discovery. Upon
25 receipt of the Righthaven Assignment, the Defendants could have prudently assessed the
26 adequacy of the assignment terms, thereby achieving a full understanding of the sufficiency of

27 of original authorship. Ultimately, the Defendants' irrelevant observations regarding the Work's authorship appear
28 to be nothing more than a trivial attempt to undermine the USCO's evaluation of Righthaven's copyright claim and
the statutory presumption arising therefrom. *See* 17 U.S.C. § 410(c).

1 the copyright transfer. At that point, if the Defendants were still inclined to challenge
2 Righthaven's standing, such an argument may then have been ripe for consideration. In *Baldain*
3 *v. American Home Mortgage Servicing, Inc.*, No. 09-0931, 2010 WL 56143, at *5 (E.D. Cal. Jan.
4 5, 2010), the court assessed a Rule 12(b)(6) motion wherein the plaintiffs did not specifically
5 plead the date of the alleged violation. In its analysis, the court noted the overall sufficiency of
6 the plaintiffs' allegations and further noted that the date of violation "is exactly the sort of
7 information which should be obtained through the discovery process." *Baldain*, 2010 WL 56143,
8 at *5 (internal quotation marks omitted). Similar logic should be applied here. While the
9 Defendants argue that the Complaint "does not give a date when the alleged transfer occurred,"
10 (Mot. to Dismiss 6:26-27) and "does not allege that Righthaven was the owner of the copyrights
11 at the time of the alleged infringement," (Mot. to Dismiss 6:7-8) the timing and extent of the
12 rights transfer effectuated by the Righthaven Assignment is precisely the type of information that
13 should be obtained through discovery. As established in the following argument, Righthaven
14 clearly pled the elements required for a cognizable copyright infringement claim. Righthaven
15 was not required to present or allege, at the pleading stage, the details and specific nature of the
16 Righthaven Assignment.

17 18 **3. Righthaven has Far Exceeded the Pleading Requirements**

19 Righthaven has easily met the pleading requirements associated with both standing and
20 the copyright claim. As demonstrated in the Complaint, Righthaven's allegations as pled clearly
21 state a viable claim for relief, in direct accordance with the applicable pleading requirements.
22 Consequently, the Defendants' unsupported contention that the Complaint fails to state a cause
23 of action and fails to establish standing because the Complaint does not allege the timeframe of
24 copyright ownership (*see* Mot. to Dismiss 6-7) simply should not be entertained by the Court.

25 Copyright actions are not held to a heightened pleading requirement. The Federal Rules
26 provide that heightened pleading standards are only applied to cases governed by Rule 9(b).
27 *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1055 (9th Cir. 2005) (*citing*
28 *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-

1 69 (1993)). The Defendants have not presented any authority to suggest that the instant claim is,
2 or should be, subject to any such standard. This lack of support is not surprising: non-fraud
3 allegations, such as the instant copyright claim, are *not* subject to Rule 9 requirements because
4 this “would impose a burden on plaintiffs not contemplated by the notice pleadings requirements
5 of Rule 8(a).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). As a result,
6 the heightened pleading standard imposed by Rule 9 is entirely inapplicable at present.

7 The instant copyright claim is instead governed by basic notice pleading requirements
8 under Rule 8. Fed. R. Civ. P. 8(a). Righthaven’s Complaint has clearly met this notice pleading
9 burden. It is well-established that to prove copyright infringement, the plaintiff must
10 demonstrate: “(1) ownership of the allegedly infringed work and (2) copying of the protected
11 elements of the work by the defendant.” *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th
12 Cir. 1991) (*citing Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989)). Thus, a plaintiff in a
13 properly pled copyright claim must satisfy these elements through the factual allegations in the
14 pleadings. In the instant matter, the elements of Righthaven’s copyright claim are expressly pled
15 in the Complaint, wherein Righthaven alleges copyright ownership of the Work and also alleges
16 the Defendants’ Infringement. (Compl. ¶¶ 9, 12.) Furthermore, Righthaven presents evidence in
17 support of these allegations by exhibiting both the copyright registration granted by the USCO
18 and the Defendants’ Infringement. (Compl. Ex. 3-4.) A copyright plaintiff “satisfies Rule 8 if
19 the ‘complaint and the incorporated documents are sufficient to allege’ that the Defendants
20 copied the work in question.” *Home Design Services, Inc. v. B & B Custom Homes, LLC*, No. 06-
21 00249, 2006 WL 3328140, at *4 (D. Colo. Nov. 15, 2006) (*quoting Jacobsen v. Deseret Book*
22 *Co.*, 287 F.3d 936, 942 (10th Cir. 2002)). Summarily, as copyright claims are subject only to
23 bare notice pleading requirements, Righthaven’s Complaint unequivocally satisfies the pleading
24 burden associated with both standing and the copyright claim.

25 The Defendants’ unfounded efforts to impose a pleading standard beyond that
26 enumerated under Rule 8(a) are entirely unsupported by law and should not be considered by the
27 Court. Pursuant to the notice pleading standard, ***Righthaven was not required to plead or***
28 ***exhibit the Righthaven Assignment, nor was Righthaven required to specifically plead the***

1 **timeframe of copyright ownership.** Nevertheless, the Defendants attempt to arbitrarily impose a
2 heightened pleading threshold, repeatedly asserting that Righthaven somehow lacks standing to
3 sue because the Complaint does not allege that the Righthaven Assignment was effectuated
4 “prior to April 12, 2010, the date of the alleged infringement.” (Mot. to Dismiss 7:1-2) This
5 legally futile argument represents nothing more than a bald-faced, self-serving proposition for
6 which the Defendants fail to cite any legal authority. In fact, given the pedestrian nature of the
7 Defendants’ argument, the only authority Righthaven can identify that specifies additional
8 elements required of a copyright plaintiff to achieve Rule 8(a) compliance derives from the
9 Eastern District of New York. In *Home & Nature Inc. v. Sherman Specialty Company, Inc.*, 322
10 F. Supp. 2d 260, 265 (E.D.N.Y. 2004), the court held that a complaint alleging copyright
11 infringement sufficiently complies with Rule 8(a) so long as the plaintiff asserts: “(1) which
12 specific original works form the subject of the copyright claim; (2) that the plaintiff owns the
13 copyrights in those works; (3) that the copyrights have been registered in accordance with the
14 statute; and (4) by what acts [and] during what time the defendant infringed the copyright.” In
15 the instant action, Righthaven irrefutably satisfies each of these elements. Righthaven’s
16 Complaint: (1) identifies and exhibits the Work, (2) alleges Righthaven’s ownership of the
17 Work, (3) alleges and exhibits the copyright registration, and (4) identifies and exhibits the
18 Infringement. (Compl. ¶¶ 9, 12, 27.) (Compl. Ex. 2-4.) Importantly, the nuanced notice pleading
19 elements outlined in *Home & Nature* do ***not require the plaintiff to allege copyright ownership***
20 ***at the time of the infringement.*** There is no legal basis upon which such a requirement should
21 be imposed here. Righthaven’s allegations clearly state a cognizable claim for relief and are
22 more than sufficient to satisfy the notice pleading requirements imposed under Rule 8.
23 Ultimately, the adequacy of Righthaven’s well-pled Complaint cannot be diminished simply
24 because Righthaven did not plead the additional, unnecessary facts unfoundedly raised by the
25 Defendants in the Motion to Dismiss.
26
27
28

1 4. *The Righthaven Assignment Unequivocally Substantiates Righthaven's*
2 *Standing to Sue*

3 a. *The Righthaven Assignment Expressly Assigns Exclusive Copyright*
4 *Ownership and Accrued Causes of Action*

5 The Righthaven Assignment assigns to Righthaven all exclusive ownership rights in and
6 to the Work, and is expressly inclusive of all accrued causes of action. Specifically, the
7 Righthaven Assignment provides:

8 . . . Assignor hereby transfers, vests and assigns [the Work] . . . to Righthaven . . .
9 all copyrights requisite to have Righthaven recognized as the copyright owner of
10 the Work for purposes of Righthaven being able to claim ownership as well as the
11 right to seek redress for ***past, present and future infringements of the copyright,***
12 ***both accrued and unaccrued,*** in and to the Work.

13 (Ex. 1.) (emphasis added).

14 Such unambiguous language is not subject to alternative interpretation.² The Righthaven
15 Assignment effects an assignment of the right to sue for all past, present, and future,
16 infringements of the Work, whether accrued or unaccrued. By no means do the terms of the
17 Righthaven Assignment impose any form of limitation upon Righthaven with respect to
18 Righthaven's standing to sue for past infringements of the Work. In fact, a cursory review of the
19 Righthaven Assignment demonstrates that the language contained therein was apparently
20 incorporated for the purpose of transferring exclusive ownership rights in their entirety,
21 including all accrued causes of action. Assignments of this nature are expressly permitted under
22 17 U.S.C. § 201(d)(1), which provides that copyright ownership "may be transferred in whole or
23 in part," and such assignments are recognized as valid by the courts. *See, e.g., ABKCO Music,*
24 *Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991). At present, the Righthaven
25 Assignment vests in Righthaven the unequivocal right to pursue legal recourse for all
26 infringements of the Work, including those accrued prior to the effective date of the Righthaven
27 Assignment.

28

² To the extent that the Righthaven Assignment is somehow deemed by the Court to be subject to alternative interpretation, this gives rise to a general issue of material fact, as discussed on pages 16-18, *infra*.

1 **b. Righthaven has Standing to Seek Redress for Past Infringements Because**
2 **the Righthaven Assignment Expressly Includes Accrued Causes of Action**

3 An assignment expressly inclusive of accrued causes of action enables the assignee to
4 bring suit for all infringements of the assigned work, irrespective of the date of infringement.
5 *ABKCO*, 944 F.2d at 980-81. Amazingly, the Motion to Dismiss relies on the Second Circuit’s
6 holding in *ABKCO* to actually strengthen the Defendants’ standing argument. (Mot. to Dismiss
7 5:18-20) Specifically, the Defendants cite the *ABKCO* court’s recitation of § 501(b) of the
8 Copyright Act: “the legal or beneficial owner of an exclusive right under a copyright is entitled
9 to bring actions for infringements of that right occurring during the period of its ownership.”
10 *ABKCO*, 944 F.2d at 980. However, the Defendants conspicuously fail to inform this Court of
11 the ***very next sentence*** of the *ABKCO* decision, wherein the Second Circuit applies § 501(b) to a
12 set of facts involving an assignment of both copyright ownership and accrued causes of action:
13 “[t]hus, a copyright owner can assign its copyright but, if the accrued causes of action are not
14 expressly included in the assignment, the assignee will not be able to prosecute them.” *ABKCO*,
15 944 F.2d at 980; *see also* DAVID NIMMER, NIMMER ON COPYRIGHT § 12.02[B] (2000) (a
16 copyright assignment is generally construed not to assign existing causes of action ***unless such***
17 ***claims are expressly included in the grant***) (emphasis added). In other words, an assignee of a
18 copyright has standing to sue for any past infringements of the assigned work so long as all
19 accrued causes of action are expressly incorporated into the copyright assignment. This is
20 exactly the case at present. The Righthaven Assignment, in addition to assigning to Righthaven
21 the exclusive ownership rights in and to the Work, specifically includes the assignment of all
22 “accrued and unaccrued” causes of action. (Ex. 1.) Thus, it is entirely irrelevant whether the
23 Defendants’ Infringement occurred before, during, or after the effective date of the Righthaven
24 Assignment.

25 The Defendants’ reliance upon the Ninth Circuit’s decision in *Silvers* is similarly
26 erroneous. (Mot. to Dismiss 5:20-25) Disturbingly, the Defendants are apparently attempting to
27 mislead the Court by proffering a wholly inaccurate interpretation of the *Silvers* analysis.
28 Purportedly paraphrasing *Silvers*, the Motion to Dismiss shortsightedly states that “a plaintiff

1 who fails to show ownership of a valid copyright at the time of infringement lacks standing to
2 sue for any infringement that occurred prior to its ownership of those rights.” (Mot. to Dismiss
3 5:20-22) To support this interpretation, the Defendants cite the Ninth Circuit’s recitation of §
4 501(b). *Silvers*, 402 F.3d at 885. However, in doing so, the Defendants deceptively ignore the
5 *Silvers* court’s clear holding: an assignee may have standing to sue for past infringements so long
6 as the assignment of rights at issue transfers both copyright ownership and all accrued causes of
7 action. *Silvers*, 402 F.3d at 890 (*citing ABKCO*, 944 F.2d at 980-81). In this regard, it is
8 shocking that the Defendants fail to realize that the Defendants’ reliance upon *ABKCO* is
9 rendered entirely inappropriate by the Ninth Circuit’s decision in *Silvers*. In *Silvers*, the court
10 was faced “with a situation in which the owner of all the exclusive rights and the owner of the
11 accrued causes of action [were] *two different people*.” *Silvers*, 402 F.3d at 889 (emphasis added).
12 As a result, the Ninth Circuit held that the plaintiff’s “bare assignment of an accrued cause of
13 action” was insufficient to establish standing. *Id.* at 890. The facts in *Silvers* are blatantly
14 distinguishable from those at present, and it is revealing that the Defendants fail to acknowledge
15 this obvious distinction in the Motion to Dismiss. To reiterate, the Righthaven Assignment
16 transferred, vested, and assigned to Righthaven: (1) “all copyrights requisite to have Righthaven
17 recognized as the copyright owner of the Work for purposes of Righthaven being able to claim
18 ownership” *and* (2) “the right to seek redress for past, present and future infringements” of the
19 Work. (Ex. 1.) There is no division of copyright ownership as was the case in *Silvers*;
20 Righthaven is the owner of both the exclusive rights in and to the Work and all accrued causes of
21 action arising therefrom. In fact, it appears that had the Ninth Circuit been dealing with the all-
22 inclusive terms of the Righthaven Assignment rather than the limited copyright assignment at
23 issue in *Silvers*, there would have been no question as to the sufficiency of the *Silvers* plaintiff’s
24 standing to sue.

25 Consequently, the Ninth Circuit’s holding in *Silvers* squarely undermines the heart of the
26 Defendants’ standing challenge. While a bare assignment of accrued claims, standing alone, was
27 deemed insufficient by the Ninth Circuit, the court acknowledged that an assignment of accrued
28 claims coupled with a transfer of copyright ownership may in fact constitute a sufficient basis for

1 standing. *Silvers*, 402 F.3d at 889-90 (citing *ABKCO*, 944 F.2d at 980-81). Furthermore, neither
2 *Silvers* nor *ABKCO* – nor any other legal authority cited by the Defendants – suggest that the
3 nature and dimension of a copyright plaintiff’s rights transfer must be articulated in the pleadings
4 in order to establish standing to sue. Critically, the Defendants should have represented to this
5 Court that the Ninth Circuit has clearly recognized that assignees of accrued causes of action
6 may well have standing to sue for past infringements depending on the nature and extent of the
7 plaintiff’s copyright assignment. Moreover, the Defendants’ presentment of *Silvers* as a means
8 of supporting the theory that Righthaven lacks standing demonstrates that the Defendants are
9 erroneously hypothesizing as to the extent of the Righthaven Assignment.

10 Preceding authority further establishes that an assignee may pursue all existing causes of
11 action so long as such causes of action are expressly included in the assignment of rights. In
12 2007, this Court considered whether a plaintiff had standing to sue for past copyright
13 infringements following a transfer of copyright ownership “that in effect backdated a purchase of
14 the copyrights.” *Marquis Models*, 2007 WL 2904172, at *4. In its analysis, the Court stated that
15 “[s]uch a transfer does not violate the Copyright Act and could potentially give [the plaintiff]
16 standing.” *Id.* Relying heavily on *ABKCO* and *Silvers* to address this issue, the Court held that
17 “such a transaction requires simultaneous conveyance of both the copyright and accrued claims.
18 Furthermore, such a transfer requires the accrued causes of action to be expressly included in the
19 assignment.” *Marquis Models*, 2007 WL 2904172, at *4 (internal quotation marks omitted)
20 (citing *ABKCO*, 944 F.2d at 980; *Silvers*, 402 F.3d at 889-90). The Court should not deviate
21 from its prior analysis. At present, Righthaven’s acquisition of exclusive ownership rights in and
22 to the Work – coupled with Righthaven’s acquisition of all accrued causes of action – should
23 accordingly be recognized as an adequate basis for standing in this lawsuit.

24 This Court is not alone in having held consistently with the *ABKCO* and *Silvers*
25 decisions. In 2007, the United States District Court for the Central District of California held
26 that a plaintiff lacked standing to sue for past infringements because the assignment at issue
27 merely “assign[ed], transfer[red] and set[] over unto [the plaintiff] all right, title and interest in
28 and to said trade dresses and copyrights.” *Lanard Toys Limited v. Novelty, Inc.*, 511 F. Supp. 2d

1 1020, 1033 (C.D. Cal. 2007). Distinguishing the facts in *Lanard* from those at present, the
2 court’s decision in *Lanard* was based largely on the fact that the assignment did not “expressly
3 convey [the assignor’s] existing claims for infringement.” *Id.* Similarly, the United States
4 District Court for the District of Arizona previously held that “[c]opyright assignments do not
5 include accrued causes of action unless they are expressly included in the assignment.” *Giddings*
6 *v. Vision House Production, Inc.*, 584 F. Supp. 2d 1222, 1229 (D. Ariz. 2008) (citing *ABKCO*,
7 944 F.2d at 980); *see also Fairview Development Corp. v. Aztex Custom Homebuilders, LLC*,
8 No. 07-0337, 2009 WL 529899, at *9 (D. Ariz. Mar. 3, 2009). Additionally, beyond *ABKCO*
9 and *Silvers*, the Defendants fail to cite any legal authority – Ninth Circuit or otherwise – to
10 support the proposition that the Righthaven Assignment is somehow invalid for the purposes of
11 standing. Righthaven maintains that such authority does not exist, and now the Defendants are
12 futilely attempting to avoid liability by asking this Court to ignore its own precedent and the
13 precedent of courts across the country. The case law on this topic is clear and unequivocal: an
14 assignment of copyright ownership that specifically includes the transfer of past, present, and
15 future causes of action entitles the assignee to sue for all infringements, both accrued and
16 unaccrued.

17
18 **c. The Defendants’ Argument is Illogical and, if Accepted, would Effectively**
19 **Dissuade Corporate Acquisitions and Assignments**

20 In addition to defying the firmly established legal authority on this topic, the Defendants’
21 standing challenge also directly defies all notions of logic and practicality. If this Court were to
22 accept the Defendants’ argument, the rights of any business engaging in a corporate acquisition
23 wherein an assignment of rights occurs would be severely diminished. In *SAPC, Inc. v. Lotus*
24 *Development Corporation*, 921 F.2d 360, 363 (1st Cir. 1990), the First Circuit sided with the
25 plaintiff corporation, holding that it had acquired the entirety of the assignor’s intellectual
26 property rights due to the unambiguous language of the asset purchase. This included the
27 plaintiff’s acquisition of all “existing claims for infringement.” *Id.* at 364. Applying the
28 Defendants’ logic to this scenario, a corporate assignee would be precluded from bringing a

1 claim for any infringement that occurred prior to the corporation's acquisition of assets –
2 regardless of the all-inclusive terms of the rights transfer – merely because the corporation's
3 ownership did not manifest until after the date of the infringement. Furthermore, any
4 infringements accrued prior to the assignment of rights would be effectively immunized from
5 liability as the exclusive owner of these accrued causes of action would be precluded from filing
6 suit. Despite the Defendants' self-serving efforts to achieve such immunization from liability,
7 the practical effect of the Defendants' argument is simply inconceivable and should not be
8 entertained by the Court. Simply stated, a plaintiff assignee should not be denied recourse to
9 pursue accrued causes of action when such rights are specifically and unambiguously
10 incorporated into an assignment of copyright ownership. Similarly, the Defendants' obvious
11 copyright infringement should not be exempted from liability merely because the infringing
12 activity occurred prior to the effective date of the Righthaven Assignment.

13
14 **5. *Despite having Withdrawn this Nearly Identical Standing Argument on***
15 ***Multiple Prior Occasions, the Defendants' Counsel Continues to Needlessly***
16 ***Bring Said Argument Before the Court***

17 The Defendants' counsel in this matter, Lewis and Roca, previously served as defense
18 counsel in the following copyright actions recently initiated by Righthaven:

- 19 1. *Righthaven LLC v. National Organization for the Reform of Marijuana Laws and*
20 *Media Awareness Project (MAP), Inc.*, 2:10-cv-0351-LDG-PAL.
21 2. *Righthaven LLC v. MajorWager.com, Inc.*, 2:10-cv-00484-RCJ-LRL.³

22 As evidenced by the court documents attached hereto as Exhibit 2 and Exhibit 3, in both
23 of the above copyright actions, Lewis and Roca asserted standing arguments substantively
24 identical to the standing argument enumerated in the present lawsuit. (Ex. 2 at 6-7.) (Ex. 3 at 3-
25 4.) In both cases, Lewis and Roca subsequently withdrew or otherwise conceded this meritless
26 argument upon receipt of Righthaven's opposition and corresponding copyright assignment. (Ex.
27 4.) (Ex. 5 at 3 n. 1.) Despite this practice of filing-and-withdrawing, Lewis and Roca apparently

28 ³ Righthaven has since obtained a judgment against Defendant National Organization for the Reform of Marijuana
Laws. Righthaven's lawsuit against MajorWager.com, Inc. is currently pending before this Court.

1 insists on continuing the fruitless exercise of putting this same, legally unfounded, grossly
2 premature standing argument before the Court. Such conduct has needlessly forced both parties
3 to engage in unnecessary additional briefing, and is ultimately nothing more than an unfortunate
4 waste of the Court's limited resources.

5 While Lewis and Roca, serving as defense counsel in the above-referenced lawsuits, has
6 previously (and prudently) withdrawn its standing arguments upon receipt of Righthaven's
7 oppositions to the same, a separate copyright defendant in another recent action pursued by
8 Righthaven opted for a different course of action. In *Righthaven LLC v. Tuff-N-Uff Productions, Inc. et al*, 2:10-cv-0794-PMP-PAL ("*Tuff-N-Uff*"), defendant Barry Meyer ("Mr. Meyer") filed a
9 standing challenge nearly identical to the standing challenge repeatedly asserted by Lewis and
10 Roca (evidence of which is attached hereto as Exhibit 6). (Ex. 6.) However, in *Tuff-N-Uff*, at no
11 point did Mr. Meyer withdraw his standing challenge, ultimately choosing to submit this issue –
12 following oral argument – to the Honorable Philip M. Pro during a hearing before this Court on
13 August 31, 2010. (See Ex. 7.) As evidenced by the minute order for the August 31, 2010 hearing
14 in *Tuff-N-Uff*, a true and correct copy of which is attached hereto as Exhibit 7, Judge Pro denied
15 Mr. Meyer's motion to dismiss, thereby denying Mr. Meyer's standing argument in its entirety.
16 (Ex. 7.) This denial warrants consideration in the Court's present analysis. In light of the
17 indistinguishable nature of the Defendants' current standing argument and the unsuccessful
18 standing argument submitted by Mr. Meyer in *Tuff-N-Uff*, there appears to be no basis upon
19 which this Court should deviate from its recent decision. Consequently, the Defendants'
20 standing challenge should be denied.
21

22
23 **6. Any Uncertainty as to the Intent of the Righthaven Assignment Gives Rise to a**
24 **Genuine Issue of Material Fact**

25 To the extent that the Court finds the Righthaven Assignment to be factually unclear in
26 any manner, this gives rise to a genuine issue of material fact. Therefore, should the Court
27 choose to treat the Defendants' Motion to Dismiss as a motion for summary judgment as
28 expressly permitted by Rule 12(d), said motion should be denied. "When ruling on a Rule

1 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must
2 normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment.” *United*
3 *States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). However, a district court may consider
4 materials attached to the complaint, materials incorporated by reference in the complaint, or
5 matters of judicial notice “without converting the motion to dismiss into a motion for summary
6 judgment.” *Id.* at 908. Thus, while the Defendants’ efforts to dismiss for lack of standing and
7 failure to state a claim⁴ are entirely unfounded in light of the preceding arguments, the
8 Defendants would also fail on a motion for summary judgment because any lingering uncertainty
9 about the Righthaven Assignment clearly constitutes a genuine issue of material fact.

10 The arguments set forth in the Motion to Dismiss fall woefully short of satisfying the
11 threshold for summary judgment. Under Rule 56, summary judgment is only proper if the
12 “pleadings, depositions, answers to interrogatories, and admissions on file, together with the
13 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
14 party is entitled to a judgment as a matter of law.” *Shaw v. Lindheim*, 919 F.2d 1353, 1359 (9th
15 Cir. 1990) (citing *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986)). Furthermore, the
16 test for summary judgment in a copyright case is the same as the standard applied to all civil
17 actions. *See id.* at 1358-59. In the instant case, as the moving party, the Defendants have the
18 initial burden of “presenting evidence which, if uncontroverted, would entitle the movant to a
19 directed verdict at trial.” *Rowell v. Powerscreen Intern., Ltd.*, 808 F. Supp. 1459, 1462 (D. Nev.
20 1992). By no means do the Defendants’ bare, unsupported arguments even remotely approach
21 this initial threshold. The Defendants have not proffered any persuasive evidence, nor have any
22 compelling arguments been presented to suggest that the Defendants are entitled to judgment as a
23 matter of law. Similarly, the Defendants have offered nothing to rebut the allegations and
24 supporting evidence put forth by Righthaven, all of which clearly implicates the Defendants’
25 liability for copyright infringement. Even assuming, solely for the sake of argument, that the
26 Defendants did meet this initial burden, the Defendants would nevertheless fail to achieve

27
28 ⁴ The first line of the Defendants’ Motion to Dismiss unambiguously states that the Defendants are seeking dismissal
“[p]ursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), **and 12(b)(6).**” (Mot. to Dismiss 1:17) (emphasis
added).

1 summary judgment. Pursuant to Rule 56, once the movant has met the first burden, “the burden
2 then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue
3 for trial.” *Rowell*, 808 F. Supp. at 1462. Righthaven, by way of the Complaint and evidence
4 attached in support thereof, has clearly presented such facts demonstrating a genuine issue for
5 trial. As extensively detailed on pages 7-9, *supra*, Righthaven has pled copyright ownership,
6 pled the specific nature of the Defendants’ Infringement, and has exhibited evidence to
7 definitively substantiate these allegations. (Compl. ¶¶ 9, 11-12, 27.) (Compl. Ex. 2-4.)
8 Furthermore, any uncertainty the Court may have regarding the intent of the Righthaven
9 Assignment and transfer of rights occurring therein unquestionably gives rise to a genuine issue
10 of material fact, thereby mandating a denial of summary judgment.

11 The purpose of the Righthaven Assignment, and the intent of the parties to the
12 Righthaven Assignment, should be construed as questions of fact. This basis, standing alone, is
13 sufficient to defeat summary judgment. *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685
14 F.2d 1149, 1156 (9th Cir. 1982) (“Summary judgment is generally not proper when the intent of
15 a party is placed in issue”). Though Righthaven maintains that the terms of the Righthaven
16 Assignment are clear and unambiguous, the Ninth Circuit has firmly established that “ambiguity
17 in a contract raises a ***question of intent, which is a question of fact precluding summary***
18 ***judgment.***” *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.*, 701 F.2d 95, 97
19 (9th Cir. 1983) (emphasis added). In addition, the Ninth Circuit has extended this philosophy to
20 the interpretation of assignments. *See, e.g., Orion Tire Corp. v. Goodyear Tire & Rubber Co.,*
21 *Inc.*, 268 F.3d 1133, 1138 (9th Cir. 2001). Adopting California law, the Ninth Circuit in *Orion*
22 *Tire* held that “the interpretation of an assignment clause, like the interpretation of contract terms
23 generally, is a question of the intent of the parties and is typically a question of fact for the jury.”
24 *Id.* Though Righthaven adamantly maintains that the terms of the Righthaven Assignment
25 definitively vested in Righthaven the right to bring suit for any past, present, or future
26 infringements of the Work, any uncertainty this Court may have as to the underlying intentions
27 of the parties to the Righthaven Assignment should appropriately be construed as questions of
28 fact. Consequently, this matter cannot be dismissed as a matter of law.

1 **B. The Defendants are Subject to Specific Personal Jurisdiction in Nevada**

2 **1. The Defendants Willfully Infringed Upon a Righthaven-Owned Work that**
3 **Knowingly Emanated from Nevada**

4 The Ninth Circuit has expressly established that a willful, knowing copyright infringer is
5 subject to forum jurisdiction. *Columbia*, 106 F.3d at 289. In *Columbia*, the Ninth Circuit held
6 that the *jurisdictional inquiry ends* in a copyright infringement case when “[the plaintiff]
7 alleged, and the district court found, that [the defendant] willfully infringed copyrights owned by
8 [the plaintiff], which, as [the defendant] knew had its principal place of business in the [forum
9 jurisdiction].” *Id.* The *Columbia* court further explained that “[t]his fact alone is sufficient to
10 satisfy the purposeful availment requirement.” *Id.* (internal quotation marks omitted). In other
11 words, when a copyright defendant is deemed to have engaged in the willful infringement of a
12 copyrighted work known to be owned by a forum resident, the infringing defendant is subject to
13 specific personal jurisdiction in that forum. Under such circumstances, no further elemental or
14 factored analysis is required. This concept is directly applicable at present.

15
16 **a. The Infringement was Expressly Aimed at Nevada**

17 The Defendants committed blatant copyright infringement of a literary work which: (1)
18 clearly emanated from a Nevada-based daily publication, (2) is of specific concern to Nevada
19 residents, and (3) is owned by a Nevada-based company. As such, the Defendants’ Infringement
20 was expressly aimed at Nevada and Nevada residents. Express aiming occurs if “the defendant
21 is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows
22 to be a resident of the forum state.” *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d
23 1082, 1087 (9th Cir. 2000). In the Motion to Dismiss, the Defendants contend that the exercise
24 of jurisdiction would in fact be appropriate in this case if the “Defendants specifically targeted
25 the content relevant to this case at Nevada residents . . .” (Mot. to Dismiss 14:3-4) However,
26 evidence of such specific targeting is plainly apparent based upon the following fact-based
27 allegations, all of which were expressly pled by Righthaven in the Complaint: both the Work and
28 the Infringement depict the LVRJ as the original source publication, the Defendants knew that

1 the Work emanated from the LVRJ, the subject matter of the Work concerns the Las Vegas-
2 based activities of several *American Idol* finalists, and the Work is of specific interest to Las
3 Vegas residents. (Compl. ¶¶ 10, 13-16.) Accordingly, the Infringement, as publicly displayed on
4 the Defendants' Website, was in fact specifically directed towards Nevada residents. Moreover,
5 because the Defendants do not specifically contest each of these jurisdictional allegations, said
6 allegations are to be taken as true. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800
7 (9th Cir. 2004). As a result, the Defendants have largely conceded these facts yet simultaneously
8 contend that the Infringement was somehow not expressly aimed at Nevada. This position is
9 both contradictory and illogical and should not be entertained by the Court. The Defendants
10 publicly displayed an unauthorized copy of a literary work which clearly and knowingly
11 emanated from a Nevada source and was of specific concern to Nevada residents. Consequently,
12 it is difficult for the Defendants to argue that the Infringement was aimed anywhere other than
13 Nevada.

14
15 **b. The Defendants Knew that the Infringement was Likely to Have Harmful**
16 **Effects in Nevada**

17 Similarly, the Defendants knew that any harm resulting from the public display of the
18 Infringement was likely to be suffered in Nevada, the Work's original source forum. This
19 proposition further strengthens the propriety of the Court's exercise of specific personal
20 jurisdiction. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199,
21 1206 (9th Cir. 2006). As detailed herein, the Work plainly displayed the LVRJ as the original
22 source publication. (Compl. Ex. 2.) The Defendants committed an undeniable violation of the
23 Copyright Act by publicly displaying an unauthorized copy of this Nevada-based, Nevada-
24 specific literary work on the Website. *See* 17 U.S.C. § 501(a). Thus, it logic dictates that the
25 Defendants were aware that any harm caused by the Infringement would likely be suffered in
26 Nevada. In light of the factual allegations in the Complaint and substantiating evidence attached
27 in support thereof, the Defendants cannot reasonably claim to have been unaware that Nevada
28 would bear the brunt of any harm caused by the Infringement. To reiterate, a verbatim copy of a

1 substantial and significant portion of the Work was publicly displayed on the Defendants'
2 Website without any form of authorization. The Infringement clearly identified a Las Vegas,
3 Nevada-based publication as the content's original source, and was clearly not authored by the
4 Defendants or by a user of the Defendants' Website. (See Compl. Ex. 2.) As the owners and
5 operators of the Website, these facts undoubtedly should have been known to the Defendants at
6 the time of the Infringement. Despite the Defendants' bald-faced assertions to the contrary, the
7 strength of Righthaven's pleadings clearly demonstrates the foreseeability of harmful effects to
8 Nevada arising from the Defendants' Infringement.

9
10 ***c. The Defendants' Infringement was Willful***

11 The pertinent facts, viewed collectively, clearly reflect the willful nature of the
12 Defendants' infringing conduct. This willfulness, coupled with the knowledge that the
13 Infringement both emanated from Nevada and was likely to have harmful effects in Nevada,
14 effectively resolves the Court's specific jurisdictional analysis in Righthaven's favor. See
15 *Columbia*, 106 F.3d at 289. While the Defendants maintain that the Infringement was not
16 committed willfully, (see Mot. to Dismiss 13) this overly generalized contention is squarely
17 undermined upon reasonable consideration of the relevant facts.

18 The Website, owned and operated by the Defendants, provides multiple user forums, or
19 message boards, wherein content can be freely posted on (and stored by) the Website at the
20 users' discretion. However, a recent search of the Website performed by Righthaven reveals that
21 the Defendants apparently do not articulate and/or implement any form of copyright enforcement
22 policy or impose any defined rules or guidelines directed towards controlling copyright
23 infringements occurring on the Website. (Chu Decl. ¶ 4.) Righthaven cannot identify any terms
24 or conditions instructing users to refrain from posting potentially infringing material on the
25 Website, nor is Righthaven able to identify any monitoring or removal procedures employed by
26 the Defendants. (Chu Decl. ¶ 4.) In other words, despite the Website's acceptance and public
27 display of extremely high volumes of user-posted content, it appears as if the Defendants do not
28 engage in any form of proactive copyright protection on the Website.

1 Furthermore, because the Defendants have entirely ignored the protections afforded to
2 Online Service Providers (“OSP”) under the Digital Millennium Copyright Act (“DMCA”),⁵ the
3 Defendants are not entitled to receive takedown notices from complaining copyright owners
4 prior to the commencement of any lawsuit for infringement. *See* 17 U.S.C. § 512 *et seq.* As
5 complaining copyright owners are not required to provide the Defendants with pre-litigation
6 infringement notices, the onus should be on the Defendants to devise and implement proactive,
7 effective enforcement measures aimed towards policing infringements occurring on the Website.
8 Instead, despite failing to comply with the DMCA, the Defendants’ seemingly non-existent
9 monitoring/removal policy unilaterally shifts the burden of enforcing copyright protection to the
10 copyright owners, putting the onus on owners, such as Righthaven, to: (1) locate any
11 infringements posted on the Website and (2) provide the Defendants with written notice of the
12 same. Ultimately, if both of these steps are not fully satisfied by the infringed works’ owners –
13 and as the Defendants appear not to employ *any form of copyright enforcement policy* – there is
14 absolutely nothing to prevent the practice of rampant copyright infringement from occurring on
15 the Website.

16 Additionally, because the Defendants have neither devised nor implemented any
17 identifiable enforcement procedures, the Defendants either knew, or reasonably should have
18 known, that extensive infringing activities – including the Infringement – were being publicly
19 displayed on the Website. An OSP’s knowledge of infringement can be inferred if the OSP is
20 “aware of facts or circumstances from which infringing activity is apparent.” 17 U.S.C. §
21 512(c)(1)(A)(ii). Congress has described this as a “red flag test,” explaining that the court must
22 determine “whether infringing activity would have been apparent to a reasonable person
23 operating under the same or similar circumstances.” S. REP. 105-190 (1998), at 44. As
24 discussed in the preceding paragraph, the Website in this case is a message board site, owned and
25 operated by the Defendants, wherein any Internet users visiting the Website are allowed to freely

26 ⁵ To enjoy the limitations on liability afforded by the DMCA – including the right to be given notice of an alleged
27 infringement as a prerequisite to filing a lawsuit for infringement – an OSP must designate an agent to receive
28 notifications of claimed infringement. 17 U.S.C. § 512(c)(2). Additionally, said designated agent’s contact
information must be clearly articulated on the OSP’s website and also provided to the USCO for publication. *Id.* As
of the filing of this Opposition, the Defendants had not complied with either of these requirements. (Chu Decl. ¶¶ 7-
8.) (Chu Decl. Ex. 4.)

1 post content on the Website at the users' discretion. In light of the apparent absence of any
2 copyright protection policies, it can reasonably be inferred that the Defendants do not proactively
3 review the Website's message boards for potentially infringing user posts unless a specific notice
4 of infringement has been submitted by a complaining copyright owner. In other words, the
5 Defendants' Website effectively serves as an unregulated platform for the practice of habitual,
6 undeterred copyright infringement, and Righthaven's allegation of willful infringement should
7 not be dismissed simply because the Defendants have chosen to turn a blind eye to the Website's
8 many red flags. "To refute evidence of willful infringement, [the defendant] must not only
9 establish its good faith belief in the innocence of its conduct, ***it must also show that it was***
10 ***reasonable in holding such a belief.***" *Peer Intern. Corp. v. Pausa Records, Inc.*, 909 F.2d 1332,
11 1336 (9th Cir. 1990) (emphasis added). In light of the present facts and circumstances – viewed
12 objectively – the Defendants' assertion that the Infringement was not willful is entirely
13 unreasonable. The Defendants' operation of the Website constitutes a perfect storm for
14 copyright infringement, and the Defendants' acquiescence to the infringing activity occurring on
15 the Website definitively substantiates the allegations of willfulness in this lawsuit.

16 Moreover, the courts have plainly established that the willfulness of a defendant's
17 copyright infringement need not be proven directly; it may also be inferred from the defendant's
18 overall conduct. *See, e.g., N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252
19 (2d Cir. 1992). In *Lanard Toys Ltd. v. Novelty, Inc.*, No. 08-55795, slip op. at 4 (9th Cir. Apr.
20 13, 2010), the Ninth Circuit considered, without limitation, the following factors in determining
21 whether the defendant's copyright infringement was willful: the "exactitude" of the copy, the
22 presence of additional infringing activity, and the defendant's willful blindness. A similar
23 analysis should be applied to this case. At present, the Infringement represents a verbatim copy
24 of the Work's entire first section. (Compl. Ex. 2-3.) In this regard, the Defendants' contention
25 that the Infringement is a copy of "approximately 1/3" of the Work (Mot. to Dismiss 3:8) is
26 highly misleading and warrants clarification. As discussed on pages 3-4, *supra*, the Work's
27 content is divided into four, wholly unrelated sections, with each section containing a separate
28 and unique heading. (Compl. Ex. 2.) The Work's formal title, "'Idol' finalists keep busy in Las

1 Vegas,” pertains exclusively to the first, and longest, section of the Work, which concerns a
2 recent trip to Las Vegas taken by the final contestants of the popular television show, *American*
3 *Idol*. (Compl. ¶ 15.) (Compl. Ex. 2.) The Work’s remaining sections are considerably shorter
4 than the Work’s first section⁶ and are entirely unrelated to *American Idol* or the *American Idol*
5 contestants. (See Compl. Ex. 2.) As such, the Infringement constitutes a verbatim copy of the
6 entire portion of the Work relevant to the Defendants’ Website. In other words, had the Work
7 solely concerned *American Idol* and not included any additional topics or sections, it is
8 reasonable to believe that the Infringement would instead have been a verbatim copy of the
9 Work in its entirety. Nevertheless, the exactitude of the Infringement’s reproduced content, as
10 publicly displayed on the Defendants’ Website, should appropriately be considered by the Court.

11 Also, due to the inexplicable absence of any copyright enforcement policy, it would not
12 be surprising to learn that additional infringing activity is commonly occurring on the Website.
13 In fact, a brief review of the Defendants’ Website confirms this suspicion. As evidenced by a
14 series of posts derived from the “Forum” section of the Website, the Website appears to have
15 infringed upon a variety of media publications (other than the LVRJ) solely within the past five
16 months. (Chu. Decl. ¶¶ 5-6.) (Chu Decl. Ex. 1-3.) These apparent infringements include, without
17 limitation, reproductions of works from publications such as the *USA Today*, <mtv.com>, and
18 *KTLA News*. (Chu Decl. ¶¶ 5-6.) (Chu Decl. Ex. 1-3.) Said examples are likely joined by
19 countless additional infringements publicly displayed on the Defendants’ Website.

20 Summarily, in light of the exactitude of the Infringement, the Defendants’ failure to
21 effectively implement any proactive copyright enforcement policies, and the seemingly extensive
22 history of infringing activity occurring on the Website, willfulness in this matter has been
23 definitively established by way of the Defendants’ willful blindness. As copyright infringement
24 is the probable and inevitable result of the Defendants’ actions, the Defendants should not be
25 allowed to avoid liability for willful infringement by consciously ignoring the multitude of red
26 flags arising from the Defendants’ operation of the Website.

27
28 ⁶ The Defendants’ Infringement constitutes an exact copy of approximately 45% of the Work’s content. (See Compl. Ex. 2-3.)

1 Alternatively, should there remain any uncertainty as to the Defendants’ willfulness, this
2 arises to a factual determination and thus warrants reasonable jurisdictional discovery. The
3 Court cannot merely dismiss this action as a matter of law on the basis of the Defendants’ self-
4 serving representations of the jurisdictional facts. (See Declaration of Nathan E. Palmer ¶¶ 4-11.)
5 Generally, the “[c]ourts frown on a litigant’s use of the motion [to dismiss] as a shotgun tactic to
6 substitute for discovery . . . In the presence of proper, although general, allegations, the motion
7 will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining
8 the detailed information.” *Crooker v. National Enterprise Systems*, No. 08-01322, 2008 WL
9 5243641, at *1 (C.D. Cal. Dec. 9, 2008). The pertinent jurisdictional facts potentially subject to
10 discovery include, without limitation: the nature and extent of the Defendants’ contacts with
11 Nevada residents, the number of third-party posts removed from the Website by the Defendants
12 pursuant to copyright protection efforts, the number of copyright infringement notices received
13 by the Defendants, the identity of the Website user identified by the Website as “Racing Rat,”⁷
14 and Racing Rat’s association and/or relationship with the Defendants and the Defendants’
15 Website. Thus, if this Court chooses to entertain the Defendants’ jurisdictional argument, then
16 jurisdictional discovery is the appropriate and necessary mechanism to efficiently resolve the
17 controverted jurisdictional facts.

18
19 **2. Righthaven’s Claim For Relief Arises Directly Out of the Defendants’ Nevada-**
20 **Related Infringing Activities**

21 Righthaven’s underlying cause of action for copyright infringement would not exist
22 absent the Defendants’ infringing activities. In the jurisdictional analysis, the Ninth Circuit has
23 established that, in addition to the defendant’s express aiming at the forum, the plaintiff’s claims
24 must arise from the defendant’s forum-related activities. *Panavision Int’l, L.P. v. Toepfen*, 141
25 F.3d 1316, 1322 (9th Cir. 1998). This requirement is satisfied if the plaintiff would not have
26 been injured “but for” the defendant’s forum-related conduct. *Myers v. Malley Law Offices*, 238
27 F.3d 1068, 1075 (9th Cir. 2000). Simply stated, ***the instant lawsuit would not exist but for the***

28 ⁷ As depicted by the Infringement, the Website attributes the post containing the Infringement to a user identified as
“Racing Rat.” (Compl. Ex. 3.)

1 ***existence of the Infringement.*** However, in the Motion to Dismiss, the Defendants somehow
2 contend that the “but-for” requirement is not satisfied solely because there is no evidence “that
3 any Nevada residents accessed the article or that any access by Nevada residents to the website
4 was anything more than *de minimis*.” (Mot. to Dismiss 16:24-25) In addition to being thinly
5 supported, this assertion is of minimal relevance. Regardless of the volume of Nevada-based
6 Internet users viewing the Infringement on the Website, this data has little, if any, bearing on the
7 facts most pertinent to the instant analysis: (1) the Defendants committed clear copyright
8 infringement of the Work, (2) the Work emanated from a Nevada-based daily publication, (3) the
9 Work is of specific concern to Nevada residents, and (4) the Work is owned by Righthaven, a
10 Nevada-based company, thus the Infringement’s resulting harm was felt by Righthaven in
11 Nevada. (*See* Compl. ¶¶ 2, 10-16, 43.) In sum, these facts collectively constitute the Defendants’
12 “forum-related activities.” *See Panavision*, 141 F.3d at 1322. Furthermore, Righthaven’s cause
13 of action for copyright infringement is predicated solely and exclusively on said forum activities,
14 and would not otherwise exist. As such, there can be no dispute that the instant lawsuit arises out
15 of the Defendants’ Nevada-related conduct, thus the Court should not entertain the Defendants’
16 futile argument to the contrary.

17 18 **3. The Court’s Exercise of Jurisdiction Would Not Be Unreasonable**

19 This Court’s exercise of jurisdiction over the Defendants would not be unreasonable, and
20 the facts and circumstances bearing on the jurisdictional analysis preclude the Defendants from
21 escaping jurisdiction on this basis. As such, a denial of the Defendants’ Motion to Dismiss
22 would squarely comport with notions of fair play and substantial justice. *Schwarzenegger*, 374
23 F.3d at 802. As the Ninth Circuit explained in *Core-Vent Corporation v. Nobel Industries*, 11
24 F.3d 1482, 1487-88 (9th Cir. 1993), once minimum contacts have been established, the
25 defendant must present “a compelling case that the presence of some other considerations would
26 render jurisdiction unreasonable.” Specifically, the determination of reasonableness is based
27 upon the following factors, as outlined in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462,
28 476-77 (1985):

- 1 (1) the burden on the defendant of defending in the forum;
- 2 (2) the forum state's interest in adjudicating the dispute;
- 3 (3) the plaintiff's interest in obtaining convenient, effective relief;
- 4 (4) the court's interest in obtaining the most efficient resolution of the controversy; and
- 5 (5) the states' shared interest of furthering fundamental substantive social policies.

6 *Id.*

7 None of the above factors is dispositive standing alone; instead, the courts are to balance
8 each factor individually. *Core-Vent Corp.*, 11 F.3d at 1488. For the following reasons, the
9 Defendants in the instant action cannot present a compelling case that jurisdiction in Nevada
10 would be unreasonable:

- 11 1. The Defendants merely contend that "they would suffer severe hardship in terms
12 of costs and asymmetries of information if forced to defend a lawsuit in the
13 District of Nevada." (Mot. to Dismiss 18:5-7) However, the Defendants fail to
14 acknowledge that this same hardship would be imposed on Righthaven should
15 Righthaven be forced to pursue this action in either Utah or Illinois, the
16 Defendants' home forums. Additionally, though a discovery plan has not yet
17 been filed, there is certainly no guarantee that the Defendants would be forced to
18 travel to Nevada for the purposes of oral deposition.
- 19 2. As set forth on pages 19-25, *supra*, this case involves the willful copyright
20 infringement of a literary work owned by a Nevada-based company and
21 emanating from a Nevada-based daily publication, the content of which is of
22 specific concern to Nevada residents. Thus, it follows that the District of Nevada
23 would be interested in adjudicating this matter and determining the rights of its
24 citizens, specifically Righthaven in this case.
- 25 3. The third prong of the *Burger King* test similarly favors Righthaven. Righthaven
26 is situated in Nevada, a substantial portion of the pertinent evidence is located in
27 Nevada, and the locus of the injury occurred in Nevada. *See Design Tex Group,*
28 *Inc. v. United States Vinyl Manufacturing Corp.*, No. 04-5002, 2005 WL 357125,
at *1 (S.D.N.Y. Feb. 14, 2005) ("[B]ecause the plaintiffs (and their intellectual
property) are based in New York, the injury is felt within the state no matter

1 where the infringement takes place”). Furthermore, Righthaven should not be
2 forced to travel to an inappropriate forum of the Defendants’ choosing simply
3 because the unlawful act was performed via the Internet and did not require the
4 Defendants to physically enter Nevada.

- 5 4. As previously discussed, this Court has a significant interest in determining the
6 rights of its citizens. Additionally, adjudication in this forum will be efficient and
7 effective because Righthaven’s principal place of business is in Nevada, the Work
8 emanated from a Nevada source, and a substantial part of the events giving rise to
9 this lawsuit are situated in Nevada. *See* 28 U.S.C. § 1391(b)(2) (non-diversity
10 actions may only be brought in a forum in which a substantial part of the events
11 giving rise to the claim occurred). Moreover, the occurrence of copyright
12 infringement in this matter is clear and unequivocal, and the Defendants have
13 offered little in the way of a viable defense to Righthaven’s well-supported
14 allegations. ***The Defendants’ failure to contest liability for Righthaven’s***
15 ***underlying infringement claim means that this lawsuit will likely come down to***
16 ***a determination of damages, regardless of the forum in which it is adjudicated.***
17 Ultimately, the Defendants fail to make a compelling case as to why this
18 determination would be inappropriate in the District of Nevada. Contrarily, all
19 remaining issues can be efficiently resolved by this Court.
- 20 5. As a matter of substantive social policy, a defendant should not be allowed to
21 commit copyright infringement of a literary work which knowingly emanating
22 from a certain forum, but then escape that forum’s sound jurisdiction simply
23 because the infringement occurred via the Internet and physical entry into the
24 forum was not required. If copyright defendants were to prevail on that basis, all
25 burdens associated with the pursuit of legal recourse for Internet-based
26 infringements would be borne entirely by the copyright owners. The Court
27 should not facilitate such an unjust outcome.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Righthaven LLC and that on this first day of September, 2010, I caused the **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** to be served by the Court's CM/ECF system.

By: /s/ J. Charles Coons

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