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10 GARRY NEWMAN

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

13 RIGHTHAVEN, LLC,

14 Plaintiff,

15 v.

16 GARRY NEWMAN, an individual; and
17 FACEPUNCH STUDIOS LTD., a limited
18 company formed under the laws of Great
Britain,

19 Defendants.
20

Case No.: 2:10-cv-01762-JCM -PAL

**DEFENDANT’S RESPONSE IN
OPPOSITION TO PLAINTIFF’S
MOTION FOR RECONSIDERATION OF
ORDER DISMISSING COMPLAINT
AGAINST GARRY NEWMAN**

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 Defendant Garry Newman (“Newman”) responds in opposition to the Motion for
23 Reconsideration that Plaintiff Righthaven, LLC (“Righthaven”) filed, seeking to set aside the
24 Court’s Order Dismissing the Complaint against Newman.¹ Under Local Rule 7-2(b), the Court
25 properly granted Newman’s Motion to Dismiss based on Righthaven’s failure to file a response.

26
27 ¹ In its First Amended Complaint, Righthaven has added as a defendant Facepunch Studios Ltd., a
28 limited company formed under the laws of Great Britain. Righthaven has not served process on
Facepunch, and this Response is filed solely on behalf of Newman.

1 As Righthaven admits in its Motion for Reconsideration, its response to Newman’s
2 Motion to Dismiss was due July 15, 2011. See Doc. 23 at p. 2. Righthaven asserts that it filed its
3 First Amended Complaint on July 15, 2011. Id. Righthaven also asserts that its First Amended
4 Complaint constitutes a response to the Motion to Dismiss. Both assertions are misleading. First,
5 the Court’s CM-ECF stamp across the top of Righthaven’s First Amended Complaint shows it
6 was not filed until July 16, 2011. See Doc. 21. Second, it was improper for Righthaven to file its
7 First Amended Complaint “as of right” under Rule 15(a), since the amended complaint is largely
8 based on new transactions and occurrences that took place after the filing of the original
9 complaint, namely Righthaven’s second amendment to the underlying Strategic Alliance
10 Agreement with Stephens Media, dated July 7, 2011, on which Righthaven claims to base its
11 standing. Accordingly, Righthaven’s “amended complaint” is actually a “supplemental
12 pleading,” which required permission from the Court and notice to Newman prior to its filing,
13 under Rule 15(d).

14 “The disposition of a motion for reconsideration is within the district court's discretion.”
15 U.S. E.E.O.C. v. Scolari Warehouse Markets, Inc., 488 F. Supp. 2d 1117, 1142 (D. Nev. 2007)
16 (denying motion for reconsideration and citing Bliesner v. Commc'n Workers of Am., 464 F.3d
17 910, 915 (9th Cir.2006)). Similarly, a district court’s dismissal of a complaint pursuant to its
18 local rules is reviewed on appeal for an abuse of discretion. Ghazali v. Moran, 46 F.3d 52, 53
19 (9th Cir. 1995) (quoting United States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979)). “Only in
20 rare cases will [an appellate court] question the exercise of discretion in connection with the
21 application of local rules.” Id.

22 Righthaven’s failure to timely respond to Newman’s Motion to Dismiss was only one of
23 the grounds the Court considered in granting the dismissal. As explicitly stated in the Order, the
24 Court also weighed five factors: “(1) the public's interest in expeditious resolution of litigation;
25 (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
26 policy favoring disposition of cases of their merits; and (5) the availability of less drastic
27 sanctions.” See Order (Doc. 22) at 1 (quoting Ghazali, 46 F.3d at 53). Reconsideration should be
28 denied given the Court’s consideration of the above factors, Righthaven’s failure to file any

1 response to the Motion to Dismiss, the Court’s granting dismissal without prejudice, and
2 Righthaven’s improper filing of an Amended Complaint as of right when it was required to seek
3 permission.

4 Here there is no need for the Court to reconsider its Order granting Newman’s Motion to
5 Dismiss. The Order granted the dismissal without prejudice, which would have allowed
6 Righthaven to file a new complaint against Newman. Righthaven failed to take advantage of the
7 opportunity to file an amendment as of right, and instead filed a supplemental pleading without
8 permission, as discussed above. Righthaven’s 21-day period under Rule 15(a)(1)(B) has since
9 expired. Nevertheless, contemporaneous with the filing of this Response, Newman is filing a
10 Motion to Dismiss Righthaven’s improperly labeled “First Amended Complaint,” to address the
11 substantive flaws in the Complaint – the lack of subject matter jurisdiction and lack of personal
12 jurisdiction.

13 DATED this 1st day of August, 2011.

14 BROWNSTEIN HYATT FARBER SCHRECK LLP

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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on the 1st day of August, 2011, the foregoing **DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION FOR RECONSIDERATION OF ORDER DISMISSING COMPLAINT AGAINST GARRY NEWMAN** was served via electronic service to the address shown below:

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