Righthaven LLC v. LEON et al Doc. 57

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN, LLC, a Nevada limited liability company,

Plaintiff,

vs.

MICHAEL LEON, an individual; DENISE NICHOLS, an individual; and MEDBILLZ, INC., a corporation of unknown origin,

Defendants.

Case No. 2:10-cv-01672

OPPOSITION TO PLAINTIFF'S APPLICATION FOR TEMPORARY STAY

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Randazza Legal Group (alternatively, the "Firm"), through attorney J. Malcolm DeVoy IV ("DeVoy"), files this opposition to Righthaven LLC's ("Righthaven['s]") application to temporarily stay this Court's entry of judgment against it in the order of $3,815.00. (Doc. # 53.)

In its Motion for Preliminary Injunction (Doc. # 54), the Firm argued that Righthaven has no intention of respecting this court's fee award decision, and is likely to take efforts to frustrate collection of the award. The instant Motion shores up this position. In correspondence dated July 9 and 11, the Firm attempted to communicate with Attorney Mangano about this issue, and seek written assurances from Righthaven regarding the payment of this judgment. (Declaration of J. Malcolm DeVoy ¶¶ 3-6.) In response, Attorney Mangano did not call, e-mail or write to the Firm: He filed an application to stay the judgment. (*Id*. ¶¶ 5-6; Doc. # 58.) There is, however, no reason for this Court to grant such a stay.

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The 30 days Righthavens seeks to stay the Firm's judgment allow it to do considerable damage to the Firm's ability to collect any judgment from Righthaven – frustrating any purpose this Court hoped to further by granting its fee award. In addition to hiding its monetary assets, this stay seems calculated to give Righthaven the opportunity to disgorge its intangible property – its Righthaven trademark and Castle mark (Doc. # 54-2 at 15-20), the <righthaven.com> domain name, and even its allegedly owned copyright rights. The Firm, most legal commentators, and every court that has ruled on the issue, disagree with the notion that Righthaven owns the copyrights it sues over,. *See Righthaven LLC v. Hoehn*, Case No. 2:11-cv-00050 (Doc. # 28) (June 20, 2011); *Democratic Underground*, Case No. 2:10-cv-01536, *2011 WL 2378186* at *1 (D. Nev. June 14, 2011). Righthaven, however, steadfastly disagrees – even in the face of a growing wall of adverse rulings, and each time its subterfuge is revealed, it rearranges the deck chairs on its sinking ship. *See Hoehn*, Case No. 2:11-cv-00050 (Docs. # 23-25) (D. Nev. May 9, 2011); *Righthaven LLC v. Smith*, Case No. 2:10-cv-01031 (Doc. 22-1) (D. Nev. July 8, 2011) (amending and restating the beleaguered Righthaven-Stephens Media LLC Strategic Alliance Agreement for a second time).

However, assuming *arguendo* that Righthaven has any rights in these copyrights (as it strenuously argues), these ownership interests can be enjoined from disgorgement and assigned to the Firm (or other judgment debtors – a number of which are lined up to take their share of Righthaven's ill-gotten gains) in satisfaction of its judgment. In the alternative, simple possession of these copyright rights, whatever nominal amount they are worth – if they are cognizable ownership rights at all – can begin to fill the glass of the Firm's judgment. While the Firm is permitted to levy Righthaven's copyrights, "the creation of a lien on a copyright may not give a creditor an immediate right to control the copyright, [but] it amounts to a sufficient transfer of rights to come within the broad definition of transfer under the Copyright Act." *In re Peregrine Entertainment, Ltd.*, 116 B.R. 194, 206 (C.D. Cal. 1990); *see In re Shamblin*, 890 F.2d 123, 127 (9 th Cir. 1988) (noting that courts consistently treat the creation of liens on a debtor's property as a transfer of that property); *Kremen v. Cohen,* 337 F.3d 1024, (9th Cir. 2003)

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(permitting seizure of intangible property rights to satisfy a judgment). If Righthaven claims that it has ownership interests in copyrights assigned to it by Stephens Media LLC, Media News Group Incorporated ("Media News") and Servo Design Incorporated, then these rights constitute intangible property that can be seized by the Firm – and other judgment recipients – in satisfaction of its judgment.

If any court ever were to find that Righthaven owned the copyrights it claimed to own, an unlikely proposition in itself, then the full copyright rights would be subject to seizure in satisfaction of a judgment by a judgment creditor. More likely than not, the "rights" obtained by Righthaven are worth less than paper upon which the agreements transferring them are printed. Nonetheless, worth a million dollars or nothing at all, such a right is intangible property and, as such, may be seized to satisfy the Firm's judgment, with its value to be determined at auction. To ensure such property is present to even be seized, though, injunctive relief is necessary. Furthermore, the relief sought is not extreme – all that is sought is an order that Righthaven may not disgorge its assets.

A stay of 30 days will enable Righthaven to liquidate money, intangible property rights in its domain name and trademarks, and its claimed copyright rights – again, to the extent Righthaven owns them at all. Depending on which version of the Strategic Alliance Agreement between Righthaven and Stephens Media LLC one looks at, Stephens Media LLC has either the immediate right to reversion, or the right to reversion with 30 day's notice and a nominal payment. *See Hoehn*, Case No. 2:11-cv-00050 (Doc. # 28). Even if Righthaven does truly own the copyrights it obtained from Stephens Media LLC – an unlikely proposition based on recent precedent – it may still use the 30 day stay to resell the copyright – potentially even to Stephens Media LLC itself.

Other agreements operate in a similar manner that allows Righthaven to move its intangible property rights outside this Court's reach. The Media News Copyright Alliance Agreement with Righthaven is the basis for copyright infringement cases in the District of Colorado, all but one of which have been stayed because of that Court's skepticism over the

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propriety of the Righthaven scheme. The agreement between Righthaven and Media News allegedly transfers the copyright to a widely published photograph. (True and correct copies of the Copyright Alliance Agreement and Assignment of the work, "Transportation Security Administration agents perform enhanced pat-downs," are attached hereto as Exhibits A and B, respectively, and are on the record in this case at Docs. # 54-2 and 54-3.) However, this agreement provides for a reversion of the copyright with a mere 20 business days' notice. (Exh. A at 3 § 10.) The copyright assignment agreement between Righthaven and Servo Design, Incorporated, is not yet public, but it stands to reason that it contains similar reversion provisions, which seem to be a hallmark of these agreements.

In all of these agreements, 30 days is ample opportunity for Righthaven to liquidate these claimed assets – if they are "assets" at all – back to their original creators to be reassigned, or to a new shell corporation, along with its money, starting the entire operation over again. Disposing of this intellectual property to defeat its seizure at the hands of a creditor would require no effort at all, but would be 100% in character for Righthaven. As for the acquisition of Righthaven's other assets, it is no coincidence that Righthaven is a LLC owned by two other LLC's, and it is widely known that "it is very difficult to pierce the corporate veil of a Nevada corporation." Rew Goodenow, Nevada Business Entities § 7.3 (State Bar of Nevada Publications 2010); *see Paul Steelman, Ltd. v. Omni Realty*, 110 Nev. 1223, 885 P.2d 549 (1994). The reasons why such conduct would be unsurprising for Righthaven, and even expected, are discussed *infra*.

First, though, Righthaven cites numerous cases to suggest that judgments are not a sufficient basis for preliminary injunction, but its offerings are readily distinguishable from the instant situation. Righthaven claims that injunctive relief is inappropriate to collect on a debt, citing *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210-211 (2002). That case relates to a claim for restitution arising under ERISA – not a judgment like the one at issue in this case. In fact, Righthaven misses the point of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 300 (1999), as well: The Supreme Court held that

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creditors do not have a right to an injunction *pre-judgment*. Here, the Firm has a judgment, and this analysis does not apply. A similar treatment is appropriate regarding *Dateline Exports, Inc. v. Basic Const., Inc.,* 306 F.3d 912 (9th Cir. 2002) (per curiam), which addresses a breached settlement agreement – not a judgment. In short, Righthaven has not cited a single case that contradicts the Firm's argument that, as a judgment creditor, it is entitled to a preliminary injunction.

This is not some mere misunderstanding, but just the latest in the long list of misrepresentations made by Righthaven before this District. When ordered to show cause why it failed to disclose financially interested parties in hundreds of cases within this District, and should not be sanctioned, Righthaven blamed two former in-house attorneys – despite its CEO being counsel of record at the time of some of the alleged misrepresentations – and attributed its late filing of the response to technical difficulties. *Righthaven LLC v. Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 127) (D. Nev. June 29, 2011). Righthaven has delayed and frustrated discovery efforts in two other cases, *Democratic Underground*, Case No. 2:10-cv-01356 (Doc. # 133), and *Righthaven LLC v. DiBiase*, Case No. 2:10-cv-01343 (Doc. # 78), according to the cited documents filed by defendants' counsel in both cases. The misdeeds alleged by defendants' counsel include incomplete and significantly delayed discovery productions, failure to produce requested documents, and general disregard for the discovery process, which is meant to be orderly and self-governed, *id.*

Other instances of this conduct include, Righthaven CEO Steven Gibson, as one of the individuals named as a signatory to the Rule 11 Motion filed in *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, Case No. 2:10-cv-0636 (Doc. # 10) (D. Nev. Aug. 8, 2010) – before the Strategic Alliance Agreement between Righthaven and Stephens Media LLC was made public – making numerous statements that were at least misleading, and potentially knowingly false, to this District. Gibson, a signatory to the Stephens Media LLC Strategic Alliance Agreement, which allowed Stephens Media to keep ownership of its copyright and gave Righthaven nothing more than the "right" to sue. Knowing that the Stephens Media LLC Strategic Alliance

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Agreement did not give Righthaven ownership or any exclusive rights in the copyrights, Gibson still signed his name to a document that made statements including:

• "Efforts to dismiss [for lack of subject matter jurisdiction] are objectively unreasonable and entirely unsupported by the relevant facts and applicable law." *Malik Law Firm*, Case No. 2:10-cv-0636 (Doc. # 10 at 6:7-9);

• "Simply stated, a competent attorney would not make the unsupported argument that a copyright plaintiff, who has already established registrant status, must plead additional facts beyond the established elements of a copyright claim in order to satisfy basic notice pleading requirements." *Id*. at 8:12-15;

• "As demonstrated on pages 16-17, infra, the Righthaven Assignment unequivocally vests Righthaven with: (1) exclusive ownership rights in and to the Work, and (2) the right to seek redress for all accrued causes of action." *Id*. at 11:26-28;

• "In the present action, there is no division of copyright ownership as was the case in *Silvers*; Righthaven is the owner of both the exclusive rights in and to the Work and the owner of all accrued causes of action." *Id*. at 12:24-26;

• "The Righthaven Assignment effects an assignment of the right to sue for any possible infringements of the Work, whether accrued or unaccrued. By no means do the terms of the Righthaven Assignment impose any form of limitation upon Righthaven with respect to Righthaven's standing to sue for infringement." *Id*. at 16:23-27.

Yet all of the statements, cosigned by Righthaven's own CEO pursuant to Rule 11, were either facially incorrect by the plain language of Righthaven's Strategic Alliance Agreement with Stephens Media LLC, or found to be legally unsupported by the District of Nevada in both *Democratic Underground*, Case No. 2:10-cv-01356, *2011 WL 2378186* at *1 (D. Nev. June 14, 2011), and *Hoehn*, Case No. 2:11-cv-00050 (Doc. # 28).

In light of these circumstances, and Righthaven's refusal to put anything regarding its alleged plans to satisfy the Firm's judgment in writing (*see* DeVoy Decl. ¶¶ 5-6), the Firm has neither basis, nor reason, to trust Righthaven, and this court should join its honorable brethren in its strong skepticism of this champertous scheme. *Democratic Underground*, *2011 WL 2378186* at *1 (ordering Righthaven to show cause why it should not be sanctioned for numerous misrepresentations); *see, e.g., Righthaven LLC v. Sumner et al*, 1:11-cv-00222 (Doc. # 21) (D.

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Colo. May 19, 2011) (staying case until resolution of *Righthaven LLC v. Wolf et al*) To boot, Righthaven's only known source of income, copyright infringement litigation, has screeched to a halt in the face of judicial scrutiny; in fact, no new lawsuits have been filed at all since May 2011.[1] (DeVoy Decl. ¶ 12.) Therefore, it stands to reason that Righthaven has no new revenue on its horizon – especially since its dozens of cases in the District of Colorado have been stayed pending the resolution of *Righthaven LLC v. Wolf et al.*, 1:11-cv-00830 (D. Colo.). *See, e.g., Sumner*, 1:11-cv-00222 (Doc. # 21) (staying case until resolution of other pending matter).

But the Firm's position is not based solely on circumstance and the common narrative of a unresponsive, difficult litigant portrayed in the *Democratic Underground* and *DiBiase* filings. In the past, when the Firm tried to engage Righthaven about the issue of a fee award without making a motion to this court, Righthaven similarly refused to do anything, period (DeVoy Decl. ¶¶ 5-8, 10). Righthaven appears to believe that by making a debt more difficult to collect, the Firm will quit pursuing it. To the contrary, each thrash in avoidance of its due payment simply increases the amount that Righthaven must pay to the firm due to the time expended in collection of its judgment. *See Holland v. Roeser*, 37 F.3d 501 (9th Cir. 1994); *Clark v. Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986); *In re Nucorp Energy*, 764 F.2d 655, 661 (9th Cir. 1985) ("If attorneys were compensated only for time spent litigating the amount of the fee to which they are entitled, but not for time spent determining the amount, then the overall rate of compensation would be effectively decreased for all hours devoted to the case. This is precisely the result that statutory fee award provisions are designed to prevent").

Furthermore, fee awards are granted in cases such as this one in order to further the purposes of the Copyright Act. *Love v. Mail on Sunday*, Case No. CV-05-7798, *2007 U.S. Dist. LEXIS 97061* at * 17 (C.D. Cal. Sept. 7, 2007). The Firm did not get involved in this case because it felt that there was a strong likelihood of a financial windfall – but rather it agreed to represent Mr. Leon *pro bono* as an act of public service, but with the knowledge that a fee award

[1] Fairuser, *June 2011 Righthaven Victims*, Righthaven Victims (July 1, 2011), http://righthavenvictims.blogspot.com/2011/07/june-2011-righthaven-victims.html (*last accessed* July 12, 2011).

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was possible.[2] While the Firm would still have been proud of a job well done in the absence of a fee award, the chance of a fee award was certainly a motivating factor in the representation, as it often is for public interest lawyers.

The Firm is well aware of the fact that scores of poor defendants in Righthaven cases have been bullied into making payments to Righthaven, despite the clear indications that the cases had no legally supportable foundation. If Righthaven can simply frustrate pro bono counsel's efforts to collect fees, there will be less of an incentive for experienced counsel to get involved in these kinds of cases. For example, while the Electronic Frontier Foundation ("EFF") is a non-profit entity with a noble mission to protect civil liberties on the Internet, it likely would have found it frustrating to secure co-counsel if there was a certainty that there would be no possible fee award, and no possibility of collecting that award. Indeed, EFF attorney Kurt Opsahl has sought fees related to his representation in the *DiBiase* case. Case No. 2:10-cv-01343 (Doc. # 78). While the evil that Righthaven has wrought upon innocent parties has motivated many good people to get involved in its cases, capitalism is built upon a series of economic incentives, and the Copyright Act's fee-shifting provisions, and the court's inherent power to grant fees, function as integral parts of this series of incentives. These incentives disappear if bad-actors such as Righthaven can simply evade responsibility for their actions through a continual game of legal three-card-monty once an honorable court gives it the punishment it needs in order to create disincentives to its continued ignoble behavior.

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[2] *See Blum v. Stenson*, 465 U.S. 886, 894-95 (1984) (awarding reasonable attorney's fees to *pro bono* counsel, holding that Congress did not intend for the calculation of fee awards to depend on whether a party was represented by private counsel or a nonprofit legal services organization); *Cuellar v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) ("[t]he fact that Cuellar's lawyers provided their services pro bono does not make a fee award inappropriate"); *Curran v. Dept. of Treasury*, 805 F.2d 1406, 1408 (9th Cir. 1986). Much like the trebling effects of 31 U.S.C. § 3729(a) (the False Claims Act) and 15 U.S.C. § 12 *et seq*. (the Clayton Act), the numerous, specific requirements of this District's Local Rule 54-16, acting in conjunction with this Circuit's precedent allowing the inclusion of time spent seeking fees in the ultimate fee award, encourage the enforcement of fee-shifting statutes – particularly by *pro bono* counsel that, otherwise, would not be compensated. This synergy of Local Rule 54-16 and precedent promotes the seeking of attorney's fees in cases like this, the adversely affected party's conduct was egregious enough to warrant an award of fees, as it acts – by its very design – to increase the amount of fees the moving party is entitled to receive. This acts as a financial inducement for the movant to seek fees, particularly where they would otherwise be minimal or unavailable, and increases the penalty on the party against which fees were awarded. This ensures not only the enforcement of these statutes, but that awards of attorneys' fees in cases of nominal economic value effect their intended purpose.

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Righthaven's dishonesty is a matter of national public knowledge, and it persists in this Motion. Righthaven bizarrely claims that the Firm concedes that subject matter jurisdiction existed in this case. (Doc. # 56 at 2.) The Firm's invocation of the Copyright Act is in no way a concession that subject matter jurisdiction existed in the above-captioned matter, and Righthaven's desperate claim is not only false, but sanctionably so. The plain language of 17 U.S.C. § 505 makes it applicable to "any action under this title" – including actions for copyright infringement under 17 U.S.C. § 501, as alleged in Righthaven's Complaint (Doc. # 1). Here, a decision was rendered on the case's merits independent of the copyright act, as Righthaven failed to timely serve Leon in accordance with Rule 4(m). (Doc. # 37.) But, assuming subject matter jurisdiction were at issue in this case's dismissal, disproving subject matter jurisdiction is an appropriate basis for awarding prevailing party fees under the Copyright Act. *Love*, *2007 U.S. Dist. LEXIS 97061* at * 17 (awarding attorneys fees upon the defendant showing that the plaintiff did not have standing to bring its action). *See also Riviera Distribs. v. Jones***,** 517 F.3d 926, 928 (7th Cir. 2008). This statutory provision can be invoked whenever a violation of the Copyright Act is alleged – even when there ultimately is no subject matter jurisdiction. Once again, Righthaven is wrong.

Moreover, the Copyright Act's fee-shifting provision, found in 17 U.S.C. § 505, provides merely an alternate basis to the Court's award of attorney's fees under Federal Rule of Civil Procedure 54. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994); *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614-15 (9th Cir. 2010); *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994). The Court authorized the Firm to seek attorney's fees in its original Order (Doc. # 37), which is a sufficient basis for the Firm to move for fees. The Court ultimately awarded these fees, along with a judgment for $3,815.00. (Docs. # 52, 53.)

The time for Righthaven to protest the ultimate recipient of this Court's fee award was during the two-week period prior to the undersigned's initial motion for Attorney's Fees (Doc. # 42). Righthaven was unresponsive during this time, when the value of this dispute was factors lower. (DeVoy Decl. ¶¶ 8-10.) Righthaven refused to seriously engage the Firm in settlement

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discussions and could have staved off the Firm's motion. The undersigned made numerous offers to Righthaven to resolve the attorney's fee issue at the then much lower costs of the fees by donating them to non-profit entities such as the EFF or the Citizen Media Law Project, which Righthaven rebuffed. (*Id*.) The Firm's interest in rewarding non-profit organizations is evident from the Firm's Reply briefing in the fee motion dispute (Doc. # 48 at 11-12).[3] Righthaven cannot now complain that it would have made a different decision, had it only known that a firm, which took this case for public interest purposes, would be the recipient of a fee award rather than a non-profit entity. Not only should it make no difference where the fee award is paid, Righthaven's "would have, could have, should have," arguments are not in line with the facts.

Despite opposing counsel's unsupportable and dishonest statements, the undersigned made great efforts to avoid filing the instant Motion (Doc. # 54), and subsequently made efforts to resolve the Motion without the necessity of Righthaven filing a response. (DeVoy Decl. ¶¶ 3-4.) The Firm moved for attorney's fees, and received an award of them and a judgment for $3,815. The time for complaining about how this money should have gone to a non-profit, when Righthaven took no steps to direct it to one when it had the opportunity to do so is long past, and such an argument is beyond disingenuous at this point. The law is clear that the Firm is entitled to fees, and this Court has concurred with that precedent (Doc. # 52). *Blum*, 465 U.S. at 894-95; *Cuellar*, 603 F.3d at 1143; *Curran*, 805 F.2d at 1408.

Finally, it is not as though the relief sought is in any way extreme. All the Firm has sought is the maintenance of the status quo – that Righthaven should not be able to disgorge any of its assets, such as they are, until it pays the lawfully entered fee award. This injunctive relief is so soft in nature that it is shocking that Righthaven would even oppose it – unless it has some design or scheme up its sleeve to do exactly what the undersigned suspects. Righthaven's stated reason for the stay is to ensure that "potential appealable issues related to the July 5th Order are properly evaluated and, if sufficient grounds exist, allow of adequate time to post any security

[3] In respect to Federal Rule of Evidence 408, more detail about Righthaven's response to these overtures cannot be offered in this filing absent a waiver from Righthaven, and the above-referenced offers are discussed in the most limited means possible solely to impeach Righthaven's claims to the contrary.

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required for appeal." (Doc. 56 at 4.) A stay would change nothing; the Firm has already met the requirements for a preliminary injunction. The injunctive relief sought, if granted, would not frustrate Righthaven's ability to evaluate its options and to file a notice of appeal. Furthermore, the posting of a bond for a mere $3,815.00 should prove little challenge to even the most financially insolvent party, as a typical bond costs 10% of the bonded amount. If Righthaven truly has such limited funds that it needs 30 days to come up with $381.50, then the Firm's need to secure its intangible intellectual property assets, including its trademarks, domain names, and its interest in any of copyrights (such as they are) is ever more heightened.

Furthermore, if Righthaven's CEO can provide a statement, under penalty of perjury, that it cannot scrounge up $381.50 in less than 24 hours, then the undersigned will gladly find someone willing to loan this amount to Righthaven for that purpose, and pledges to do so within 60 minutes of being presented with this sworn declaration.

The stay Righthaven requests should, therefore, be denied.

Dated July 12, 2011

Respectfully Submitted,

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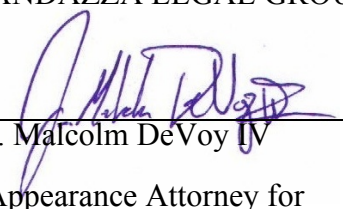

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Randazza Legal Group and that on this 12th day of July, 2011, I caused the document(s) entitled:

- **OPPOSITION TO PLAINTIFF'S APPLICATION FOR TEMPORARY STAY**

and all attachments to be served as follows:

[ ] by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne Avenue, Suite 210, Las Vegas, Nevada, 89129-7701, upon which first class postage was fully prepaid; and/or

[ ] Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or

[X] by the Court's CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy

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