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16 UNITED STATES DISTRICT COURT
 17 FOR THE DISTRICT OF NEVADA

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 SAN FRANCISCO

18 RIGHTHAVEN LLC, a Nevada limited liability
 19 company,
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 21 Plaintiff,
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 23 v.
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 25 PAHRUMP LIFE, an entity of unknown origin
 26 and nature; MAREN SCACCIA, an individual;
 27 and MICHAEL SCACCIA, an individual,
 28
 Defendants.

Case No. 2:10-cv-01575-JCM (PAL)

**ORDER DISMISSING
 RIGHTHAVEN'S COMPLAINT AND
 DENYING PLAINTIFF'S MOTION TO
 AMEND ITS COMPLAINT**

1 Presently before the court is the order to show cause why the court should not dismiss the
2 instant action for lack of standing (Dkt. # 21) and plaintiff Righthaven’s motion for leave to
3 amend its complaint (Dkt. # 45).

4 Righthaven has filed a response to the order to show cause (Dkt. # 25), an omnibus reply
5 brief to various amicus briefs (Dkt. # 44), the abovementioned motion for leave to amend (Dkt. #
6 45), a supplemental brief to its motion for leave to amend (Dkt. # 57), and a supplemental reply
7 memorandum (Dkt. # 62). Defendant Michael Scaccia has filed a response to the order to show
8 cause (Dkt. # 30). Amicus Democratic Underground has filed a reply to Righthaven’s response
9 (Dkt. # 32) and a response to the motion to amend (Dkt. #57). Amicus Professor Jason Schultz
10 has filed an amicus brief and reply brief (Dkt. # 36 and 46). Amicus Citizens Against Lawsuit
11 Abuse, Inc., has filed an amicus brief (Dkt. # 48). Amici Democratic Underground, Professor
12 Schultz, and Citizens Against Lawsuit Abuse have together filed an omnibus reply to
13 Righthaven’s supplemental brief (Dkt. # 58). Amicus Media Bloggers Association did not file a
14 brief but argued at the hearing. Having considered all of those filings and the arguments of
15 counsel, the court makes the following findings and order:

16 **BACKGROUND**

17 On January 18, 2010, attorney Steven A. Gibson (through his company Net Sortie
18 Systems LLC), along with the family of Warren Stephens (through their investment vehicle SI
19 Content Monitor LLC), executed the Righthaven operating agreement (“RHOA,” Dkt. # 32-2,
20 Exh. 1), creating Plaintiff, Righthaven LLC. The RHOA describes Righthaven’s business
21 objectives. Righthaven seeks a “limited, revocable assignment (with a license-back) of copyright
22 from third Persons.” RHOA § 3.2(c). It then obtains copyright registrations listing itself as the
23 copyright owner and files lawsuits with the understanding that the real copyright owner “would
24 ultimately enjoy the copyright registration.” Id. §§ 3.2(c), (d). Righthaven’s initial partner was
25 Stephens Media, LLC (“Stephens Media”) (also part of the Stephens family’s investments), the
26 publisher of the Las Vegas Review-Journal.

27 Within two months of the execution of the RHOA, Righthaven’s litigation campaign
28 began. See complaint, Righthaven LLC v. MoneyReign, Inc., No. 2:10-cv-00350 (D. Nev. Mar.

1 13, 2010). Since then, Righthaven has filed over 200 lawsuits in this district, including this case,
2 which was filed on September 14, 2010. Each of those lawsuits was premised on the allegation
3 that Stephens Media assigned various copyrights to Righthaven, which were documented by a
4 purported “assignment” of a Las Vegas Review-Journal article.¹ The assignment in this present
5 matter (Dkt. # 26, Exh. 1) purportedly transfers “all copyrights requisite to have Righthaven
6 recognized as the copyright owner of the Work for purposes of Righthaven being able to claim
7 ownership as well as the right to seek redress for past, present and future infringements of the
8 copyright.” In this case, Righthaven asserts that Stephens Media assigned it the copyright to an
9 August 14, 2010, Las Vegas Review-Journal article entitled “Warden, other employees resign
10 from prison in escape fallout.”²

11 However, Stephens Media and Righthaven entered into the “Strategic Alliance
12 Agreement” (“SAA,” Dkt. # 26, Exh. 2) that explains what actually happens “[d]espite any such
13 Copyright Assignment.” SAA, Section 7.2. The SAA was not disclosed to the public or to this
14 court until recently as a result of other litigation. (*Righthaven LLC v. Democratic Underground,*
15 *LLC*, 2011 WL 1457743 (D. Nev. April 14, 2011) (unsealing the SAA)). Instead of the usual
16 benefits of copyright ownership, under the SAA, “Righthaven shall have no right or license to
17 Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media
18 Assigned Copyrights other than the right to proceeds in association with a Recovery.” SAA,
19 Section 7.2. In addition, the SAA provided that “Stephens Media shall have the right at any time
20 to terminate, in good faith, any Copyright Assignment (the “Assignment Termination”) and enjoy
21 a right of complete reversion to the ownership of any copyright that is subject of a Copyright
22 Assignment.” SAA, Section 8. While Stephens Media is entitled to half of the recovery from
23 Righthaven’s lawsuits (less costs) (SAA, Section 5) when Righthaven filed its complaints, it did
24 not list Stephens Media as a party with “a direct, pecuniary interest in the outcome of the case” as
25

26 ¹To the Court’s knowledge, the sole exception is *Righthaven v. Allec*, Case No. 2:2011-cv-00532-KJD (filed April 8,
27 2011), in which Righthaven allegedly acquired the copyright at issue from a different third party.

28 ²The article is available, for no charge, on the Las Vegas Review-Journal website: <http://www.lvrj.com/news/warden-other-employees-resign-from-prison-in-escape-fallout-100678314.html>.

1 required by Local Rule 7.1-1 (Dkt. # 5).³ This failure to disclose Stephens Media’s interest
2 subsequently resulted in an order of sanctions. Democratic Underground, Dkt. 138.

3 Before the SAA was disclosed publicly, Righthaven misled “the district judges of this
4 district to believe that it was the true owner of the copyright in the relevant news articles.”
5 Democratic Underground, 2011 WL 2378186 at *6. It obtained numerous settlements of its
6 cases. Once the SAA became publicly known, however, several defendants challenged
7 Righthaven’s right to bring its lawsuits, contending that the arrangement between Righthaven and
8 Stephens Media failed to convey any of the exclusive rights under the Copyright Act, leaving
9 Righthaven without a cause of action. On April 29, 2011, this court issued an order to show cause
10 why it should not dismiss this case for lack of standing.

11 On May 9, 2011, the day its response to this court’s order to show cause was due,
12 Righthaven and Stephens Media executed a document entitled the “Clarification and Amendment
13 to Strategic Alliance Agreement.” (“Clarification,” Dkt. # 26, Exh. 3). The clarification states
14 that it amends sections 7.2 and 8 of the SAA and replaces them with new sections 7.2, 8.1 and
15 8.2. Id. On June 14, Judge Hunt found that Righthaven did not own the copyright under the
16 original SAA. Righthaven LLC v. Democratic Underground, LLC, No. 2:10-cv-01356-RLH, __
17 F. Supp. 2d __, 2011 WL 2378186 (D. Nev., June 14, 2011). On June 20, Judge Pro concurred
18 and also found that Righthaven did not own the copyright under the Clarification. Righthaven,
19 LLC v. Hoehn, No. 2:11-cv-00050-PMP, 2011 WL 2441020 (D. Nev. June 20, 2011).

20 On June 23, 2011, Righthaven moved to amend its complaint pursuant to Rule 15(a),
21 seeking to add the May 9 clarification to the allegations in its complaint (Dkt. #45). On July 7,
22 2011, Righthaven and Stephens Media executed a document entitled the “Amended and Restated
23 Strategic Alliance Agreement” (the “restated SAA,” Dkt. 57, Exh. 1). On July 11, 2011,
24 Righthaven filed a supplemental brief (Dkt. # 57), seeking leave to file a different amended
25 complaint that includes allegations about both the clarification and the restated SAA.

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27 _____
28 ³Following an order to show cause why it should not be sanctioned for failing to disclose Stephens Media’s interest
issued in the Democratic Underground case, Righthaven filed a revised certificate of interested parties (Dkt. #43).

DISCUSSION

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2 To show standing, Righthaven must plead an injury in fact at the time the complaint is
3 filed. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see also *Newman-Green, Inc.*
4 *v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)) (standing is based upon the facts when the
5 complaint is filed).

6 Moreover, “[t]he right to sue for an accrued claim for infringement is not an exclusive
7 right under § 106.” *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 884 (2005). “Exclusive
8 rights in a copyright may be transferred and owned separately, but . . . [there are] no exclusive
9 rights other than those listed in § 106.” *Id.* at 885. These rights include reproduction, preparation
10 of derivative works, distribution, and display of copies. 17 U.S.C. § 106(1)-(6).

11 Accordingly, pursuant to Section 501(b) of the Copyright Act, a plaintiff “must have a
12 legal or beneficial interest in at least one of the exclusive rights described in § 106” to bring a
13 copyright infringement action. *Id.* Thus, “only copyright owners and exclusive licensees of
14 copyright may enforce a copyright.” *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144
15 (9th Cir. 2008); see also *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361
16 (1991) (ownership of the copyrighted work is an element of a copyright claim); *Ellison v.*
17 *Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (same). Moreover, “[t]he Copyright Act [does
18 not] permit holders of rights under copyrights to choose third parties to bring suits on their
19 behalf.” *Silvers*, 402 F.3d at 889, citing *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d
20 27, 32 n. 3 (2d Cir. 1982).

21 Several decisions in this district have examined the SAA and correctly found that it does
22 not transfer true ownership of the copyrighted work to Righthaven. “[T]he SAA in its original
23 form qualifies the Assignment with restrictions or rights of reversion, such that in the end,
24 Righthaven is not left with ownership of any exclusive rights.” *Hoehn*, 2011 WL 2441020, *5;
25 accord *Righthaven, LLC v. DiBiase*, No. 2:10-cv-01343-RLH, 2011 WL 2473531 (D. Nev. June
26 22, 2011); *Righthaven, LLC v. Barham*, No. 2:10-cv-02150-RLH, 2011 WL 2473602 (D. Nev.
27 June 22, 2011). “[T]he SAA prevents Plaintiff from obtaining any of the exclusive rights
28 necessary to maintain standing in a copyright infringement action.” *Righthaven, LLC v. Mostofi*,

1 No. 2:10-cv-01066-KJD-GWF, 2011 WL 2746315, *5 (D. Nev. July 13, 2011). “[T]he plain
2 language of the SAA conveys the intent to deprive Righthaven of any right, save for the right to
3 sue alleged infringers and profit from such lawsuits.” Democratic Underground, 2011 WL
4 2378186, *4. “[T]he SAA makes abundantly clear [that] Stephens Media retained the exclusive
5 rights, never actually transferring them to Righthaven.” *Id.* at *6 (emphasis original).

6 Moreover, it is clear from the language of the RHOA that it was never the intent of the
7 parties that created Righthaven for true copyright ownership to vest. Instead, Righthaven was
8 created solely to acquire a “limited, revocable assignment (with a license-back) of copyright from
9 third Persons.” RHOA § 3.2(c). That further supports the finding that Righthaven lacks the
10 requisite ownership rights to assert standing in this action.

11 In the wake of multiple decisions finding that Righthaven did not own the copyright,
12 Righthaven and Stephens Media signed what they described as a “clarification” to the SAA on
13 May 9, 2011. In its motion for leave to amend (Dkt. # 45), Righthaven initially urged this court
14 to consider the clarification instead of the original SAA.⁴ However, the clarification fails because
15 it is merely an attempt by Righthaven and Stephens Media to impermissibly change the facts as
16 pleaded in the complaint to manufacture standing instead of truly clarifying an ambiguity or
17 honest mistake in alleging those facts as they originally stood at the time this lawsuit was
18 initiated. See Democratic Underground, 2011 WL 2378186, at *4. Moreover, as Judge Pro
19 found, the “May 9, 2011 Clarification . . . does not provide Righthaven with any exclusive rights
20 necessary to bring suit.” Hoehn, 2011 WL 2441020 at *6.

21 After the Hoehn decision found that the clarification did not succeed, Righthaven and
22 Stephens Media tried once again to alter the SAA, creating the restated SAA on July 7, 2011, and
23 now seek permission in this case to file and serve a second amended complaint, alleging the
24

25 ⁴Righthaven moved to amend pursuant to Rule 15(a)(2). Rule 15(d) is the appropriate rule for “setting out any
26 transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Fed.R.Civ.Proc.
27 15(d); U.S. for Use and Benefit of Wulff v. CMA, Inc., 890 F. 2d 1070, 1073 (9th Cir.1989). Because the execution
28 of both the Clarification and the Restated SAA happened after the date of the Complaint that Righthaven seeks to
supplement, Righthaven’s motion should have been pursuant to Rule 15(d). *Id.* The Court will treat the motion as a
motion to supplement.

1 restated SAA as the basis for standing in this action. However, this approach fails for two
2 reasons.

3 First, as with the clarification, the Restated SAA does not simply attempt to clarify or
4 supplement the facts pleaded in the complaint with additional facts that were present at the time
5 of filing; rather, the restated SAA presents a new set of facts with respect to the alleged copyright
6 ownership for the court to consider. That is impermissible under the Supreme Court's
7 jurisprudence on standing. See *Newman-Green*, 490 U.S. at 830. Second, while Plaintiff
8 attempts to present the restated SAA as simply "restating" the original SAA document, the
9 restated SAA's terms substantially contradict the original SAA and the clarification, as well as the
10 business objectives of the RHOA. These contradictions cannot be reconciled with the original
11 complaint. Righthaven cannot cure its lack of ownership at the initiation of this lawsuit by means
12 of a nunc pro tunc amendment. See *Bushnell, Inc. v. Brunton Co.*, 659 F. Supp. 2d 1150, 1160-61
13 (D. Kan. 2009). Defective allegations may be amended, but not defects in the facts themselves.

14 **CONCLUSION**


15
16 Having considered both the parties' written argument and oral argument at the July 27,
17 2011, hearing on the order to show cause, and in light of the above findings of fact and
18 conclusions of law, the court now requests further briefing regarding the relationship of
19 Righthaven's ownership of the copyright at the time the suit was filed to (1) Righthaven's
20 standing in this case and (2) the merits of Righthaven's copyright infringement claim. The court
21 also requests briefing on how the relationship of these two issues affects dismissal of the case;
22 specifically, whether the matter should now be dismissed with or without prejudice.

23
24 Accordingly,

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the parties shall submit
26 further briefing, if any, regarding the above-cited issues by August 30, 2011. Thereafter, the court
27 will issue a written order disposing of the case.
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Dated: August 12, 2011

By: 
The Hon. James C. Mahan
United States District Court Judge

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