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10
 11 **UNITED STATES DISTRICT COURT**
 12 **DISTRICT OF NEVADA**
 13

14 RIGHTHAVEN LLC, a Nevada limited-
 liability company,
 15
 16 Plaintiff,
 17
 18 v.
 19 DEMOCRATIC UNDERGROUND, LLC, a
 District of Columbia limited-liability
 company; and DAVID ALLEN, an individual,
 20
 21 Defendants.

Case No.: 2:10-cv-01356-RLH-GWF

**RIGHTHAVEN LLC’S REPLY IN
 SUPPORT OF ITS APPLICATION TO
 INTERVENE AS OF RIGHT PURSUANT
 TO FEDERAL RULE OF CIVIL
 PROCEDURE 24(a)(2)**

22 DEMOCRATIC UNDERGROUND, LLC, a
 District of Columbia limited-liability
 23 company,
 24 Counterclaimant,
 25
 26 v.
 27 RIGHTHAVEN LLC, a Nevada limited-
 liability company; and STEPHENS MEDIA
 LLC, a Nevada limited-liability company,
 28
 Counterdefendants.

1 **I. INTRODUCTION**

2 Righthaven has sought to intervene as a matter of right in this action based on its
3 ownership of the copyrighted work (the “Work”) at issue, which was assigned to it, along with
4 the right to sue for past, present and future infringements of the Work (the “Assignment”). As
5 noted in its Application, Righthaven does not seek to challenge the Court’s June 14, 2011
6 standing decision, which was limited to the Assignment and the Strategic Alliance Agreement
7 (the “SAA”) prior to being amended on May 9, 2011 (the “Amendment”). (Doc. # 116 at 7-8
8 n.1.)

9 Rather, Righthaven seeks to intervene based on its ownership of the Work in view of the
10 Amendment and in further view of the more recent Restated and Amended Strategic License
11 Agreement (the “Restated and Amended SAA”). It is black-letter law that a non-exclusive
12 licensee lacks standing to sue for infringement. *See* 17 U.S.C. § 101; *Silvers v. Sony Pictures*
13 *Entm’t, Inc.*, 402 F. 3d 881, 898 n. 7 (9th Cir. 2005) (“*Silvers*”). Stephens Media LLC
14 (“Stephens Media”) is a non-exclusive licensee under the amended SAA. Righthaven is
15 therefore the only party with the ability to sue for infringement of the Work.

16 In response, Democratic Underground, LLC (“Democratic Underground”) has asserted
17 numerous arguments, such as collateral estoppel, fraud upon the Court and champerty, in urging
18 denial of Righthaven’s Application. (Doc. # 140.) Ironically for a party seeking to invoke the
19 doctrine of collateral estoppel, Democratic Underground had these exact same arguments
20 rejected by the court in *Righthaven LLC v. Pahrump Life, et al.*, Case No. 2:10-cv-01575-JCM-
21 PAL (Mahan, J.) (“*Pahrump Life*”) (Doc. # 63). In dismissing Righthaven’s claims without
22 prejudice in view of the original SAA for lack of standing, the refused to apply collateral
23 estoppel or adopt Democratic Underground’s champerty and fraud-based arguments. (*Pahrump*
24 *Life*, Doc. # 63.) Nevertheless, Democratic Underground is apparently perfectly content with
25 trotting out its previously rejected arguments under the hope of garnering a different result from
26 this Court.

27 As argued in this submission and in its prior submission, Righthaven’s ownership of the
28 Work is demonstrated through the Assignment in view of the amended SAA. Once this

1 conclusion is reached, and which would not be inconsistent with the Court's June 14, 2011
2 decision given the nature of its standing analysis based on the jurisdictional facts as of the filing
3 of the Complaint, Righthaven's Application should be granted.

4 **II. ARGUMENT**

5 As the below arguments will demonstrate, Democratic Underground's response to
6 Righthaven's Application does not alter the result that leave to intervene as a matter of right
7 should be granted. This conclusion is warranted because Righthaven is the current owner of the
8 Work, and the only party vested with standing to sue for infringement, based on the amended
9 SAA, which was not fully considered by the Court in its June 14th Order. (Doc. # 116 at 8 n.1.)

10 In this regard, it is quite telling that Democratic Underground does not substantively
11 challenge the rights granted under the Restated and Amended SAA or that the amended SAA
12 fails to address the concerns expressed by prior decisions in this District. Rather, Democratic
13 Underground is apparently content with relying upon prior arguments that were found to lack
14 merit recently in the *Pahrump Life* case. (*Pahrump Life*, Doc. # 63.) The Court should likewise
15 reject Democratic Underground's arguments and grant Righthaven's Application.

16 **A. Contrary to Democratic Underground's Contention, Righthaven's Application is** 17 **Timely.**

18 Democratic Underground argues that Righthaven's Application is untimely. (Doc. # 140
19 at 12.) In support of its position, Democratic Underground argues: (1) that ten months and
20 substantial litigation has occurred before the Application was filed; (2) Democratic Underground
21 would be prejudiced because it has devoted substantial efforts to addressing the issue of
22 standing; and (3) the reason for delay is due to Righthaven's fault for failing to have true
23 ownership of the Work sued upon. (*Id.*) Democratic Underground's arguments are unpersuasive
24 and should be rejected.

25 To begin with, Righthaven unquestionably sought to intervene shortly after the Court's
26 June 14, 2011 decision. In doing so, Righthaven clearly acted diligently once it received notice
27 of the Court's decision and appreciated the standing analysis employed in view of its current
28 ownership rights under the amended SAA. *See R & G Mortg. Corp. v. Federal Home Loan*

1 *Mortg. Corp.*, 584 F.3d 1, 8 (1st Cir. 2009) (“[T]he timeliness inquiry centers on how diligently
2 the putative intervenor has acted once he has received actual or constructive notice of the
3 impending threat.”). Democratic Underground attempts to improperly construe the length of
4 time encompassed while Righthaven was a party to this action as being material to the Court’s
5 timeliness inquiry. Democratic Underground is wrong. Righthaven could not have sought to
6 intervene as a matter of right while it was the Plaintiff in this action. It could only have sought to
7 intervene once it was dismissed as a party to this case and it did so promptly upon this occurring.
8 Even if Democratic Underground’s logic were adopted, the mere lapse of time does not render an
9 application untimely. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

10 While Democratic Underground asserts that granting the Application cause it to suffer
11 prejudice given the “substantial efforts to address the issues of standing . . .” devoted by it in this
12 case. (Doc. # 140 at 12:23-25.) In evaluating the prejudice to an existing party for purpose of
13 deciding whether an application to intervene is timely, the court should not consider “whether
14 the intervention itself will cause the nature, duration, or disposition of the lawsuit to change.”
15 *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999); *see also Edwards v. City of Houston*, 78
16 F.3d 983, 1002 (5th Cir. 1996); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir.
17 1995). If Democratic Underground’s claimed prejudice were grounds to deny the Application,
18 intervention would never be allowed because doing so inevitably prolongs the litigation. *See id.*

19 In reality, Democratic Underground would suffer absolutely no prejudice if the
20 Application were granted. It apparently intends to litigate its non-infringement counterclaim
21 against Stephens Media. If Righthaven were to re-enter this case, Democratic Underground
22 would be placed in the same position as it was in until the Court’s June 14th Order. It has
23 propounded written discovery on both Righthaven and Stephens Media. It has received
24 responses to these discovery requests from Righthaven and from Stephens Media. There is no
25 claim that evidence has been lost over time. Its non-infringement claim raises the same issues
26 that would be raised by Righthaven’s complaint in intervention. In sum, it is not like Righthaven
27 is some unknown third party seeking to enter the fray at the last minute. Righthaven’s
28

1 Application merely seeks to re-establish its position as a party in this dispute based upon its
2 ownership rights to the Work based on the amended SAA.

3 Democratic Underground's final argument in support of deeming Righthaven's
4 Application untimely asserts that Righthaven's misrepresentations are the alleged reason for the
5 delay in it seeking to intervene. (Doc. # 140 at 12-13.) Democratic Underground provides
6 absolutely no supporting authority that a party's alleged culpability is germane to the Court's
7 timeliness inquiry. Rather, Democratic Underground has simply sought to inject this as part of
8 the inquiry as a means for additional mudslinging. As stated, Righthaven promptly moved to
9 intervene upon its dismissal for lack of standing. Since there was no delay, material or
10 otherwise, in seeking to intervene there are no meaningful grounds to find the Application
11 untimely.

12 **B. Righthaven Has a Significantly Protectable Interest in The Work.**

13 Righthaven's Application demonstrates that it has a significantly protectable interest as
14 the current owner of the Work based on the amended SAA, thereby satisfying the second
15 intervention as of right requirement under Rule 24(a)(2). Democratic Underground, however,
16 argues that Righthaven does not have such an interest. In attempting to advance this argument,
17 Democratic Underground claims that Righthaven is barred by collateral estoppel from claiming
18 ownership of the Work, that the amended SAA is champertous and unenforceable, and that the
19 SAA constitutes the unauthorized practice of law. (Doc. # 140 at 15-18.) Judge Mahan rejected
20 these very same arguments made by Democratic Underground in the *Pahrump Life* case. This
21 Court should do the same and find that Righthaven has demonstrated significantly protectable
22 interest in support of its Application.

23 ***1. Righthaven is not barred by arguing that it has a significantly protectable***
24 ***interest through its ownership of the Work.***

25 Democratic Underground asserts that Righthaven is barred by the doctrine of collateral
26 estoppel (also known as issue preclusion) from arguing that it has a significantly protectable
27 interest through its ownership of the Work. (Doc. # 140 at 15-18.) As it did in connection with
28 the *Pahrump Life* order to show cause hearing, Democratic Underground has incorrectly applied

1 the elements of collateral estoppel in order to secure the result it desires. A dismissal for lack of
2 subject matter jurisdiction, which all of the prior decisions relied upon by Democratic
3 Underground have found, does not constitute an adjudication on the merits as is required for
4 application of collateral estoppel. In fact, Judge Mahan expressly rejected Democratic
5 Underground's collateral estoppel argument in the *Pahrump Life* case by expressly dismissing
6 Righthaven's claims without prejudice for lack of standing. (*Pahrump Life*, Doc. # 63.)

7 A prior federal court decision has preclusive effect where (1) the issue necessarily
8 decided at the previous proceeding is *identical* to the one which is sought to be relitigated; (2)
9 the first proceeding ended with a *final judgment on the merits*; and (3) the party against whom
10 collateral estoppel is asserted was a party or in privity with a party a the first proceeding.”

11 *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005) (emphasis added) (citing *Hydranautics v.*
12 *FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000)); *Owens v. Kaiser Found. Health Plan, Inc.*,
13 244 F.3d 708, 713 (9th Cir. 2001); *W. Radio Servs. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir.
14 1997).

15 Democratic Underground's flawed issue preclusion analysis can be quickly dispensed of
16 because a dismissal for lack of standing is not a decision on the merits. *See Stalley v. Orlando*
17 *Reg. Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (“A dismissal for lack of
18 subject matter jurisdiction is not a judgment on the merits and is entered without prejudice.”);
19 *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 164-65 (1st Cir. 2007) (entry of judgment
20 for lack of subject matter jurisdiction failed to constitute a decision on the merits of copyright
21 infringement allegations); *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1188 (11th Cir. 2003)
22 (stating that a dismissal for lack of subject matter jurisdiction “plainly is not an adjudication on
23 the merits that would give rise to a viable res judicata defense”); *Wages v. IRS*, 915 F.2d 1230,
24 1234 (9th Cir. 1990) (“A jurisdictional dismissal is not a judgment on the merits.”); *GHK*
25 *Exploration Co. v. Tenneco Oil Co.*, 857 F.2d 1388, 1392 (10th Cir. 1988) (“[A] court-ordered
26 dismissal for lack of subject matter jurisdiction is also not a decision on the merits”); *Cook v.*
27 *Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035 (9th Cir. 1985) (holding that a dismissal for lack of
28 subject matter jurisdiction divests the court of the power to make judgments relating to the merits

1 of the case); *see also* FED. R. CIV. P. 41(b) (involuntary dismissal for lack of jurisdiction is not an
2 adjudication on the merits). Indeed, each of the Righthaven decisions relied upon by Democratic
3 Underground involve a dismissal *without prejudice pursuant to the express language of*
4 *Federal Rule of Civil Procedure 41(d), which compels such a conclusion unless the dismissal*
5 *order states otherwise.* (See *Hoehn*, Docs. # 28 at 7-10, 30; *Mostofi*, Docs. # 34 at 4-8, 35;
6 *DiBiase*, Docs. # 72 at 2, 73.) Moreover, the Court’s decision in this case is not a final judgment
7 because it is an interlocutory order. (Doc. # 116 at 11.)

8 Even assuming the prior decisions in this District did have preclusive effect (which they
9 do not), *none* were based upon the Restated and Amended SAA. In fact, the decisions in
10 *DiBiase*, *Barham*, *Mostofi*, along with the decision by this Court, were decided under the
11 unamended SAA. Only the decision in *Hoehn* considered, on a potentially advisory basis, the
12 effect of the Amendment on standing. Therefore, there is an absence of identical issues required
13 to properly apply issue preclusion under controlling Ninth Circuit precedent. *See Kourtis*, 419
14 F.3d at 994. For at least these reasons, Democratic Underground’s collateral estoppel argument
15 fails.

16 **3. *The Restated and Amended SAA is not champertous, unenforceable or***
17 ***otherwise against public policy.***

18 Democratic Underground next asserts that the Restated and Amended SAA is
19 champertous, unenforceable or otherwise against public policy. (Doc. # 140 at 22-23.)
20 Democratic Underground raised this exact same argument before Judge Mahan in the *Pahrump*
21 *Life* case and it was rejected. Nevertheless, Democratic Underground has elected to raise it again
22 in hopes of obtaining a different result. As Judge Mahan did, this Court should also reject
23 Democratic Underground’s champerty argument.

24 Putting aside its irrelevance to the issue of standing, Democratic Underground has
25 incorrectly applied the law of champerty—a centuries-old doctrine with limited application – in
26 order to advance its argument that the Restated and Amended SAA is champertous,
27 unenforceable and against public policy. *Prosky v. Clark*, 109 P. 793, 794 (Nev. 1910) (“The
28 reason for the enactment of the English statutes of champerty and maintenance having very

1 largely ceased to exist, the extent to which the doctrine is applied varies greatly in different
2 states. Some states, for example California, have refused to recognize it at all.”).

3 Under Nevada law, champerty is a contract defense that “cannot be invoked except
4 between the parties to the champertous agreement in cases where such contract is sought to be
5 enforced.” *Del Webb Communities, Inc. v. Partington*, 2011 WL 2854086, at *7 (9th Cir. 2011)
6 (citing *Prosky*, 109 P. at 794). Democratic Underground cannot challenge the Restated and
7 Amended SAA as champertous because it was not a party to the agreement—a threshold
8 requirement that it completely ignores. While this, in and of itself, is fatal to Democratic
9 Underground’s argument, it should also be noted that even if it could assert champerty, there is
10 no substantive basis to conclude the contractual agreement between Righthaven and Stephens
11 Media is champertous. As stated by the Nevada Supreme Court, an agreement cannot be
12 champertous if the plaintiff has an interest in the litigation:

13 Where a person promoting the suit of another has any interest whatever,
14 legal or equitable, in the thing demanded, . . . he is in effect also a suitor
15 according to the nature and extent of his interest. *McIntosh v. Harbour
Club Villas Condominium*, 421 So.2d 10, 11 (Fla. Dist. Ct. App. 1982).

16 *Schwartz v. Eliades*, 939 P.2d 1034, 1036 (Nev. 1997). Moreover, as the U.S. Supreme
17 Court has held, an assignee of an accrued cause of action has standing to bring suit in his or her
18 own name even if there is a promise to remit a portion of any proceeds recovered to the assignor.
19 *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 275 (2008).

20 Under the Restated and Amended SAA, Righthaven has ownership of all works assigned
21 to it by Stephens Media, along with the right to sue for all past, present and future infringements.
22 As such, it is beyond dispute that Righthaven has an interest in the works upon which its
23 copyright infringement claims are based. This precludes a finding that the Restated and
24 Amended SAA is champertous under Nevada law. *See Schwartz*, 939 P.2d at 1036. Moreover,
25 the fact that Righthaven has agreed to share the proceeds of any recovery for infringement of a
26 work assigned by Stephens Media is not improper. *See Sprint Communications Co., L.P.*, 554
27 U.S. at 275.

1
2 **3. The Restated and Amended SAA does not constitute the unauthorized**
3 **practice of law.**

4 Democratic Underground next asserts that the Restated Amendment constitutes an illegal
5 attempt to practice law without a license. (Doc. # 140 at 24-25.) Despite this Court remarks at
6 the recent order to show cause hearing, Righthaven maintains that it is not engaged in the
7 unauthorized practice of law. In fact, this exact same argument was recently rejected by Judge
8 Mahan in the *Pahrump Life* case as demonstrated by his decision to dismiss the case without
9 prejudice for lack of standing.

10 Righthaven is not a law firm. While it has in-house counsel, all cases in this District are
11 currently handled exclusively by outside counsel licensed to practice in this jurisdiction or with
12 permission to do so from the Court on a *pro hac vice* basis. The fact that Righthaven and
13 Stephens Media may share the proceeds of any recovery related to copyright litigation based on
14 assigned works is neither unlawful nor does it constitute “an illicit contingency fee agreement”
15 as asserted by Amici (Doc. # 58 at 19:4-5). *See Sprint Communications Co., L.P.*, 554 U.S. at
16 289 (“Petitioners . . . say [] the assignments in this litigation constitute nothing more than a
17 contract for legal services. We think this argument is overstated. There is an important
18 distinction between simply hiring a lawyer and assigning a claim to a lawyer (on the lawyer’s
19 promise to remit litigation proceeds). The latter confers a property right (which creditors might
20 attach); the former does not.”); *see also In re Brooms*, 447 B.R. 258, 265 (9th Cir. 2011) (“And
21 for collection purposes, the assignee who holds legal title to the debt according to substantive
22 law is the real party in interest, even though the assignee must account to the assignor for
23 whatever is recovered in the action.”)

24 Democratic Underground cites *Bay County Bar Ass’n v. Finance Sys., Inc.*, 345 Mich.
25 434 (1956) for the proposition that a law firm cannot sue on clients’ cases in its own name. This
26 case is inapposite. As noted, Righthaven is not a law firm. Moreover, under the Restated and
27 Amended SAA, Righthaven has been validly conveyed ownership in the assigned works, along
28 with the right to sue for past, present and future infringements.

1
2 While Democratic Underground wishes to characterize the structure of this transaction as
3 analogous to a law firm bringing a client's suit in the firm's own name, this is simply not the
4 case. Ownership of the works is transferred to Righthaven along with right to sue for
5 infringement. Stephens Media's receipt of a non-exclusive license to exploit the works does not
6 alter this conclusion. In fact, given the Stephens Media's non-exclusive license, Righthaven is
7 the only party with standing to sue for copyright infringement. *See Davis*, 505 F.3d at 101
8 (“[T]he holder of a nonexclusive license may not sue others for infringement.”); *I.A.E., Inc.*, 74
9 F.3d at 775 (“[A] person holding a nonexclusive license has no standing to sue for copyright
10 infringement.”); *Eden Toys, Inc.*, 697 F.2d at 32 (“The Copyright Act authorizes only to types of
11 claimants to sue for copyright infringement: (1) owners of copyrights, and (2) persons who have
12 been granted exclusive licenses by owners of copyrights.”). Accordingly, there is no justifiable
13 basis to adopt Democratic Underground's claim the Restated and Amended SAA constitutes the
14 unauthorized practice of law or to invoke the overreaching relief of barring Righthaven from
15 relying on the amended version of the SAA or any other subsequent amendment of the SAA in
16 any litigation commenced by the company.

17 **C. Righthaven's Interests Are Not Adequately Protected Through Stephens**
18 **Media's Defense of Democratic Underground's Counterclaim.**

19 Democratic Underground further contends that Righthaven's Application should be
20 denied because its interests are adequately protected through Stephens Media's Counterclaim
21 defense. (Doc. # 140 at 13-14.) Democratic Underground's argument is unpersuasive.

22 Righthaven is only required to make a minimal showing of inadequacy of representation
23 to justify intervention as a matter of right. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th
24 Cir. 2003); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). Once it is
25 determined that Righthaven has a significantly protectable interest through its ownership of the
26 Work, and that Stephens Media is the holder of a non-exclusive license, it clearly follows that
27 Stephens Media would inadequately represent Righthaven's interests in defending Democratic
28 Underground's Counterclaim and by being unable to assert an affirmative infringement claim.

1 Simply put, Democratic Underground seeks to litigate its non-infringement claim against
2 Stephens Media because it does not face the threat of an affirmative infringement claim against
3 that Righthaven would assert through its complaint in intervention.

4 Stephen Media's current status as a non-exclusive licensee bars it from bringing an
5 affirmative copyright infringement claim against Democratic Underground. *See Davis v. Blige*,
6 505 F.3d 90, 101 (2d Cir. 2007)("[T]he holder of a nonexclusive license may not sue others for
7 infringement."); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996)("[A] person holding a
8 nonexclusive license has no standing to sue for copyright infringement."); *Eden Toys, Inc. v.*
9 *Florelee Undergarment Co.*, 697 F.2d 27, 32 (2d Cir. 1982)("The Copyright Act authorizes only
10 to types of claimants to sue for copyright infringement: (1) owners of copyrights, and (2) persons
11 who have been granted exclusive licenses by owners of copyrights."). Righthaven, as owner of
12 the Work, is permitted to bring such a claim as set forth in its proposed complaint in
13 intervention. *See Silvers*, 402 F.3d at 884; *Eden Toys, Inc.*, 697 F.2d at 32; 17 U.S.C. § 101.
14 Denying the Application to intervene as of right would therefore preclude an infringement claim
15 from being asserted against Democratic Underground, which Righthaven's proposed complaint
16 in intervention would assert.

17 Democratic Underground argues that if Stephens Media's is not the real party in interest
18 based on its standing as non-exclusive licensee is improper, then it will be able to obtain a
19 dismissal without prejudice or otherwise prevail in defense of the Counterclaim. (Doc. # 140 at
20 13-14.) While it is true that Stephens Media would have an incentive to vigorously assert such
21 an argument, Democratic Underground's argument ignores that denying Righthaven's
22 Application permits it to seek a potentially preclusive adjudication on the merits that can be used
23 against Righthaven without its participation and without the risk of facing an affirmative
24 infringement claim. In essence, Democratic Underground is placed in the enviable procedural
25 posture of having a tremendous amount to gain with little risk if Righthaven's Application were
26 denied. Democratic Underground's procedural windfall aside, the clear fact remains that
27 Stephens Media cannot assert an affirmative infringement claim, while Righthaven can do so.

1 Accordingly, Stephens Media cannot adequately protect Righthaven’s ownership interest in the
2 Work. This necessary conclusion supports granting Righthaven’s Application.

3 **D. The Restated and Amended SAA Does Not Constitute a Fraud Upon The Court.**

4 Democratic Underground next accuses Righthaven of defrauding the Court because it and
5 Stephens Media chose to amend their agreement to comply with the court’s ruling in *Hoehn*.
6 Democratic Underground made this identical argument in the *Pahrump Life* case and Judge
7 Mahan rejected it. Nevertheless, Democratic Underground trots this same argument out in the
8 hopes of securing a different result in this case, which it should not.

9 As with its argument in *Pahrump Life*, Democratic Underground makes this serious
10 accusation with absolutely no basis. As the Ninth Circuit has held, the power of a Court to find
11 that a party has committed fraud on the court “is narrowly construed, applying only to fraud that
12 defiles the court or is perpetrated by officers of the court.” *U.S. v. Chapman*, 642 F.3d 1236,
13 1240 (9th Cir. 2011) (citing *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1104 (9th Cir.
14 2006) (describing fraud on the court as “fraud perpetrated by officers of the court that prevents
15 the judicial machinery from performing its impartial task of adjudging cases that are presented
16 for adjudication.”)).

17 Here, Righthaven and Stephens Media revised their agreement in order to comply with
18 the court’s decision regarding standing in *Hoehn*. Not only did Righthaven promptly inform
19 Democratic Underground and all parties in the *Pahrump Life* case of the existence of the
20 Restated and Amended SAA just after it was executed, Righthaven also promptly informed the
21 Court and disclosed the agreement. In both this case and in *Pahrump Life*, Righthaven
22 affirmatively sought a stipulation giving all parties the opportunity to address standing under this
23 agreement. Righthaven respectfully submits that its actions were consistent with providing this
24 Court with the information it needs to adjudicate its standing under the Restated and Amended
25 SAA. Democratic Underground’s attempt to use the Court’s prior determination concerning
26 Righthaven’s failure to disclose Stephens Media as an interested party under the local rules has
27 nothing to do with its standing to sue under the Restated and Amended SAA.

1 Democratic Underground has failed to cite a single case that prohibits private parties,
2 such as Righthaven and Stephens Media, from amending their contractual agreements to
3 effectuate the parties' intent. Moreover, through Section 15.1 of the SAA, the parties expressly
4 empowered the Court to correct any defective provision in order to approximate the manifest
5 intent of the parties. Indeed, even the U.S. Supreme Court has expressly acknowledged that
6 failure to confer standing upon an assignee of an accrued claim "could easily be overcome" by
7 rewriting the agreement. *See Sprint Communications Co., L.P.*, 554 U.S. at 289. Thus, it would
8 be illogical to hold that such revisions constitute fraud upon this Court. Accordingly,
9 Democratic Underground's argument should be rejected.

10 **III. CONCLUSION**

11 For the foregoing reasons, Righthaven respectfully requests the Court grant its request to
12 intervene as of right pursuant to Rule 24(a)(2) in this action. Righthaven additionally requests
13 the Court grant such other relief as it deems just and proper.

14 Dated this 5th day of August, 2011.

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